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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1885

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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.
Augustus H. Garland.

SOLICITOR-GENERAL.
John Goode.

CLERK.
James H. McKenney.

MARSHAL.
John G. Nicolay.

See Appendix for:

ERRATA.

Page 99, last line in column headed DATE of CHECK.
For "Jan'y" read "Feb'y"

Page 114, line 12. For "October 6" read "October 7."

" " line 13. For "1881" read "1880."

Page 410, line 4. For "that the" read "that, under the."

Page 327, line 7. After "dissented" insert "[See 118 U. S. 210]."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1885.

EXPRESS CASES.

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

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

MEMPHIS & LITTLE ROCK RAILROAD COMPANY *v.* SOUTHERN EXPRESS COMPANY.

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

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *v.* DINSMORE, PRESIDENT & SHAREHOLDER IN ADAMS EXPRESS COMPANY.

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

Argued together November 3, 4, 5, 6, 1885.—Decided March 1, 1886.

Railroad companies are not required by usage, or by the common law, to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled.

Railroad companies are not obliged either by the common law or by usage to do more as express carriers than to provide the public at large with reasonable express accommodation; and they need not in the absence of a statute furnish to all independent express companies equal facilities for doing an express business upon their passenger trains.

These cases were commenced by defendants in error as plaintiffs below to compel plaintiffs in error to give them respectively the express facilities on the several lines of railway which they had previously enjoyed by contract, and of which they had been dispossessed by notice given in accordance with the terms of the contracts. Judgments below in favor of the express companies, from which the railroad companies appealed. The causes were argued together. The case is stated in the opinion of the court.

Mr. J. F. Dillon, *Mr. R. J. Morgan*, *Mr. B. C. Brown* and *Mr. J. O. Broadhead* for appellants. *Mr. Sidney Bartlett* and *Mr. Wager Swayne* were with them on the brief.

Mr. Clarence A. Seward, *Mr. George F. Edmunds* and *Mr. John A. Campbell* for appellees. *Mr. F. E. Whitfield* was with them on the brief.

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

These suits present substantially the same questions and may properly be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company.

1. *The St. Louis, Iron Mountain and Southern Railway Company.*

This suit was begun May 21, 1880, and the business of the express company is thus described in the bill:

"Your orator, the Southern Express Company, is a corporation duly created, organized, and now existing under the laws of the State of Georgia, for the purpose, and with the powers

necessary thereto, of receiving and forwarding upon railroads, steam vessels, and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practicable expedition, in the special care and custody of its own employés, and at destination personally delivering packages of money or currency, gold and silver bullion, bonds, bank notes, deeds, and other valuable papers, jewels, silks, laces, and other articles of great value, requiring for their security extraordinary care and precaution, and also parcels of goods, wares, and merchandise, requiring great dispatch or careful handling, and also fruit, vegetables, fresh meats, fish, oysters, fish spawn, and other articles liable to decay or other injury from delay; and also live animals requiring particular care and attention during transportation; and also for receiving and forwarding for collection bills, notes, drafts, and accounts, and receiving and returning payment thereof; and also for receiving and forwarding all articles of trade and commerce, with the bills and charges of the shipper thereto attached, to be collected of the consignee on delivery of such articles, and returned to shipper; and in so doing to afford the public, under a single contract, and on assured responsibility, safe, reliable, and speedy transportation from and to all points accessible only over two or more railroads, and generally to perform for the public all offices that, by usage, are incident to the class of carriers now well known, recognized and designated by the public, as 'express carriers.'"

The St. Louis, Iron Mountain and Southern Railway Company is a railway corporation existing in the States of Missouri and Arkansas, formed by the consolidation of the St. Louis and Iron Mountain Railroad Company, the Cairo and Fulton Railroad Company, and the Cairo, Arkansas and Texas Railroad Company. Its railway extends from St. Louis, and from a point on the Mississippi, opposite Cairo, through Missouri and Arkansas, by way of Little Rock, to Texarkana, on the boundary between Arkansas and Texas, with certain branches.

On the 30th of April, 1872, and before the consolidation, the St. Louis and Iron Mountain Company entered into a contract, in writing, with the Adams Express Company, by which the railroad company agreed to furnish the express company "one-

half the baggage-car on each of its passenger trains on main line and branches for carrying express freight," and also "the use of a part of the baggage-car on accommodation trains between St. Louis and Potosi to an extent not in excess of the amount allowed in passenger trains." The cars were not to be loaded with over seven thousand pounds at any one time, and the railway company agreed that each of the cars should run each way daily on the passenger trains. The company also agreed that it would "prohibit its conductors, agents, and baggage-masters from transporting on its passenger trains, or from accepting compensation for, any matter except extra baggage;" and further, that it would not "permit any person or company to do an express business on its passenger trains on any better terms, or for any less payment, than that given the Adams Express Company." In consideration of this service the express company agreed to pay $125 a day, and a proportional increase for every ten miles operated by it on an extension of the railroad, "for the transportation of its messengers with safes and package chests, and an average amount of freight not exceeding ten thousand pounds per day," and an agreed rate for all freights in excess of that amount. The express company also agreed "to carry all money and other valuables for the said railroad company to and from points on the line of its road free of charge, and for such matter as may be sent to, or received from, points off the line to charge the railroad company not exceeding two-thirds the rate charged the public." It was also stipulated that "the railroad company should be exempt and indemnified by said express company against all loss or damage to goods or money transported by said express company;" and that settlements should "be made on or before the tenth day of each month for the business of the preceding month." The contract also contained this clause: "This agreement to remain in full force one year from the 1st day of May, 1872, and thereafter until thirty days' notice shall be given by either party to the other of its desire to discontinue the same."

On the first of February, 1874, also before the consolidation, the Southern Express Company entered into a contract in writing with the Cairo and Fulton Railroad Company, and the

Cairo, Arkansas and Texas Railroad Company, by which the railroad companies agreed to furnish the express company "one-third of the room in the baggage-car on each passenger train over the Cairo and Fulton road and the Cairo, Arkansas and Texas road, for the carriage of express matter not to exceed six thousand pounds per day for each car." This contract also contained provisions similar to that between the Adams and St. Louis and Iron Mountain companies as to the regulation of the duties of conductors, agents, and baggage-masters, and the privileges of other persons for doing an express business on passenger trains. The Southern Company agreed to pay for the transportation of its messengers, with safes and package chests, and an average amount of express matter, not to exceed six thousand pounds per car, $50 a day to the Cairo and Fulton Company, and $10 a day to the Cairo, Arkansas and Texas Company, and an agreed rate for all excess over six thousand pounds. There were also other provisions as to the carriage of money packages and valuables by the express company for the railroad companies, and as to the details of the business, at the end of which was the following: "This contract to remain in force until terminated on either party giving the other sixty days' notice of its intention to thus withdraw therefrom."

The consolidation took place May 16, 1874, and the two express companies continued their business upon the road under their respective contracts until April 1, 1878, when the Adams Company, with the assent and permission of the consolidated railway company, relinquished its business on the line to the Southern Company, and that company thereafter conducted the whole express business on the entire line under the two contracts.

On the 26th of March, 1880, the railroad company having come to the conclusion to change the mode of doing the express business over its line, gave the express company the stipulated notice for a termination of the existing contracts. All efforts by the express company to secure facilities for a continuation of its business over the road having failed, this suit was brought, and the prayer of the bill is:

"1. That during the pendency of this suit the defendant, its

officers, agents, servants and employés may be restrained and enjoined by a proper preliminary or provisional order or injunction, and until the further order of the court, from interfering in any manner with or disturbing in any manner the enjoyment by the Southern Express Company of the facilities now accorded to it by the said defendant, upon its lines of railway, for the transaction of the business of the said Southern Express Company, 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 Southern Express Company; and from excluding or ejecting any of its express matter or messengers from the depots, cars, and lines of the said defendant, as the same have been heretofore and are now enjoyed and occupied by the said Southern Express Company; and from refusing to receive and transport, in like manner as the said defendant is now doing, over its lines of railway, the express matter and messengers of the said Southern Express Company; and from interfering with or disturbing the business of the said Southern Express Company, or its present relations, in reference thereto, with the said defendant in any way or manner whatsoever, and so long as the said Southern Express Company shall be willing and ready, and offer to pay, according to all legal rates therefor.

"2. That if any dispute or disagreement shall arise between the parties hereto during the pendency of this suit, and before a final decree herein upon the question of what is a lawful or reasonable compensation to be paid by your orator to the defendant for the transportation of express matter, your orator may be permitted to bring the same by way of interlocutory application to this court for its decision, and that, pending the inquiry thereon, the preliminary injunction heretofore prayed may be continued to the same purport, tenor, and effect as if the prayer for the same were here repeated.

"3. That the said defendant may be decreed by this court to transport at all times the express matter, safes, and messengers of the said Southern Express Company by the same trains and with the same accommodations thereon, and in its depots and stations as it may transport its own express matter or as it may accord to itself; and that the said defendant may be decreed

so to transport the said express matter, safes, and messengers of the said Southern Express Company, at and for the statutory tolls and compensation in that behalf by law provided; and that the said defendant may be decreed to make a reasonable rebate or reduction, to be fixed and determined by this honorable court, from its charges to the said Southern Express Company by reason of its performance of said accessorial service, as above specified, so long as the said Southern Express Company shall offer to conform to all the reasonable rules and regulations of the said defendant, and to pay all lawful charges for the transaction of its said business.

"4. That a permanent injunction may issue herein to the same purport and effect as is hereinbefore prayed in regard to said provisional or preliminary injunction.

"5. That your orator may have such other relief or such further or different relief herein, with its costs, as to the court may seem meet."

The railway company answered the bill, and, among other things, as follows:

"38. Defendant further avers that it does not claim and never has claimed a right to exclude the transportation of the express matter of the complainant from the lines of defendant's railway, and has always been willing and is now willing to carry and transport any freight or express matter of complainant that it may offer to defendant. Defendant claims the right to carry and transport what is called express matter in the spaces in its express cars selected by itself, and under the supervision, care, and control of its own employés, and has refused and does refuse to complainant the right to have allotted to itself any particular space in defendant's express cars for its exclusive use, or to permit its messengers to ride in the express cars and to take charge of complainant's express freight."

2. *The Memphis and Little Rock Railroad Company.*

This suit was begun by the same express company on the 11th of June, 1880. The Memphis and Little Rock Railroad Company is a railroad corporation formed by the reoganization of a former corporation of the same name, owning and operat-

ing a railroad in Arkansas, between Little Rock and a point on the Mississippi River opposite Memphis. On the 26th of May, 1871, before the reorganization, and while the railroad of the present company was owned and operated by the original corporation, that corporation entered into a written contract with the Southern Express Company, by which the railroad company was to furnish the express company with one end of a baggage-car for express service when convenient, and, if not, a box car. For this the express company was to pay for each hundred pounds of freight carried at certain agreed rates, and to assume all risks of the transportation of express matter, except such damage as arose from the gross neglect or carelessness of the railroad company. This agreement also contained other stipulations for the regulation of the conduct of the parties under it, and at the end was this: "This agreement takes effect June 1, 1871, and may be terminated by either party on thirty days' notice." After the reorganization no new contract was made, but the express company continued business on the road under the old contract, without objection by the reorganized company, until June 2, 1880, when it was notified that, as the railroad company had "determined to transport all express matter and transact all express business on its own account, and through and by its own officers and agents on and after the fourteenth of June," all contracts or arrangements existing between the companies would terminate on that day. The notice concluded as follows: "We shall be glad to receive, transport, and deliver any express matter you or your company may think proper to entrust to us at reasonable rates and in conformity to law." This suit was brought in consequence of that notice, and the prayer of the bill is substantially like that against the St. Louis, Iron Mountain and Southern Company.

This company also answered the bill, and, among other things, is the following:

"It says that the fact is that when it purchased the road it now operates, May 1, 1877, it found complainant on the road with all its investments made and its agencies and business routes established, and that respondent tacitly permitted complainant to continue its business over its road. But it is now

able, ready and willing to do the express carrying business over its road for itself, and for the benefit of its own stockholders, and desiring to take the business into its own hands it gave complainant the notice mentioned and copied in the bill. It repeats here what it said in that notice, that it is ready and willing to carry for complainant in the same manner and upon the same terms that it carries for all other shippers. It submits that this is the extent of its duty toward complainant, and no injunction of this court is necessary to compel it to discharge that duty. It submits that complainant has no privilege or right which is not common to all shippers, and it repeats that what it does for others it will freely and in its proper order do for complainant. None of the privileges claimed by complainant are accorded by respondent to any other shipper, and no other even asks such privileges. Respondent denies that it must give complainant the same privileges or facilities that it enjoys itself, for that would be to surrender to complainant a part of its corporate rights and privileges, and also to surrender to complainant the control of a part of its cars and business. All that it is required to do for complainant is to receive and carry for it in the same manner and at the same rates it does for others. In the conduct of its business, express and all other, it receives freights from the shippers, giving therefor a receipt or bill of lading, takes the freight into its own possession, loads it itself into its cars, carries it in its own custody, and at the place of destination delivers it to the consignee. All this it is willing, has offered, and again offers, to do for complainant."

3. *The Missouri, Kansas and Texas Railway Company.*

This suit was brought on the 28th of December, 1880, by or on behalf of the Adams Express Company, a joint stock association of the State of New York, organized in 1854. The Missouri, Kansas and Texas Railway Company is a Kansas railroad corporation, owning and controlling lines of railroad from Junction City, Kansas, and Sedalia, Missouri, to Parsons, Kansas, thence southerly to a crossing of the Arkansas River; and from Holden, Missouri, on the Missouri Pacific Railroad, westerly to

Paoli, on the Missouri River, Fort Scott and Gulf Railroad, in all a length of say four hundred and seventy-three miles.

The bill in this case contains, among others, the following averments:

"X. After the formation of the Adams Express Company various other express companies were formed for the conduct of the same general business, to be operated in like manner over the public thoroughfares of the country. As the principal railway lines known as 'Trunk Lines' and running in a general direction from east to west, ran in courses generally parallel, the principal express companies existing at the early date aforesaid, namely, the 'Adams,' the 'American,' and the 'United States,' agreed among themselves that they would reach the commercial centres of the country by different railway and steamboat routes, and that they would divide the north and south express business in a manner best calculated for the welfare thereof, and for the best service of the public.

"This understanding was generally effectuated, but in various instances two express companies have, at the same time, and with permission of the railway company, occupied, for a greater or less distance, the same line of railway, and such occupation has not been found incompatible with the harmonious working of such two express companies, and has resulted in a larger income to the railway company than it would have received had its line been occupied but by one express company only, and has also afforded the public the opportunity, both upon short and long routes, for the most efficient service and for the competition to which it is lawfully entitled.

"XI. Under the mutual understanding aforesaid the Adams Express Company, as soon as the demands of the public warranted the expenditure, extended its business westward to the cities of Wheeling, Columbus, Cincinnati, Indianapolis, Louisville, and St. Louis, by means of the facilities afforded by the Pittsburg, Cincinnati, and St. Louis Railroad and other companies, and thereby made the routes of the said Adams Express Company continuous from Boston, New York, Philadelphia, and Pittsburg to the cities last aforesaid, and such continuous routes are now operated by it.

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"XII. The said Adams Express Company, under the arrangements and understandings aforesaid, extended its business in a southerly direction, and, as the word 'express' imports, always by the shortest line of communication to all the principal cities in the South—namely, Richmond, Charleston, Savannah, Mobile, Montgomery, New Orleans, Memphis, and other places—and in so doing was always afforded by those occupying the public office of a common carrier all necessary facilities therefor, and which facilities were by said carriers increased to the said Adams Express Company in proportion with the increase of the demands of the public therefor.

"XIII. The Adams Express Company has always, in the conduct of its business, paid, and now pays to the common carriers whom it employs a just and reasonable compensation, satisfactory to them, for the facilities afforded, and has itself always charged the public only a just and reasonable compensation for the express services performed for it.

"XIV. In the conduct of its business, as aforesaid, the Adams Express Company has always represented, and now represents, that portion of the public which desires to avail itself, in the transmission of its property and valuables, of the pecuniary responsibility of the express company, and of the safeguards and checks which it has originated, provided, and enforced for the safe custody of the property committed to its care.

"XV. The Adams Express Company conducted its business, as aforesaid, until the commencement of hostilities, in 1861, when, by reason of the derangements of commercial intercourse then ensuing, and for other controlling reasons of a public character then generally known, it was obliged to discontinue its organization and business in the Southern States, and it thereupon withdrew from the same, and sold so much of its good-will and its equipment as then there existed to the Southern Express Company, a corporation created, as this plaintiff is informed and believes, under and pursuant to the laws of the State of Georgia; and since then the express business in the principal Southern States has been, and is now, conducted by the said Southern Express Company, under said charter, by which it is expressly authorized to conduct the same, and which said charter gives a leg-

islative description of the kind and character of business to be done by said company as an express company, and to a copy of which the plaintiff craves leave to refer.

"XVI. After the cessation of the hostilities aforesaid an arrangement was made, and which is now in force, between the said Adams Express Company and the said Southern Express Company, for the general regulation of the transportation of property coming from the territory of the one into the territory of the other, and by which property received by the Adams Express Company, destined for points within the territory of the Southern, and property received within the territory of the Southern, destined to points within the territory of the Adams Express Company, or reached by its connections, is interchanged at certain specified points, and upon a basis of charge proportioned to the distance traversed in the territory of either. In case of such interchange of express matter within such territory the express company originally receiving the same remains liable to the public for the value thereof, until delivered to the consignee.

"XVII. Since the said understanding and arrangement, the Adams Express Company has made such interchanges with the said Southern Express Company, and now makes the same, at Richmond, Lynchburg, and Danville, Virginia; Chattanooga, Tennessee; Cairo, Illinois, and Paducah, Kentucky, and has not, itself, since then either delivered or received express matter directly south of such points, but the territory so directly south thereof has been operated by the said Southern Express Company alone."

On the 23d of November, 1871, the Adams Express Company and the Missouri, Kansas and Texas Company entered into the following contract:

"This agreement, made this twenty-third day of November, A.D. 1871, between Missouri, Kansas and Texas Railway Company, by R. S. Stevens, its general manager, party of the first part, and the Adams Express Company, by ——— ———, party of the second part, witnesseth:

* * * * * *

"1. The Missouri, Kansas and Texas Railway Company will

furnish for the use of the Adams Express Company one car each way on its line from Sedalia, Missouri, *via* Parsons, Kansas, to Junction City, Kansas, to be hauled on a passenger train each day that a passenger train is to run over the line. The car to be used exclusively by the Adams Express Company, but not to carry at any one time an excess of seven tons of freight; the charges by the express company to its patrons to be not less than one and one-half first-class rates of the Missouri, Kansas and Texas Railway Company at the time, as per its freight tariff. The railway company will also furnish from Parsons south to the Arkansas River the necessary accommodations in its baggage-car, and also similar accommodations in a baggage-car on the Holden line on one train each way. The express car, as well as all express matter carried over the road in any baggage or other car, to be in charge of one agent or messenger of the express company on each train, who is to be carried free.

"2. All express matter from points on or north of the Missouri Pacific Railroad, and all that comes from any point beyond or east of St. Louis, *via* that city, for points on the line of the Missouri, Kansas and Texas Railway or beyond, is to be brought on the said line at Sedalia, and no business for this road is to be done, or freight of any kind to be received or delivered, at Vinita, except such as originated at or is destined to points on the Atlantic and Pacific Railroad south and west from Franklin, Missouri.

"3. As part compensation to the railway company for the privileges furnished by it, as herein provided, the express company will pay to the railway company monthly one hundred dollars per day for each and every day that trains are run over the railway or any part thereof.

"4. As part consideration, it is also agreed that the express company shall carry the money and valuable packages belonging to the railway company over the line of the Missouri, Kansas and Texas Railway free of charge, and for all matter going to or coming from points beyond the line of the Missouri, Kansas and Texas Railway, the express company will charge not exceeding two-thirds of its regular rate for such business. The

superintendents and agents for said express company, whenever it is necessary to supervise the business, to have the privilege of travelling over the line of said road free; passes for such free passage to be furnished on application of the superintendent of the express company for this division.

"5. The railway company agree, further, that they will not carry freight or packages for pay in their baggage-cars on passenger trains, nor allow their conductors or baggage-masters or other employés to do so, during the existence of this agreement, nor will they allow any other company, firm, or person the privilege of carrying freight on their passenger trains at any less rate of payment per day, or any greater weight in a car, or upon any better terms in any way than is granted to said express company under this agreement.

"6. It is understood that as the line of the Missouri, Kansas and Texas Railway is extended south from the Arkansas River, similar accommodations will be furnished for an express business, as herein above provided, at a reasonably increased cost, to be paid by the express company, as shall hereafter be agreed upon.

"7. This agreement to take effect on the first day of December, A.D. 1871, and continue in force for one year thereafter, and until thirty days' notice shall have been given to the other by the party desiring to terminate same."

Under this contract the Adams Company carried on its business over the railroad line, without objection from the railroad company, until December 1, 1880, when the railroad company notified the express company that it would be expected to retire from the operation of its business on that road January 1, 1881, as on and after that date the business would be done by or for the railroad company. This suit was brought after the service of that notice, and the prayer of the bill is substantially like that in the other cases.

The railroad company at first answered the bill, and testimony was taken, but before a final hearing the answer was withdrawn and a demurrer substituted.

In each of the cases a preliminary injunction was granted, and from that time until now the express companies have occu-

pied the roads the same as before the suits, but in connection with the railroad companies, as carriers of express matter, or with some other express company to which the privilege of doing an express business over the line had been granted by the railroad company.

A large amount of testimony was taken, and on the final hearing a decree was entered in each of the cases, one of which is as follows:

"I. That the express business, as fully described and shown in the record, is a branch of the carrying trade that has by the necessities of commerce and the usages of those engaged in transportation become known and recognized so as to require the court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

"II. That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

"III. That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it is to be carried, and to deny to them the right to the custody of the property while so carried, would be destructive of the express business and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

"IV. That the defendant, its officers, agents, and servants, have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge be afforded.

"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.

"VI. That on and subsequent to the 1st day of May, 1877, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as are specifically in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the 21st day of June, 1880; that such intention and purpose were restrained by the preliminary injunction order of the court, which said injunction order was afterwards modified, as appears in the record.

"VII. That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to the plaintiff on all its passenger trains.

"VIII. That the plaintiff keep and render monthly a true account of the services performed for it by defendant, and pay therefor at the rate hereinafter specified, on or before the —— of each month, after the date hereof, for the business of the month preceding; and that the defendant has no right to require prepayment for said express facilities, or payment therefor at the end of every train, or in any other manner than as is herein provided; and that plaintiff execute and deliver to the defendant a bond in the sum of twenty-five thousand dollars, conditioned well and faithfully to make such payments as are herein provided, and with surety to be approved by a judge of the court.

"IX. That it is and was the duty of said defendant to afford, and to have afforded, such facilities to the plaintiff as herein specified, for a just and reasonable compensation.

"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 employés, 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 way or 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 the 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.

"XII. It is further ordered, adjudged, and decreed that defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor. And the said defendant enters herein its prayer for appeal, which prayer is granted."

The decrees in the other cases differ from this only in matters of detail.

The cases are now here for review on these appeals.

The evidence shows that the express business was first organized in the United States about the year 1839. The case of *New Jersey Steam Navigation Company* v. *Merchants' Bank*, 6 How. 344, grew out of a loss by the burning of the steamboat Lexington on Long Island Sound in January, 1840, of $18,000 in gold and silver coin, while in charge of Wm. F. Harnden, an express carrier, for transportation from New York to Boston. In the report of this case is found a copy of one of the earliest advertisements of the express business as published in two of the Boston newspapers in July, 1839. It is as follows:

"Boston and New York Express Package Car.—Notice to Merchants, Brokers, Booksellers, and all Business Men.

"Wm. F. Harnden, having made arrangements with the New York and Boston Transportation and Stonington and Providence Railroad Companies, will run a car through from Boston to New York and *vice versa*, via Stonington, with the mail train daily, for the purpose of transporting specie, small packages of goods, and bundles of all kinds. Packages sent by this line will be delivered on the following morning, at any part of the city, free of charge. A responsible agent will accompany the car, who will attend to purchasing goods, collecting drafts, notes and bills, and will transact any other business that may be intrusted to him.

"Packages for Philadelphia, Baltimore, Washington, New Haven, Hartford, Albany and Troy will be forwarded immediately on arrival in New York.

"N. B.—Wm. F. Harnden is alone responsible for any loss or injury of any articles or property committed to his care; nor is any risk assumed by, or can any be attached to, the Boston and New York Transportation Company, in whose

steamers his crates are to be transported, in respect to it or its contents at any time."

The report also contains a copy of the contract between Harnden and the New Jersey Steam Navigation Company, the owner of the Lexington, dated the 1st of August, 1839, for the facilities to be afforded Harnden for his business on the steamers of that company. This contract was similar to one made a short time before with the Boston and New York Transportation Company, a company which became merged in the New Jersey Steam Navigation Company August 1, 1839, and it provided that Harnden, in consideration of $250 per month, was to have the privilege of transporting in the steamers of the company between New York and Providence, via Newport and Stonington, not to exceed once each day from New York and from Providence, "one wooden crate of the dimensions of five feet by five feet in width and height, and six feet in length, (contents unknown)." It was also stipulated and agreed that "the said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the said New Jersey Steam Navigation Company will not, in any event, be responsible either to him or his employers for the loss of any goods, wares, merchandise, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, in the boats of the said company." It was also further provided that Harnden should attach to all his advertisements for business, and to his bills of lading, notices in the form of that at the foot of his advertisement, a copy of which is given above, and that he should not violate any of the provisions of the post office laws, or interfere with the Navigation Company in its transportation of letters or papers, or carry powder, matches, or other combustible materials of any kind calculated to endanger the safety of the boats or the property or persons on board. At the end was this clause: "And that this contract may be at any time terminated by the New Jersey Steam Navigation Company, or by the said Harnden, upon one month's notice given in writing."

Such was the beginning of the express business which now has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and with the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long settled habits of business, and interfering materially with the conveniences of social life.

In this connection it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The controversy, in each case is not with the public, but with a single express company. And the real question is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freights for express companies as they carry like freights for the general public; but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company.

When the business began railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true, as alleged in each of the bills filed in these cases, that "no railroad company in the United States . . . has ever refused to transport express matter for the public, upon the application of some ex-

press company, of some form of legal constitution. Every railway company . . . has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter." Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. In some of the States, statutes have been passed which, either in express terms or by judical interpretation, require railroad companies to furnish equal facilities to all express companies, Gen. Laws N. H., 1878, ch. 163, § 2; Rev. Stat. Maine, 1883, 494, ch. 51, § 134; but these are of comparative recent origin, and thus far seem not to have been generally adopted.

In Missouri, by the Constitution, railways are "declared public highways, and railroad companies common carriers." The general assembly is also required "to pass laws to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in

this State," and "to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties." Art. XII., sec. 14. And by section 23 it is provided that "no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad company, or any lessee, manager, or employé thereof shall make any preference in furnishing cars or motive power." We have not been referred to any statute of the State which does more than reproduce these constitutional provisions in substantially the same general language.

Art. XVII., sec. 1, of the Constitution of Arkansas provides that "all railroads, canals and turnpikes shall be public highways, and all railroad and canal companies shall be common carriers." Sections 3, 5 and 6 of the same article are as follows:

"SEC. 3. All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads, canals and turnpikes, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for transportation of freight or passengers within the State, or coming from or going to any other State."

"SEC. 5. No president, director, officer, agent, or employé of any railroad or canal company shall be interested, directly or indirectly, in the furnishing of material or supplies to such company, or in the business of a common carrier of freight or passengers over the works owned, leased, controlled, or worked by such company, nor in any arrangement which shall afford more advantageous terms or greater facilities than are offered or accorded to the public.

"SEC. 6. No discrimination in charge or facilities for transportation shall be made between transportation companies and individuals, nor in favor of either, by abatement, drawback, or otherwise; and no railroad or canal company, or any lessee, manager, or employé thereof, shall make any preference in furnishing cars or motive power."

Opinion of the Court.

The legislation of this State has not, so far as we have been advised, extended the operation of these constitutional provisions in a way to affect the questions now to be decided.

In Kansas the following statute is in force:

"SEC. 55. Every railway corporation in this State which now is, or may hereafter be, engaged in the transportation of persons or property, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails, and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junction of other roads, and at the several stopping-places; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railways a sufficient length of time to allow the transfer of passengers, personal baggage, mails, and express freight from the trains or railways so connecting or intersecting, or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting and intersecting roads whenever the same shall be delivered to them." Comp. Laws Kansas, 1879, 225, ch. 23.

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employé of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the express man in charge. As the business to be done is "express," it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law

carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own ap-

propriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so well understood both by the express companies and the railroad companies that the three principal express companies, the Adams, the American, and the United States, almost immediately on their organization, now more than thirty years ago, by agreement divided the territory in the United States traversed by railroads among themselves, and since that time each has confined its own operations to the particular roads which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. At the beginning of the late civil war the Adams Company gave up its territory in the Southern States to the Southern Company, and since then the Adams and the Southern have occupied, under arrangements between themselves, that part of the ground originally assigned to the Adams alone. In this way these three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying when these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles, the American two hundred roads, with a mileage of 28,000 miles, and the Southern ninety-five roads, with a mileage of 10,000 miles. Through their business arrangements with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitat-

ingly by all who need their services. The good will of their business is of very great value if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits, and the better their means of serving the public. In making their investments and in extending their business, they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time.

The territory traversed by the railroads involved in the present suits is part of that allotted in the division between the express companies to the Adams and Southern companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because that is not within the scope of judicial power.

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of

the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The constitutions and the laws of the States in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas, the Missouri, Kansas and Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the States of Missouri, Arkansas and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers, but this is all.

Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more

than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights.

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage, was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies

at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way as it seems to us, "the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves," and that, we said in *Atchison, Topeka and Santa Fé Railroad Co.* v. *Denver & New Orleans Railroad Co.*, 110 U. S. 667, followed at this term in *Pullman's Palace Car Co.* v. *Missouri Pacific Railway Co.*, 115 U. S. 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage or by contract, or by statute, the courts cannot be called on to give it effect.

The decree in each of the cases is reversed, and the suit is remanded, with directions to dissolve the injunction, and, after adjusting the accounts between the parties for business done while the injunctions were in force, and decreeing the payment of any amounts that may be found to be due, to dismiss the bills.

Mr. Justice Miller dissenting.

When these cases were argued before Circuit Judge McCrary and myself at St. Louis, after due consideration and consultation with him and Judge Treat, of the District Court, I announced certain propositions as the foundations on which the decrees should be rendered. These were afterwards entered in the various circuits to which the cases properly belonged, and, I believe, in strict accordance with the principles thus announced.

I am still of opinion that those principles are sound, and I repeat them here as the reasons of my dissent from the judgment of the court now pronounced in these cases.

They met the approval of Judge McCrary when they were submitted to his consideration. They were filed in the court in the following language:

"1. I am of opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

"That, while it is not possible to give a definition in terms which will embrace all classes of articles usually so carried, and to define it with a precision of words of exclusion, the general character of the business is sufficiently known and recognized to require the court to take notice of it as distinct from the transportation of the large mass of freight, usually carried on steamboats and railroads.

"That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like.

"2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

"3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

"4. That, under these circumstances, there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

"5. I am of the opinion that it is the duty of every railroad company to provide such conveyance by special cars, or otherwise, attached to their freight and passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

"If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

"6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the courts to decide.

"7. I am of the opinion that a court of equity, in a case properly made out, has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

"8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay and the railroad company shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment.

"9. To permit the railway company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

"10. To avoid this difficulty, I think that the court can as-

sume that the rates, or other mode of compensation heretofore existing between any such companies, are *prima facie*, reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the court at stated intervals, and claim an addition to, or rebate from, the amount paid. And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

"11. When no such arrangement has heretofore been in existence it is competent for the court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, &c.

"12. I am of opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the right of the express companies."

Three years' reflection and the renewed and able argument in this court have not changed my belief in the soundness of these principles.

That there may be slight errors in the details of the decrees of the Circuit Courts made to secure just compensation for the services of the railroad companies is possibly true, but I have not discovered them, and the attention of the court has not been given to them in deciding this case; for holding, as it does, that the complainants were entitled to no relief whatever, it became unnecessary to consider the details of the decrees.

I only desire to add one or two observations in regard to matters found in the opinion of this court.

1. The relief sought in these cases is not sought on the ground of usage in the sense that a long course of dealing with the public has established a custom in the nature of law. Usage is only relied on as showing that the business itself has forced its way into general recognition as one of such necessity to the public, and so distinct and marked in its character, that it is entitled to a consideration different from other modes of transportation.

2. It is said that the regulation of the duties of carrying by the railroads, and of the compensation they shall receive, is legislative in its character, and not judicial.

As to the duties of the railroad company, if they are not, as common carriers, under legal obligation to carry express matter for any one engaged in that business in the manner appropriate and usual in such business, then there is no case for the relief sought in these bills. But if they are so bound to carry, then in the absence of any legislative rule fixing their compensation I maintain that that compensation is a judicial question.

It is, then, the ordinary and ever-recurring question on a *quantum meruit*. The railroad company renders the service which, by the law of its organization, it is bound to render. The express company refuses to pay for this the price which the railroad company demands, because it believes it to be exorbitant. That it is a judicial question to determine what shall be paid for the service rendered, in the absence of an express contract, seems to me beyond doubt.

That the legislature *may*, in proper case, fix the rule or rate of compensation, I do not deny. But until this is done the court must decide it, when it becomes matter of controversy.

The opinion of the court, while showing its growth and importance, places the entire express business of the country wholly at the mercy of the railroad companies, and suggests no means by which they can be compelled to do it. According to the principles there announced, no railroad company is bound to receive or carry an express messenger or his packages. If they choose to reject him or his packages, they can throw all the business of the country back to the crude condition in which it was a half century ago, before Harnden established his local express between the large Atlantic cities; for, let it be remembered that plaintiffs have never refused to pay the railroad companies reasonable compensation for their services, but those companies refuse to carry for them at any price or under any circumstances.

I am very sure such a proposition as this will not long be acquiesced in by the great commercial interests of the country and by the public, whom both railroad companies and the

express men are intended to serve. If other courts should follow ours in this doctrine, the evils to ensue will call for other relief.

It is in view of amelioration of these great evils that, in dissenting here, I announce the principles which I earnestly believe *ought* to control the actions and the rights of these two great public services.

MR. JUSTICE FIELD dissenting.

I agree with MR. JUSTICE MILLER in the positions he has stated, although in the cases just decided I think the decrees of the courts below require modification in several particulars; they go too far. But I am clear that railroad companies are bound, as common carriers, to accommodate the public in the transportation of goods according to its necessities, and through the instrumentalities or in the mode best adapted to promote its convenience. Among these instrumentalities express companies, by the mode in which their business is conducted, are the most important and useful.

MR. JUSTICE MATTHEWS took no part in the decision of these cases.

PICKARD, Comptroller, *v.* PULLMAN SOUTHERN CAR COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Argued January 25, 26, 1886.—Decided March 1, 1886.

Section 6 of the act of the legislature of Tennessee, passed March 16, 1877, Laws of 1877, ch. 16, p. 26, which imposes a privilege tax of $50 *per annum* on every sleeping car or coach used or run over a railroad in Tennessee and not owned by the railroad on which it is run or used, is void so far as it applies to the inter-State transportation of passengers carried over railroads in Tennessee, into or out of or across that State, in sleeping cars

Statement of Facts.

owned by a corporation of Kentucky and leased by it for transportation purposes to Tennessee railroad corporations, the latter receiving the transit fare, and the former the compensation for the sleeping accommodations.

Section 28 of Article II of the Constitution of Tennessee, of 1870, contains these provisions: "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the Legislature shall have power to tax merchants, pedlers, and privileges, in such manner as they may from time to time direct."

On the 16th of March, 1877, the Legislature of Tennessee passed an Act, entitled "An Act declaring the mode and manner of valuing the property of telegraph companies for taxation, and of taxing sleeping cars," Laws of 1877, ch. 16, p. 26, the 6th section of which provided as follows: "That the running and using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used, is declared to be a privilege, and the companies owning and running or using said cars or coaches are required to report, on or before the 1st day of May of each year, to the comptroller, the number of cars so used by them in this State; and they shall be required to pay to the comptroller by the first of July following $50 for each and every of said cars or coaches used or as run over said roads; and if the said privilege tax herein assessed be not paid as aforesaid, the comptroller shall enforce the payment of the same by distress warrant."

Under this act the comptroller of the State claimed that there was due from the Pullman Southern Car Company, a corporation of Kentucky, to the State, for each of the years 1878, 1879 and 1880, a privilege tax of $50 on each one of thirty-eight sleeping cars, run and used on railroads in Tennessee, and not owned by the railroad companies on whose roads they were used, but owned by the Pullman Company. The aggregate amount of the taxes claimed was $5700, and the comptroller instituted proceedings to collect them from that company, which, under the provisions of a statute of the State, paid the

money under protest, and it was paid into the State treasury, with notice to the comptroller that it was paid under protest, and the company, within the time prescribed by the statute, and in August, 1881, brought an action at law against the comptroller to recover the $5700, in the Circuit Court of the United States for the Middle District of Tennessee.

The declaration alleged, among other things, that the sleeping cars, for the running or use of which the taxes were claimed and collected, were not run or used by the plaintiff during any one of the years 1878, 1879 or 1880, but were run and used by certain railroad companies in Tennessee, though they were owned during that time by the plaintiff, which permitted those railroad companies to run and use them under certain contract stipulations; that the sleeping cars so run and used were, during the whole of the years 1878, 1879 and 1880, employed by them in inter-State commerce, being run into and through Tennessee, from and into other States, transporting passengers from other States into or across Tennessee, or from Tennessee into other States; and that, therefore, such taxes and the collection thereof were illegal and contrary to the Constitution of the United States. There was a demurrer to the declaration, raising, among other things, the question above stated, but, on a hearing, the demurrer was overruled, the opinion of the court being delivered by Mr. Justice Matthews. 22 Fed. Rep. 276. The conclusion arrived at in the opinion, which accompanies the record, was that the levying of a privilege tax on the running and using, on railroads in Tennessee, of sleeping cars not owned by those railroads, was, as applied to such cars when employed in inter-State transportation, a regulation of commerce among the States, and contrary to the Constitution of the United States, and, therefore, void. Leave being given to the defendant to plead over, *nil debet* was pleaded, and the issue was tried by the court without a jury, by a written stipulation between the parties, which embodied an agreed statement of facts, on which the cause was heard.

The agreed statement set forth that the plaintiff was a Kentucky corporation, having its chief office and place of business at Louisville; and that, since 1872, it had been engaged, at

Statement of Facts.

Louisville, in manufacturing railway cars, known as drawing-room cars and sleeping cars, and in hiring those cars to various railroad companies in Tennessee and other States, under the following form of contract:

"This indenture, made this 19th day of June, A.D. 1872, between the Louisville and Nashville Railroad Company, the party of the first part, and the Pullman Southern Car Company, of the second part: Whereas, the said party of the second part is now engaged in the business of manufacturing railway cars, known as drawing-room and sleeping cars, under certain patents belonging to them, and of hiring the same to railroad companies, and receiving therefor income and revenue by the sale to passengers of seats and berths, and accommodations therein; and whereas the said party of the first part is desirous of availing itself of the use on and over its lines of road, of the cars constructed under the sleeping and drawing-room car patents now the property of said second party, and also of connections by means of said cars with other lines of railroad, whereon said cars are now operated by said second party, now this contract witnesseth: That the said party of the second part, in consideration of the covenants and agreements of the party of the first part, hereinafter mentioned to be by them kept and performed, hereby agrees with the said party of the first part, that they will furnish drawing-room cars and sleeping cars to be used by said party for the transportation of passengers, sufficient to meet the requirements of travel on and over their line of railroad, and on and over all lines of railroad which they now control, or may hereafter control, by ownership, lease, or otherwise, the said cars so furnished to be satisfactory to the general superintendent of the first party.

"2d. The said party of the second part agrees that they will keep the carpets, upholstery, and bedding of each of the said cars in good order and repair, and renew and improve the same, when necessary, at their own expense, excepting repairs and removals made necessary by accident or casualty; it being understood that the said first party shall repair all damages to said cars, of every kind, occasioned by accident or casualty, during the continuance of this agreement.

"3d. The said party of the second part hereby agrees, at their own expense and cost, to furnish one or more employés, as may be needful, upon each of said cars, whose duties shall be to collect fares for the accommodations furnished in said cars, and generally to wait upon passengers therein, and provide for their comfort.

"4th. The said party of the first part hereby agrees that the general officers of said second party, and the employés named in article third of this agreement, shall be entitled to free passage over the lines of the first party, when they are on duty for the second party.

"5th. The party of the second part hereby agrees that the general officers of the first party shall be entitled to free passes in any of the cars furnished by said second party under this agreement.

"6th. It is hereby mutually agreed, that the said employés of the second party named in article third of this agreement shall be governed by and subject to the rules and regulations of the said first party, which are, or may be, adopted from time to time, for the government of their own employés, and, in the event of any liability arising against said first party for personal injury, death, or otherwise of any employé of said second party, it is hereby distinctly understood and agreed, that the said first party shall be liable only to the same extent they would be if the person injured was an employé in fact of said first party, and for all liability in excess thereof shall be indemnified and paid by said second party.

"7th. The party of the first part, in consideration of the use of the aforesaid cars, hereby agrees to haul the same on the passenger trains on their line of road, and on all roads which they now control or may hereafter control by ownership, lease, or otherwise, and also on all passenger trains on which they may, by virtue of contracts or running arrangements with other roads, have the right to use such cars in such manner as will best accommodate passengers desiring the use of said cars; and the said party of the first part shall, at their own expense, furnish fuel for the cars and materials for the lights, shall wash and cleanse said cars, and shall also keep said cars in good

order and repair, including renewals of worn-out parts, and all things appertaining to said cars, necessary to keep them in first-class condition, except such as are provided for in article second of this agreement.

"8th. The party of the first part agrees to furnish said party of the second part, at convenient points, room and conveniences for airing and storing bedding.

"9th. The said party of the first part further agrees, that the said party of the second part shall be entitled to collect from each and every person occupying said cars, such sums for said occupancy as may be usual on competing lines furnishing equal accommodations, and that such rules and regulations shall be agreed upon as will most favor the renting of seats and couches in said cars.

"10th. The party of the first part hereby agrees to permit the party of the second part to place their tickets for seats and couches for sale in such of the railroad ticket offices as may be desired by said second party, and such services shall be performed by and as part of the general duties of the ticket agents, and without charge to the party of the second part; proceeds of such sales to be at the risk of said second party.

"11th. The party of the first part hereby agrees that said second party shall have the exclusive right, for a term of fifteen years from the date hereof, to furnish for the use of the first party drawing-room or parlor cars and sleeping cars, including reclining-chair cars, on all the passenger trains of said first party, and over their entire lines of railroad, and on all railroads which they may control, or may hereafter control, by ownership, lease, or otherwise, and also on all passenger trains on which they may, by virtue of contracts or running arrangements with other roads, have the right to use such cars, and that they will not contract with any other parties to run said class of cars on or over said lines of road during said period of fifteen years.

"The said second party, for the consideration aforesaid, hereby guarantees said first party against all damages of whatsoever kind which may be by said first party incurred in consequence of any infringement of patent rights in the construction and

use of any of said cars which may be used by said second party upon the lines of said first party under this arrangement, it being the meaning and intent of this article, that the second party shall secure said first party against all manner of expenditures which may be incurred by said first party in consequence of any litigation connected with alleged infringements of patent rights for the interior arrangements of said cars, and that they will pay off and discharge all judgments obtained at any time against said first party on account of such infringements.

"12th. It is mutually agreed between the parties hereto, that, in case either of said parties shall, at any time hereafter, fail to keep and perform any of the covenants herein contained to be by them respectively kept and performed, then, and in that case, after written notice shall have been given to the defaulting party thereto of the default complained of, if the said defaulting party shall refuse or neglect to make good, keep, and perform such unfulfilled covenants and conditions of this agreement within a reasonable time after such notice, the other party shall be at liberty to declare this contract ended and no longer in force."

The agreed statement further set forth, that the plaintiff had never had any branch office or establishment of any kind in Tennessee, unless the fact that the plaintiff had placed its tickets for sale with railway agents in that State constituted the offices of such agents branch offices or establishments of the plaintiff; that it had never had any ticket agents of its own in Tennessee, except in so far as the ticket agents of the railway companies with whom the tickets of the plaintiff had been placed for sale might be regarded as the agents of the plaintiff; that the plaintiff had never had any other agents, officers or employés in Tennessee, except the conductors and porters which it furnished with its cars under its contracts with the railroad companies; that the cars furnished by the plaintiff under those contracts constituted all the property owned by it in Tennessee, and the business done by it under those contracts, such as it was, was the only business done by it in Tennessee; that the cars furnished by it under those con-

tracts (with the exception of two sleeping cars running between Nashville and Memphis), were used in transporting passengers from other States into or across Tennessee, and from points in Tennessee to points in other States; that the same cars also transported passengers from points in Tennessee to other points in that State whenever they properly applied for such transportation, but the number of such passengers bore an inconsiderable proportion to the other passengers transported in those cars; that those cars ran into, out of or across Tennessee, making such stops as the trains to which they were attached made; that, in the case of passengers travelling across Tennessee, or from points out of it to points in it, their sleeeping-car tickets were purchased and paid for before they entered Tennessee, but in the case of passengers from points in Tennessee to points in other States, or in Tennessee, the tickets were purchased and paid for in Tennessee; that the railroad companies of Tennessee with whom such contracts were made were duly chartered by that State, or organized or operated under its laws, with power to transport passengers for hire; that they were taxed by that State on the value of their roads, rolling stock and other tangible property, and also on the value of their franchises; that from March 16, 1877, to the present time, the Memphis and Charleston Railroad Company, and the East Tennessee, Virginia and Georgia Railroad Company, both of them Tennessee corporations, had owned sleeping cars which they had run and used during that time as sleeping cars upon their respective roads, and they had not been required by the State to pay any tax for running or using said sleeping cars upon their roads, except in so far as such a tax might have been included in the tax assessed on the value of their franchises; and that the thirty-eight cars before mentioned included the two cars run between Nashville and Memphis.

The agreed statement set forth the other facts hereinbefore contained, necessary to a recovery; and, on the 29th of December, 1884, a judgment was entered, which stated that the cause was heard on an agreed statement of facts, and that it was thereby made a part of the record at large in the cause, and

that the court found the issue joined in favor of the plaintiff. It then set forth the material facts contained in the agreed statement, and awarded a judgment for $5400, for the taxes on the thirty-six cars, and for $1089.90 interest, and for costs, assigning as a reason that the State had no power to impose a privilege tax on the plaintiff for running or using the thirty-six cars in the State, the tax being a regulation of commerce between the States, and, therefore, a violation of the Constitution of the United States. To reverse this judgment the defendant sued out a writ of error.

Mr. J. B. Heiskell for plaintiff in error (*Mr. S. A. Champion* was with him on the brief), argued:

I. That all State questions had been eliminated by the decision in the case of *Pullman Southern Car Co.* v. *Gaines*, 3 Tenn. Ch. 587, and the only contentions now before this court were contained in the Federal questions involved. *Stone* v. *Wisconsin*, 94 U. S. 181, 183; *Fairfield* v. *County of Gallatin*, 100 U. S. 47, 52; *Burgess* v. *Seligman*, 107 U. S. 29, 34; *Railroad Co.* v. *Gaines*, 97 U. S. 697, 709.

II. That the fact that certain parts of attachments of the sleeping cars were patented could in no way interfere with the right of the legislature to levy a privilege tax upon the "running and using" of sleeping cars over the railroads in the State owned by foreign corporations and run for the accommodation of passengers into, out of or through the State.

III. That the contract between the Pullman Southern Car Company and the various railroad companies exhibited in the record, showed that the arrangement intended to be made with the railroad companies was to secure the privilege of running and using sleeping cars or coaches over the lines of the various railroads, and was not a contract of hiring or leasing cars by the railroad companies, and that the business was done by the defendants and not by the railroad companies.

IV. That the running and using of cars for sleeping purposes only, not owned by the railroads upon which they were run or used, was not such inter-State commerce, the regulation of which is placed by the Constitution of the United States under the

control of Congress, nor did the regulation of this occupation such as was imposed by the privilege tax in question, interfere with transportation or commerce among the States. *Sinnot* v. *Davenport*, 22 How. 227; *Gibbons* v. *Ogden*, 9 Wheat. 1, 210–214; *Foster* v. *Davenport*, 22 How. 244; *Crandall* v. *Nevada*, 6 Wall. 35; *Osborne* v. *Mobile*, 16 Wall. 479; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Moran* v. *New Orleans*, 112 U. S. 69; *Pullman Southern Car Co.* v. *Gaines*, 3 Tenn. Ch. 587; *Dun* v. *Cullen*, 13 Lea, 202; *Lightburn* v. *Taxing District*, 4 Lea, 219.

V. That a tax laid upon the instruments of commerce was not a tax upon commerce itself.

VI. That it is a well-settled rule, long adhered to by this court, that a construction given by State courts of last resort to legislative enactments and provisions of State constitutions ought, as a rule, to be followed in the Federal courts; and while this court is not necessarily governed by previous decisions of said courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property, yet unless the decision in question is held to be unreasonable, violative of some fundamental law or well-established principle, this court will be governed by the construction given by the Supreme Court of the State. *Railroad Co.* v. *Gaines*, 97 U. S. 697, 709; *Stone* v. *Wisconsin*, 94 U. S. 181.

Mr. Thomas L. Dodd on behalf of Davidson County for plaintiff in error.

Mr. O. A. Lochrane and *Mr. E. S. Isham* for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court. After stating the Case as above reported, he continued:

The point upon which the final judgment was rendered in the case was the one considered and adjudged in the decision given on the demurrer to the declaration. The tax was not a property tax, because, under the Constitution of Tennessee, all property must be taxed according to its value, and this tax was

not measured by value, but was an arbitrary charge. What was done by the plaintiff was taxed as a privilege, it being assumed by the State authorities, that the Legislature had the power, under the Constitution of Tennessee, to enact the 6th section of the Act of 1877, and that the plaintiff had done what that section declared to be a privilege. By the decisions of the Supreme Court of Tennessee, cited in the opinion of the Circuit Court on the demurrer, it is held, that the Legislature may declare the right to carry on any business or occupation to be a privilege, to be purchased from the State on such conditions as the statute law may prescribe, and that it is illegal to carry on such business without complying with those conditions. In this case, the payment of the tax imposed was a condition prescribed, without complying with which what was done by the plaintiff was made illegal. The tax was imposed as a condition precedent to the right of the plaintiff to run and use the thirty-six sleeping cars owned by it, as it ran and used them on railroads in Tennessee. The privilege tax is held by the Supreme Court of Tennessee to be a license tax, for the privilege of doing the thing for which the tax is imposed, it being unlawful to do the thing without paying the tax. What was done by the plaintiff in this case, in connection with the use of the thirty-six cars, if wholly a branch of inter-State commerce, was made by the State of Tennessee unlawful unless the tax should be paid, and, to the extent of the tax, a burden was placed on such commerce; and, upon principle, the tax, if lawful, might equally well have been large enough to practically stop altogether the particular species of commerce.

What was that commerce? The plaintiff, by its contract, furnished sleeping cars to the railroad company, to be used by the latter "for the transportation of passengers," sufficient in numbers to meet the requirements of travel on the road. The plaintiff kept in order and renewed the carpets, upholstery and bedding of the cars, except repairs and renewals made necessary by accident or casualty, but all damages to the cars by accident or casualty were repaired by the railroad company. The plaintiff furnished employés on each car to collect fares for the accommodations furnished by the car, and to wait upon

passengers and provide for their comfort. Those employés were governed by the rules adopted by the railroad company to govern its own employés, and the railroad company was liable for personal injury to, or the death of, any such employé of the plaintiff to the same extent only as if such employé was in fact an employé of the railroad company, and the latter was indemnified by the plaintiff for all liability in excess thereof. The railroad company carried free on its line such employés of the plaintiff and its general officers when on duty for it, and the plaintiff carried free in the cars it so furnished the general officers of the railroad company. In consideration of the use of such cars, the railroad company hauled them on the passenger trains on its line, in such manner as best accommodated passengers desiring to use the cars, and furnished, at its own expense, fuel for them and materials for the lights, and washed and cleansed them, and kept them in good order and repair, including renewals of worn-out parts, and all things appertaining to them, necessary to keep them in first-class condition, with the exceptions before specified in regard to carpets, upholstery and bedding, and furnished room and conveniencies for airing and storing bedding. The plaintiff collected from every person occupying the car compensation for its accommodations in seats and couches. The railroad company permitted the plaintiff to place its tickets for seats and couches on sale in the ticket offices of the railroad company, the sale to be a part of the general duties of the ticket agents of the latter, and to be without charge to the plaintiff, but the proceeds of sales to be at its risk. The contract was made an exclusive one for fifteen years, and the plaintiff agreed to protect the railroad company against all liability for the infringement of any patent in the construction and use of the cars, and there was a provision for the termination of the contract by either party on a breach of it by the other.

On these facts, the cars in question were cars for the transportation of the passengers who occupied them, in their transit into, or through, or out of Tennessee. They were used by the railroad company for such transportation, and it received the transit fare or compensation. For purposes of transit, it dealt

with the cars as it would with cars owned by itself. It hauled them, furnished fuel and materials for lights, washed and cleansed them, kept them in repair, renewed worn-out parts, repaired all damages to them by accident or casualty, and even repaired and renewed carpets, upholstery, and bedding damaged or destroyed by accident or casualty; all at its own expense, and without charge to the plaintiff; leaving to the plaintiff only to make good the ordinary wear and tear of the sitting and sleeping conveniencies, and allowing it to have the compensation for such conveniences, and furnishing it free of charge with all facilities for selling seats and couches.

The tax was a unit, for the privilege of the transit of the passenger and all its accessories. No distinction was made in the tax between the right of transit, as a branch of commerce between the States, and the sleeping and other conveniences which appertained to a transit in the car. The tax was really one on the right of transit, though laid wholly on the owner of the car. So, too, the service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniencies or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it was engaged in inter-State commerce, was not taxable by the State of Tennessee; because the plaintiff had no domicil in Tennessee, and was not subject to its jurisdiction for purposes of taxation; and the cars had no *situs* within the State for purposes of taxation; and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege.

The case of *Attorney-General* v. *London & North Western Railway Co.*, in the Court of Appeal, 6 Q. B. Div. 216, before Lord Chief Justice Coleridge, and Lord Justices Baggallay and Brett, affirming the judgment of the Exchequer Division, 5 Ex. Div. 247, is instructive in the above point of view, as to the subject in hand. There, the railway company attached to its night trains sleeping carriages for the accommodation of such of its first class passengers as might choose to avail them-

selves of it. For the use of these carriages they were charged an extra sum in addition to the ordinary first-class fare. Besides couches with pillows, sheets and blankets, each carriage contained a lavatory, and other conveniences. Passengers using such carriages were not disturbed during the night by demands for their tickets, and, if they arrived at their destination in the night, the passengers were allowed to remain in their beds until the morning. Under a statute imposing a percentage duty "upon all sums received or charged for the hire, fare or conveyance of passengers" on any railway, the Government claimed and was allowed the duty on the extra sum charged for the use of the sleeping carriage. The Court of Appeal, by Lord Coleridge, said: "We regard the additional accommodation afforded by the sleeping carriages as differing in no essential particular from the superior accommodation afforded by a second-class carriage over a third, or by a first-class carriage over both. If the company issued tickets to all passengers alike, at the price charged to passengers travelling in third-class carriages, and then issued tickets, at corresponding prices, to those desiring to travel in a higher class of carriage, it could hardly be contended that duty would not be payable upon the prices paid for such second ticket. The passenger who is content to travel in a third-class or second-class carriage in the day, might well desire to travel in a carriage of a higher class by night; and, in like manner, a passenger ordinarily travelling by day in a first-class carriage might desire the additional accommodation at night of a sleeping carriage. No separate charge is made in the present case; the charge, though written on a separate ticket, is, in our opinion, part of one charge for the conveyance of the passenger in a particular way, and is, therefore, a part of the charge for the conveyance of a passenger, received and charged for such conveyance." That case is in harmony with the views before taken in regard to the present case. The fare paid by the inter-State passenger to the railroad company, and that paid to the plaintiff, added together, were merely a charge for his conveyance in a particular way, and there was really but one charge for the transit, though the total amount paid was divided among two recipi-

ents. The service was a single one, of inter-State transit, with certain accommodations for comfort, and what was paid to the plaintiff was part of a charge for the conveyance of the passenger.

The views above expressed are in harmony with numerous decisions which have been made by this court on the subject to which they relate. In *Almy* v. *The State of California*, 24 How. 169, a stamp tax had been imposed by the State on bills of lading for the transportation of gold or silver from any point within the State to any point without it, and was held by this court to be invalid; and in *Woodruff* v. *Parham*, 8 Wall. 123, 138, it was said by this court, Mr. Justice Miller delivering its opinion, that that stamp tax "was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with the freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall* v. *Nevada*, 6 Wall. 35, and with the authority of Congress to regulate commerce among the States."

In the *State Freight Tax Case*, 15 Wall. 232, 281, it was said that a State cannot tax persons for passing through or out of it; that inter-State transportation of passengers is beyond the reach of a State legislature; and that a tax upon it amounts to a tax upon the passengers transported.

In *Railroad Co.* v. *Maryland*, 21 Wall. 456, 472, Mr. Justice Bradley, in speaking for the court, said, that a State cannot impose a tax or duty on the movements or operations of commerce between the States, because it would be a regulation of such commerce "in a matter which is essential to the rights of all, and, therefore, requiring the exclusive legislation of Congress," being "a tax because of the transportation," and "therefore, virtually, a tax on the transportation."

The decisions in the various cases in this court on the subject of a tax by a State on the bringing in of passengers from foreign countries, and which are collected and commented on by Mr. Justice Miller, in delivering the opinion of this court in the *Head Money Cases*, 112 U. S. 580, 591, show it to be a settled matter that to tax the transit of passengers from foreign countries or between the States, is to regulate commerce.

The principles which governed the decisions in *Welton* v. *Missouri*, 91 U. S. 275, *Guy* v. *Baltimore*, 100 U. S. 434, and *Moran* v. *New Orleans*, 112 U. S. 69, holding unlawful the State taxes in those cases on inter-State commerce in merchandise, are equally applicable to the tax in this case on the transit of passengers. The rule which governs the subject is accurately and tersely stated by Mr. Justice Field, in delivering the opinion of the court, in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 211: "While it is conceded that the property in a State, belonging to a foreign corporation engaged in foreign or inter-State commerce, may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce." The case of *Telegraph Co.* v. *Texas*, 105 U. S. 460, in regard to a State tax on telegraphic messages sent out of a State, is a kindred case. The whole subject, in reference to a State tax imposed for selling goods brought into a State from other States, was recently fully considered by this court in *Walling* v. *Michigan*, 116 U. S. 446. And in that case Mr. Justice Bradley, speaking for the court, says: "We have also repeatedly held, that, so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammeled." See *Welton* v. *Missouri*, 91 U. S. 275, 282; *Machine Co.* v. *Gage*, 100 U. S. 676, 678; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204; *Brown* v. *Houston*, 114 U. S. 622, 631, where the cases on that point are collected.

It is urged that the decison of the Circuit court in this case was inconsistent with the rulings in *Osborne* v. *Mobile*, 16 Wall. 479, and in *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365. It becomes necessary, therefore, to examine those cases.

In *Osborne* v. *Mobile*, Osborne was an agent, at Mobile, Ala-

bama, of a Georgia corporation, an express company, and, as such, transacted at Mobile a general express business within and extending beyond the limits of Alabama. An ordinance of the city of Mobile required an annual license fee of $500 to be paid by every express company doing business in Mobile, and having a business extending beyond the limits of Alabama, while every express company doing business within the limits of the State was required to pay a license fee of only $100, and every such company doing business within the city was required to pay a license fee of only $50. A fine was prescribed for a violation of the ordinance. Osborne violated it and was fined. The legality of the tax was upheld. Chief Justice Chase, in delivering the opinion of the court, cited the *State Freight Tax Case*, 15 Wall. 232, decided at the same term, as holding "that the State could not constitutionally impose and collect a tax upon the tonnage of freight taken up within its limits and carried beyond them, or taken up beyond its limits and brought within them; that is to say, in other words, upon inter-State transportation"; "because it was, in effect, a restriction upon inter-State commerce, which by the Constitution was designed to be entirely free." The tax on the Georgia Express Company was upheld as a tax "upon a business carried on within the city of Mobile." Osborne was a local agent, personally subject to the taxing jurisdiction of the State, as representing his principal, and the tax was on the general business he carried on, and the subject of the tax was not, as here, the act of inter-State transportation. In *Osborne* v. *Mobile*, the court drew the distinction between the case before it and the *State Freight Tax Case*. The present case falls within the latter.

In *Wiggins Ferry Co.* v. *East St. Louis*, the decision was that the State had power to impose a license fee, upon a ferry-keeper living in the State, for boats which he owned and used in conveying from the State passengers and goods across a navigable river to another State; and that the levying of a tax on such boats, or the exaction of a license fee in respect of them, by the State in which they had their *situs*, was not a regulation of commerce within the meaning of the Constitution. In the case at bar the plaintiff was not a Tennessee cor-

poration, and had no domicil in Tennessee, and the sleeping cars in question, as before said, had not any *situs* in Tennessee for the purposes of taxation.

The question involved in this case was before the Court of Chancery of Tennessee in *Pullman Southern Car Co.* v. *Gaines*, 3 Tenn. Ch. 587, on the same facts, as to the privilege tax for 1877. That court held (and it is stated that the Supreme Court of Tennessee, on appeal, affirmed its ruling), that this privilege tax, as to such of the cars as passed and repassed through the State, and did not abide in it, was not amenable to the objection that it interfered with inter-State commerce. The view taken was that the property of the foreign corporation, used in Tennessee, could be taxed as property or by an excise on its use; and that the tax in this case was not directly on the object of commerce, or directly aimed at commerce. We have given to the views set forth by the Tennessee Chancery Court the consideration due to the judgments of that tribunal, but are unable to concur in its conclusion.

Judgment affirmed.

TENNESSEE *v.* PULLMAN SOUTHERN CAR COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Argued January 25, 26, 1886.—Decided March 1, 1886.

The case of *Pickard* v. *Pullman Southern Car Co.*, *ante*, p. 34, confirmed and applied to a privilege tax of $75 a year, on each sleeping car, imposed by the act of Tennessee, of April 7, 1881, Laws of 1881, ch. 149, p. 202.

This case was argued with *Pickard* v. *Pullman Southern Car Co.*, *ante*, 34, by the same counsel.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Chancery Court of

Syllabus.

Davidson County, Tennessee, on December 15, 1883, by the State of Tennessee, against the Pullman Southern Car Company, a Kentucky corporation. The questions involved are the same as those disposed of in *Pickard* v. *The Pullman Southern Car Co.*, *ante*, 34. The bill sets forth the act of Tennessee of March 16, 1877, and alleges that from 1877 the company had run sixty sleeping cars instead of thirty-eight each year, and ought to have paid as a privilege tax for each car for each of the years 1877, 1878, 1879, and 1880, $50, making $12,000, whereas it had paid only $7276.41; and that by an act passed April 7, 1881, Laws of 1881, ch. 149, 202, the privilege tax was increased to $75 a year, for each car, making due for the years 1881 and 1882, $9000. The bill prays for a discovery, and an account, and for judgment.

The defendant removed the suit into the Circuit Court of the United States for the Middle District of Tennessee, and then answered the bill. The answer raises the same questions which were adjudged in the other suit, and on the same facts. The case was heard on bill and answer. The decree gave a recovery for $300 and interest for the taxes for 1881 and 1882 on the two cars which ran wholly within Tennessee, but dismissed the bill in all other respects. The plaintiff appealed to this court from all of the decree except that part which awarded a recovery. For the reasons assigned in the opinion in the other suit, the decree in this case is

Affirmed.

HAGOOD & Others *v.* SOUTHERN & Another.

HAGOOD & Others *v.* WILLIAMS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Argued January 12, 13, 1886.—Decided March 1, 1886.

State scrip which declares on its face that it is receivable "in payment of all taxes and dues to the State" gives the holder no right to maintain a suit

Statement of Facts.

to compel its receipt for taxes, unless he owes the taxes for which it is receivable.

Marye v. *Parsons*, 114 U. S. 325, and *Williams* v. *Hagood*, 98 U. S. 72, affirmed.

When a suit is brought in a court of the United States against officers of a State to enforce performance of a contract made by the State, and the controversy is as to the validity and obligation of the contract, and the only remedy sought is the performance of the contract by the State, and the nominal defendants have no personal interest in the subject matter of the suit, but defend only as representing the State, the State is the real party against whom the relief is sought, and the suit is substantially within the prohibition of the XIth Amendment to the Constitution of the United States.

Louisiana v. *Jumel*, 107 U. S. 711, affirmed and applied.

The jurisdictional distinction pointed out between cases in which the relief sought is the performance of a plain official duty requiring no exercise of discretion, or where State officers under color of a State authority which is unconstitutional have invaded and violated personal and property rights, and cases like the present in which the relief sought is affirmative official action by State officers in performing an obligation which attaches to the State in its political capacity.

These two cases were heard together in the Circuit Court upon the same testimony, and the same decree passed in each. The facts, common to both, were as follows:

By an act of the General Assembly of South Carolina, passed September 15, 1868, entitled "An act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina," the State, by a guaranty indorsed thereon, pledged its faith and funds to the payment of the principal and interest of bonds to be issued by the railroad company, to the amount of $4,000,000. The bonds authorized by the act, with the guaranty indorsed, were in fact issued.

On March 2, 1872, an act of the General Assembly of South Carolina was passed, entitled "An act to relieve the State of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company by providing for the securing and destruction of the same."

The preamble to this act recited the issue of the bonds, the fact of the guaranty indorsed, the liability of the State on account thereof, and the desire of the State to withdraw them and thus relieve itself. It then proceeded to require that all

such bonds then held by the financial agent of the State, as security for advances of money made to the railroad company by the State, should be delivered up and cancelled, releasing the railroad company from all liability on account of such advances.

It then provided, that, upon the surrender by the company to the State of the balance of the issue of $4,000,000 of said bonds, issued and guaranteed as aforesaid, the State treasurer should issue in lieu thereof, to the amount of $1,800,000, certificates of indebtedness, styled revenue bond scrip, expressing that the sum mentioned therein was due by the State of South Carolina to bearer, and that the same would be received in payment of taxes and all other dues to the State, except special tax levied to pay interest on the public debt. The act also provided as follows:

"SEC. 4. That the faith and funds of the State are hereby pledged for the ultimate redemption of said revenue bond scrip, and the county treasurers are hereby required to receive the same in payment of all taxes levied by the State, except in payment of special tax levied to pay interest on the public debt, and the State treasurer and all other public officers are hereby required to receive the same in payment of all dues to the State; and still further to provide for the redemption of said revenue bond scrip, an annual tax of three mills on the dollar, in addition to all other taxes, on the assessed value of all taxable property in the State, is hereby levied, to be collected in the same manner and at the same time as may be provided by law for the levy and collection of the regular annual taxes of the State; and the State treasurer is hereby required to retire, at the end of each year from their date, one-fourth of the amount of the treasury scrip hereby authorized to be issued, until all of it shall be retired, and to apply to such purpose exclusively the taxes hereby required to be levied.

"SEC. 5. That if any such revenue bond scrip is received in the treasury for the payment of taxes, the treasurer be, and he is hereby, authorized to pay out such revenue bond scrip in satisfaction of any claim against the treasury, except for interest that may be due on the public debt."

Statement of Facts.

The exchange contemplated by this act was effected; private individuals holding the guaranteed bonds as collateral security for loans of money to the railroad company surrendered them, and accepted, in lieu thereof, revenue bond scrip at the lower rate. In this way, Amos D. Williams, the appellee in one of these causes, became and remained the holder of $165,000 of revenue bond scrip, for which he surrendered $417,000 of guaranteed bonds; and Edward B. Wesley became the holder of $1,005,000 of revenue bond scrip, for which he advanced in cash $344,925, with which were redeemed $2,902,000 of guaranteed bonds, also surrendered to the State. Wesley became, by leave of court, a party complainant with Williams in his bill, before final decree. Subject to the lien of Wesley for the payment of his cash advance as above stated, the assignees in bankruptcy of the Blue Ridge Railroad Company, who were appellees in the other cause, claimed to own the revenue bond scrip held by Wesley as collateral security for his advance. Other bonds of said railroad company guaranteed by the State, by like exchanges, were surrendered by other holders, who received and held corresponding amounts of said revenue bond scrip, and who came in, under the bill of Williams, which was filed on behalf of himself and all others in like interest choosing to do so, and proved their claims before a master, so that the whole issue of $4,000,000 of said bonds, except about $4,000 thereof, were shown to have been surrendered to the State and cancelled, on the faith of said revenue bond scrip.

After the consummation of these transactions, the Legislature of the State of South Carolina, by an act passed March 13, 1872, abolished the office of State auditor, and vested his powers in the comptroller-general; and, by an act approved October 22, 1873, repealed the fourth section of the act of March 2, 1872, providing for an annual tax of three mills on the dollar for the redemption of the revenue bond scrip, and also forbad the comptroller to levy any tax for any purpose whatever, unless expressly thereafter authorized to do so by statute.

On December 22, 1873, it also passed an act forbidding any State or county officer to accept payment of taxes in revenue bond scrip.

Statement of Facts.

In a similar case between the same parties, in which the complainant's bill was dismissed without prejudice, and reported as *Williams* v. *Hagood*, 98 U. S. 72, it was said by this court:

"This legislation was manifestly inconsistent with the undertaking of the State expressed in the act of March 2, 1872, and in the revenue bond scrip issued thereunder, and its constitutionality and obligatory force would be a legitimate subject for consideration if the complainant had placed himself in a position to invoke our judgment. But he has not. His bill does not aver that he has been injured, or will be injured, by this legislation, or by any act or neglect of the comptroller-general or the county treasurer. It does not aver that the comptroller-general has neglected or refused to perform every duty imposed upon him by the statute under which the revenue bond scrip was issued, nor even that he threatens such neglect or refusal. It does not aver that the county treasurer has refused, or even threatened to refuse, receiving the complainant's scrip, or any scrip, in payment of taxes or dues to the State, other than taxes levied to pay the interest on the State debt. It does not aver any demand from the State treasury or any tender to the county treasurer. Its object is plainly to obtain from this court a declaration that the legislative acts of October 22d and December 22d, 1873, are unconstitutional, because impairing the obligation of the contract made by the act of 1872, and the certificates thereby authorized and thereunder issued, and this without any averment that the complainant will be injured by them. The question presented to the court is, therefore, merely an abstract one; such a one as no court can be called upon to decide, and the bill shows no equity in the complainant. Hence it was properly dismissed in the court below, and it must be dismissed here, but without prejudice to the complainant's right to bring and prosecute another suit, when he shall be in a condition to exhibit any equity in himself."

To supply the omissions of his former bill, it was alleged by the complainant in the present one, that, in April, 1879, he tendered the said certificates of indebtedness, amounting to about $166,000, to the treasurer of the State of South Carolina and demanded payment thereof, which was refused; and that

thereupon, having advised the defendant Hagood, the comptroller-general of the State, of this refusal of payment by the State treasurer, he requested the comptroller-general, "from time to time, to prepare and transmit to the several county auditors all such forms and instructions as he might deem necessary for collection, in the same manner and at the same time as had been provided by law for the levy and collection of the regular annual taxes of the State for the current fiscal year, the taxes provided to be levied by the 4th section of the aforesaid act of the General Assembly for the redemption of said scrip, which class of duties, your orator avers, were duties imposed upon the comptroller-general by the said act of March 2d, 1872;" but that the said comptroller-general neglected and refused to comply with said request.

It was also alleged in the bill that the revenue bond scrip, prior to the passage of the acts of the Legislature complained of had a market value equal to seventy per cent. of its face value, according to which the complainant could dispose of the same to parties desiring to use the same in payment of taxes levied by the State of South Carolina, and that the complainant lately disposed of a quantity of said scrip, on a conditional sale, that it could be so used in payment of taxes; but that the county treasurers of the different counties of the State, among others of the counties of Charleston, Oconee, Anderson and Richland, refused, and continued to refuse, to receive the said revenue bond scrip in payment of taxes; and that thereby the said revenue bond scrip had ceased to have any market value.

It was not averred, however, in the bill that either of the complainants, Williams or Wesley, had ever tendered revenue bond scrip in payment of taxes due from either of them; but in the bill filed by Southern and Low, as assignees in bankruptcy of the Blue Ridge Railroad Company, an averment of that character was made.

In that bill it was alleged that the Blue Ridge Railroad Company was indebted to the State of South Carolina for taxes on its property for the year 1872 in the sum of $10,845.33, none of said taxes being special taxes levied to pay the interest on the public debt, of which $7541.22 was payable to the treasurer of

Oconee County, and $3,304.11 to the treasurer of Anderson County, to each of whom tenders had been duly made of said revenue bond scrip by said railroad company in payment of said taxes, but the same were refused.

The prayer of the bill in the case of Williams was, "that the act of the Legislature of the State of South Carolina of the 2d March, 1872, may be decreed a contract binding the State of South Carolina and affecting the said State with an obligation to do and perform, or cause to be done and performed, the several matters and things therein stipulated and set forth to be done and performed by the said State, through its officers and agents, particularly so much of the said act as provides for the levy of a tax to retire the said certificates of indebtedness, and to receive the same in payment of taxes and other dues to the State, except the tax levied to pay interest on the public debt; that the several parties holding, or claiming to hold, the said treasury certificates of indebtedness, *bona fide* and for value, may be called in and admitted to prove the same before a proper person to be appointed for that purpose; that the whole amount of such treasury certificates of indebtedness may be ascertained; that the repeal of the provisions of the said act of the 2d March, 1872, by the Legislature may be declared unconstitutional, null and void, because such repeal impairs the obligation of the contract between the State of South Carolina and your orator, and all other parties who are *bona fide* holders of such treasury certificates of indebtedness; that for the purpose of defending itself in such manner as it may be advised to be proper, the State may be allowed, upon the application of its attorney-general in its behalf, to be made a party to these proceedings; that, upon the ascertainment of the amount of the treasury certificates of indebtedness, proper process may be decreed against the State treasurer to perform the duties enjoined upon him by the 4th section of the act of March 2d, 1872, that is to say, to redeem the aforesaid treasury certificates of indebtedness, otherwise called revenue bond scrip, tendered by your orator to the said State treasurer, and that he may be required to receive the same in payment of all dues to the State, except interest on the public debt, and that

proper process may be issued against the comptroller-general, requiring him to perform the duties enjoined upon him under and pursuant to the different sections of said act of March 2d, 1872, and for that purpose that he from time to time be decreed to prepare and transmit to the several county auditors all such forms and instructions as may be proper and lawful for levying and collecting, or either, in the same manner and at the same time, as has been provided by law for the levy and collection of the regular annual taxes of the State for the current fiscal year, the taxes levied by the 4th section of the aforesaid act of the General Assembly for the redemption of said scrip; that the county treasurers of the said State be required to receive such treasury certificates of indebtedness as may be established as a claim under the contract created by the said act, in tender of taxes and dues to the State, except interest on the public debt; that in cases where such tender is made, the county treasurer refusing to receive the same shall be prevented by injunction from selling property or otherwise enforcing the payment of the said tax; that a mandatory injunction may be issued out of this honorable court, requiring the comptroller-general to cease from refusing to levy the tax for retiring the said treasury certificates of indebtedness, and the county treasurers to cease from refusing to receive the same for taxes and dues to the State, except to pay the interest on the public debt, and for such other and further relief as to your honors shall seem meet," &c.

The relief prayed for in the bill of the assignees of the Blue Ridge Railroad Company included also a prayer "that the defendants, the county treasurers, may be decreed to receive the said revenue bond scrip in payment of the said taxes due by your orators to the State of South Carolina; that on their refusal to do so they may be enjoined from enforcing the said taxes by selling the property of your orators, or in any other manner; and that on such refusal the lien of said taxes on the property of your orators may be declared to be discharged."

The revenue bond scrip was of different denominations, varying from $1 to $5000, and was in the form following:

Statement of Facts.

"100.00. No. 91. $100.00.

"*Revenue Bond Scrip.*

"The State of [Palmetto Tree] South Carolina.

"Columbia, S. C., *March* —, 1872.

"Receivable as one hundred dollars in payment of all taxes and dues to the State, except special tax levied to pay interest on public debt.

"NILES G. PARKER, *State Treasurer.*

"One hundred dollars. One hundred dollars.

[On each side of scrip:] One hundred dollars, act March, 1872."

In the case of *The State ex rel. &c.* v. *Hoge, Comptroller-General*, 4 S. C. 185, the Supreme Court of that State decided, April 18, 1873, that the certificates of revenue bond scrip issued under the act of March 2, 1872, were void, as being bills of credit within the prohibition of the Constitution of the United States, the design and intention to create by means of them a circulating medium and currency being inferred from the whole scope of the act, and the form and circumstances of the emission.

Decrees were entered in the two causes, which, after reciting the findings of fact and conclusions of law reached by the Circuit Court, proceeded as follows:

"It is therefore ordered—

"I. That it be referred to James E. Hagood, Esq., clerk of this court, as special master, to take proof of the claims of all parties other than the said Amos D. Williams and Edward B. Wesley (whose claims are hereby adjudged as established), holding, or claiming to hold, any of said revenue bond scrip, *bona fide*, and for value, who may, on contributing *pro rata* to the expense of such reference and this action, prove their claims. And that said special master do ascertain and report the total outstanding amount of such treasury certificates of indebtedness.

"II. That for the purpose of defending itself the State of South Carolina may, at its option, and in such manner as it may be advised to be proper, be allowed, upon the application

of the attorney-general of said State on its behalf, to be made a party to these proceedings.

"III. That upon the ascertainment of the amount of said treasury certificates of indebtedness outstanding, proper process do issue out of and under the seal of this court against the State treasurer of the State of South Carolina for the time being, and his successors in office, compelling and requiring him and them to perform the duties enjoined upon the incumbent of that office by the fourth section of the act of 2d March, 1872, to wit, to redeem the said treasury certificates of indebtedness, and compelling and requiring him and them to receive the same in payment of all taxes and other dues to the State, except the special tax levied to pay interest on the public debt; that proper process do issue out of and under the seal of this court against the comptroller-general of the State of South Carolina for the time being, and his successors in office, compelling and requiring him and them to perform the duties enjoined upon that officer by the different sections of the act of 2d March, 1872, and compelling and requiring him from time to time to prepare and transmit to the several county auditors all such forms and instructions as may be proper and lawful for levying and collecting, in the same manner as the annual taxes, the taxes required by the fourth section of the act of 2d March, 1872; and that proper process do issue out of and under the seal of this court compelling and requiring the different county treasurers of the State of South Carolina for the time being, and their successors in office, to receive such treasury certificates of indebtedness in payment of all taxes due to the State of South Carolina, except the special tax levied to pay interest on the public debt. And in all cases where a tender of said treasury certificates of indebtedness is made, and the same refused, an injunction may issue restraining the county treasurer so refusing from selling property, or in any manner enforcing payment of said taxes.

"IV. Any party to these suits may apply at the foot of this decree for further orders in the premises."

From those decrees the appeals were prosecuted, and the two causes were argued as one.

Argument for Appellees.

Mr. Charles Richardson Miles, Attorney-General of South Carolina, and *Mr. Le Roy F. Youmans* for appellants.

Mr. Dennis McMahon for appellees (*Mr. Thomas S. Cavender* and *Mr. James H. Rion* were with him on the brief). The distinction in *Marye* v. *Parsons*, 114 U. S. 325, as to relief to be given to persons who are tax-payers, and those who are not tax-payers is contrary to the provision in sec. 2, Art. IV. of the Constitution, "that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The true ground for the decisions in that case, and in *Williams* v. *Hagood*, 98 U. S. 72, is, that neither had put himself, by previous demands or tenders, in a position to ask a judicial determination of his rights in the court. The statute of South Carolina of March 2, 1872, when executed by the surrender of the guaranteed bonds, created a contract between the State and the holders of the certificates. See *Antoni* v. *Greenhow*, 107 U. S. 769; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Williams* v. *Louisiana*, 103 U. S. 637. The Federal courts have jurisdiction to enforce rights under this contract. The laws of the State impose upon the State officers who are parties duties connected with the levying and collection of taxes, which can be enforced by a citizen of South Carolina in the courts of that State by remedies analogous to those sought in these bills. *D'Oyley's Case*, 1 Brevard, 238; *Watson* v. *Mayrant*, 1 Rich. S. C. Eq. 449; *Singleton* v. *Commissioners*, 2 Bay, 105.

The remedies asked for are proper to be granted. See observations of this court in *Allen* v. *Baltimore & Ohio Railroad Co.*, 114 U. S. 311, 315, 316. See *Transportation Co.* v. *Parkersburgh*, 107 U. S. 691, 695; *Tomlinson* v. *Branch*, 15 Wall. 460; *Cummings* v. *National Bank*, 101 U. S. 153, 157; *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Clark* v. *Barnard*, 108 U. S. 436; *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U. S. 446; *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Davis* v. *Gray*, 16 Wall. 203, 220. See also *Murray* v. *Charleston*, 96 U. S. 432; *Edwards* v. *Kearzey*, 96

U. S. 595; *Tennessee* v. *Sneed*, 96 U. S. 69; *Allen* v. *Baltimore & Ohio Railroad Co.*, 114 U. S. 311, 315, 316; *Transportation Co.* v. *Parkersburgh*, 107 U. S. 691, 695; *Tomlinson* v. *Branch*, 15 Wall. 460; remarks in *Poindexter* v. *Greenhow*, 114 U. S. at page 295 on equitable remedies; *Cummings* v. *National Bank*, 101 U. S. 153, 157. If the court reaches the conclusion that all the relief given below should not be awarded, it may modify the decrees. But the fact that the granting the relief in question, so far as it orders the State officers of South Carolina to levy the tax specified and provided for in the act of March 4, 1872, constituting the contract in question, trenches upon the political power of the State of South Carolina, ought not to be an objection to affirming the decree in question. See *United States* v. *Peters*, 5 Cranch, 115—a most remarkable case; *Martin* v. *Hunter*, 1 Wheat. 304; *McCulloch* v. *State of Maryland*, 4 Wheat. 316; *Cohens* v. *Virginia*, 6 Wheat. 264; *Osborn* v. *Bank of the United States*, 9 Wheat. 738. See observations of Field, J., in *Louisiana* v. *Jumel*, 107 U. S. 733, in his dissenting opinion.

These certificates were not issued in violation of the Constitution of the United States; nor were they issued in violation of the provisions of the Constitution of South Carolina—*Mr. McMahon* also argued at length other points not passed upon in the opinion of the court.

Mr. Justice Matthews delivered the opinion of the court. After stating the case as above reported, he continued:

No specific provision is made in these decrees for the redemption of the revenue bond scrip in which the assignees of the Blue Ridge Railroad Company claim an interest, nor any direction to the treasurers of the counties in which its taxes are due to receive the scrip in payment therefor from the company; but the command of the decrees is broad enough to include such relief in their favor. But it is difficult to conceive on what theory of the relation between the railroad company and the State it can be maintained. The revenue bond scrip was issued by the State in exchange for the bonds of the railroad company guaranteed by the State, and in order that by

their surrender and cancellation the State might be relieved from its liability on that account. The State was surety for the railroad company and not debtor to it, and was not liable to it, either upon the guaranty or the certificates of indebtedness issued in lieu thereof. Neither was available as a demand against the State except in the hands of a holder for value, and neither constituted a contract until value had thus passed, as a consideration for the promises of the State. The railroad company is certainly not such a holder, and its assignees in bankruptcy are in no better position. As between the railroad company and the State, the former is primarily liable for any debt represented by the revenue bond scrip, or for which it is held by others as security, and is bound to indemnify the State against loss on account of its suretyship. To authorize the railroad company to pay its taxes in these certificates, is simply to exonerate it from taxation, and to compel payment of them to it, is to reverse the order of the obligation, by compelling the surety not only to become principal debtor to strangers, but to convert its debtor into a creditor.

No other parties to these suits, including those who have merely proved their claims before the master under the order of reference, have made any tender of revenue bond scrip in payment of specific taxes due from them; and, so far as the contract is that such payment may be made, no breach is shown. The discredit cast upon the scrip by the general refusal to accept it by the tax collectors of the State, and the depreciation in value occasioned thereby, are not actionable injuries. In this aspect, the case falls precisely within that of *Marye* v. *Parsons*, 114 U. S. 325, and does not materially differ from the case as made on the previous bill of Williams, and decided in *Williams* v. *Hagood*, 98 U. S. 72. So far as the instrument contains a promise that it will be received in payment of taxes, it is a contract with the holder for the time being, who has taxes to pay; and although such a stipulation, faithfully executed, would give commercial value to the paper, in whosesoever hands it may happen to be, it cannot be said, as a matter of law, that the contract is broken, until it has been tendered for taxes due from a holder and been refused, nor that the legal

right of the holder is threatened, unless he is in a situation to make a present tender for that purpose. He has no legal right to have this scrip received for taxes, unless he owes taxes for which it is receivable; and in order that it may be used for the payment of the taxes of another, he must transfer it to the new holder, and that would divest himself of all right to enforce a contract to which he is no longer a party and in which he has ceased to have a legal interest.

But it is urged, with earnestness and zeal, that the complainants, Williams and Wesley, are entitled to so much of the relief prayed for as in effect would operate to compel the comptroller-general of the State to execute in their favor the provisions of the act of March 2, 1872, relating to the levy, collection, and application of the tax pledged by the fourth section of that act to the redemption of the revenue bond scrip. The ground on which that relief is based, of course, is, that the act of March 2, 1872, must still be regarded as subsisting, notwithstanding the subsequent formal repeal by the Legislature; which must be treated as null and void, because it impairs and destroys the obligation of the contract between the holders of these certificates of indebtedness and the State of South Carolina. Treating the repealing acts, then, as of no force, the inference is drawn that the duty of the officers of the State remains, as declared and defined by the act of March 2, 1872, and its performance may be enforced by judicial process in behalf of every one having a legal interest in the subject.

It is to be borne in mind, however, that the State of South Carolina denies the existence and validity of the alleged contract. It asserts that the revenue bond scrip was issued in violation of the Constitution of the State, which provides, Art. IX., sec. 7, that public debts may be contracted for the purpose of defraying extraordinary expenditures; sec. 10, that no scrip, certificate, or other evidence of State indebtedness, shall be issued, except for the redemption of stock, bonds, or other evidences of indebtedness previously issued; and sec. 14, that any debt contracted by the State shall be by loan on State bonds, of amounts not less than $50 each, on interest, payable

within twenty years after the final passage of the law authorizing such debts. It asserts that the guaranty by the State of the original bonds of the Blue Ridge Railroad Company was illegal and void, because made in violation of express statutory conditions, which, it alleges, were never repealed, as was claimed by the holders of them; and that, consequently, the revenue bond scrip was without consideration, which, appearing on the face of the law itself, deprived the certificates of all validity in whatever hands they might be found. It further asserts, that the revenue bond scrip in question is void, as being in violation of that provision of the Constitution of the United States, Art. I., sec. 10, which declares that no State shall emit bills of credit, contending that these certificates, on the face of the instrument and of the law creating it, appear manifestly designed to circulate as money in the ordinary transactions of business.

It thus appears that a distinct issue is made by the State of South Carolina with the holders of this revenue bond scrip, and the controversy between them and the State involves the very question of the existence and obligation of the alleged contract. This controversy the State has undertaken to settle for itself. By its legislative department, it has repealed the statutes authorizing its officers to execute the contract on its behalf, and forbidden the levy, collection, and appropriation of taxes for the payment of the scrip. Through its judicial department it has declared as between itself and its officers, that the instruments themselves are unconstitutional and void, and without obligation. To this judgment, however, no holder of the scrip was a party, and, of course, it concludes no one.

The peculiarity of the alleged contract deserves to be noted. The instrument, looked at as the sole evidence of the obligation, contains no promise whatever to pay money. It declares simply that it is receivable for the amount of money named, in payment of taxes and dues to the State, except special tax to pay interest on public debt. If it be read as containing the law which authorized its issue, it is a contract that it shall be redeemed, one-fourth of the whole amount each year, out of taxes specially to be levied for that purpose. Although

styled in the law "certificates of indebtedness," there is no agreement generally to pay a named sum at a given time, in the usual form of public securities for the payment of money, nor even an express acknowledgment of an existing debt.

The controversy in which the validity and obligation of the scrip are involved is the subject of the present suits. The complainants as holders of this scrip, in behalf of themselves and of all other holders choosing to take part, are seeking to obtain by judicial process its redemption by the State, according to the terms of the statute in pursuance of which it was issued, by the levy, collection, and appropriation of special taxes pledged to that purpose, as they claim, by an irrepealable law, constituting a contract protected from violation by the Constitution of the United States. And such are the decrees which have been rendered according to the prayer of the bills. These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the XIth amendment to the Constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against

one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

The case comes thus directly within the authority of *Louisiana* v. *Jumel*, 107 U. S. 711. It was there said: "The question, then, is whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers of the State, whose authority has been withdrawn in violation of the contract, without the State itself in its political capacity being a party to the proceedings. The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done." p. 721. And: "The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question, until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power, in their administration of the finances of the State." p. 727.

Opinion of the Court.

If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be. If the State is named as a defendant, it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a State could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the State itself. If not, it may well be asked, what would constitute such a proceeding?

In the present cases the decrees were not only against the defendants in their official capacity, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office.

The principle which governs in these cases must be carefully distinguished from that which ruled in *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Board of Liquidation* v. *McComb*, 92 U. S. 531; and *Allen* v. *Baltimore & Ohio Railroad Co.*, 114 U. S. 311;—a distinction which was pointed out in *Louisiana* v. *Jumel*, *ubi supra*, and in *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U. S. 446. The rule for such cases was well stated by Mr. Justice Bradley in *Board of Liquidation* v. *McComb*, *ubi supra*, as follows: "A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate

compensation cannot be had at law, may have an injunction to prevent it." p. 541. And on the other hand, the rule for that class of cases was stated by the Chief Justice in *Louisiana* v. *Jumel*, *ubi supra*, in these words: "The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the State, but not the State through them." p. 723. In such cases, as was said by Chief Justice Marshall in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 858, "The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

A broad line of demarcation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void. Of such actions at law for redress of the wrong, it was said by Mr. Justice Miller, in *Cunningham* v. *Macon & Brunswick Railroad Co.*, *ubi sup.*: "In these cases he is not sued as or because he is the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him." p. 452. Of such cases that of *United States* v. *Lee*, 106 U. S. 196, is a conspicuous example, and it was upon this ground that the judgment in *Poindexter* v. *Greenhow*, 114 U. S. 270, was rested.

And so the preventive remedies of equity, by injunction, may be employed in similar cases to anticipate and prevent the threatened wrong, where the injury would be irreparable, and there is no plain and adequate remedy at law, as was the case in *Allen* v. *Baltimore & Ohio Railroad Co.*, 114 U. S. 311, where many such instances are cited.

The defendants in the present cases, though officers of the State, are not authorized to enter its appearance to the suits and defend for it in its name. The complainants are not entitled to compel its appearance, for the State cannot be sued without its consent. And the court cannot proceed to the determination of a cause and controversy, to which the State is an indispensable party, without its presence. This, however, the Circuit Court has in fact done; and its decrees undertake to dispose of the matter in controversy, and enforce the judgment of the court against the State through its officers, in a suit to which it is not a party. The suggestion that it has had the opportunity and the invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit. For these reasons

The decrees of the Circuit Court are reversed, and the causes are remanded, with instructions to dismiss the bills of complaint.

Mr. Justice Field and Mr. Justice Harlan, while adhering to the views expressed by them in their dissenting opinions in *Louisiana* v. *Jumel*, 107 U. S. 726, 748, admit that the doctrines of that case require a reversal of the judgment in this case.

Syllabus.

WRIGHT, Assignee *v.* KENTUCKY & GREAT EASTERN RAILWAY COMPANY & Another.

FARMERS' LOAN & TRUST COMPANY *v.* WRIGHT, Assignee & Others.

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

Argued January 15, 18, 19, 1886.—Decided March 1, 1886.

The Kentucky and Great Eastern Railway Construction Company, which had a contract with the Kentucky and Great Eastern Railway Company, made May 22, 1873, to construct for it a railway in Kentucky, from Newport to Catlettsburg, and did work between Maysville and Catlettsburg, completing about seven miles of road, and purchasing and putting down the iron rails and other materials, acquired no lien on the road or on any part of its line, completed or not completed.

The Kentucky and Great Eastern Railway Company having previously, under a contract made by it January 15, 1873, with the owners of the Maysville and Big Sandy railroad, for a conditional sale of that railroad, taken possession of it, and the Construction Company having notice of that contract, when the construction contract was made, and the vendors having declared that contract to be void, according to its terms, and resumed possession of the railroad, with the consent of the vendee, the Construction Company acquired no rights in regard to so much of the line, completed or not completed, between Maysville and Catlettsburg, as was part of the line of the Maysville and Big Sandy railroad, which were not subject to the rights of the vendors of that road.

A mortgage having been made by the Kentucky and Great Eastern Railway Company on February 15, 1872, to a trustee, to secure bonds, on the line from Newport to Catlettsburg, the trustee acquired under it no greater rights at any time than the Railway Company had, and, no bonds having been issued before the conditional sale of the Maysville and Big Sandy railroad was made, on January 15, 1873, the trustee had, as against the vendors of that road, only such rights as the mortgagor had.

The facts which make the case are stated in the opinion of the court.

Mr. C. L. Raison, Jr., for the assignee.

Mr. John A. Campbell for Farmers' Loan & Trust Company.

Mr. Aaron F. Perry for the railroad companies.

Mr. Justice Blatchford delivered the opinion of the court.

On the 18th of December, 1850, the Legislature of Kentucky, by special act, Laws of 1850, vol. ii., ch. 96, p. 73, created a corporation known as the Maysville and Big Sandy Railroad Company (hereinafter called the Big Sandy Company), with power to construct and maintain a railroad, commencing at or near the city of Maysville, Kentucky, and running thence to the Big Sandy River, by such route as might be found practicable. The act gave authority to the counties of Mason, Lewis and Greenup, and to any town in any of those counties, to subscribe to the stock of the company, when authorized by a majority of the voters of the county or town, the proposition to be submitted to them by the directors of the company; and the issue of bonds by the counties and towns in aid of the railroad was provided for. This indicated that the route of the road was expected to run through the counties above named. Maysville is in Mason County, on the south bank of the Ohio River. Lewis County adjoins Mason on the east, and Greenup adjoins Lewis on the east. All three of them lie along the south bank of the Ohio River. The next county in Kentucky east of Greenup is Boyd, and the Big Sandy River, after being for some distance the boundary between Kentucky and West Virginia, empties into the Ohio River in Boyd County, only a short distance eastward of the line between Greenup and Boyd Counties. For the railroad to reach the Big Sandy River it was necessary it should pass for a short distance through Boyd County.

The company was organized and began the construction of the road in 1853, and, after expending a considerable sum of money, claimed to have been $300,000, it became financially embarrassed and suspended the work permanently in 1854. To secure certain of its creditors, it executed one or more mortgages to them on its road and all its franchises and chartered privileges.

By an act of the Legislature of Kentucky, approved February 17, 1866, Laws of 1866, ch. 755, p. 664, those mortgages

were declared to be legal, and authority was given to foreclose them by proceedings in the Mason Circuit Court, with power to that court to sell the road, with all its property, rights of property, franchises, and chartered privileges, at public sale; and the act provided, that the purchasers at the sale, after it had been approved by the court, should be invested with the title to the road, and all its franchises and chartered privileges, and should have power to reorganize the company under its charter, and, for the purposes of its charter, to "make contracts with individuals, corporations and other railroad companies for the building, completion and operation of said road, or any part thereof." The foreclosure proceedings were had in 1869, resulting in a decree and a sale thereunder, at which M. Ryan, H. Taylor, Elizabeth Gray, W. H. Wadsworth, John B. Poyntz, and John G. Hickman, trustee of Charles B. Coons, deceased, became the purchasers of what the act of 1866 authorized to be sold, and a deed of it was made to them, but was not recorded until 1875.

On the 21st of March, 1870, the Legislature of Kentucky, by a special act, Laws of 1870, vol. 2, ch. 867, p. 545, created a corporation known as the Kentucky and Great Eastern Railway Company (hereinafter called the Great Eastern Company). The 10th section of that act gave power to the company to construct a railway from such point or points in the cities of Covington and Newport as it might select, thence through the Counties of Campbell, Kenton, Pendleton, Bracken, Harrison, Fleming, Nicholas, Robertson, Bourbon, Clark, Montgomery, Menifee, Bath, Rowan, Powell, Wolfe, Morgan, Carter, Lawrence, Johnson, Magoffin, Breathitt, Floyd, Pike and Letcher, or such of them as it might choose, to any point or points on the boundary line between the States of Kentucky and Virginia that it might select. The route thus indicated for the road, by naming those counties, carried it far to the southward of the south line of Boyd County and of any road running from Maysville through Mason, Lewis, Greenup and Boyd Counties to the Big Sandy River. The 10th section of the act also authorized the company "to construct such branch railroads to their main trunk road, in or through such counties,"

as it might deem proper. Provision was made, in section 16 and following sections, for subscriptions by counties, precincts, cities and towns to the stock of the company, and for the issuing of bonds to pay therefor. Section 41 provided as follows: "That the president and directors of said company may, with the assent of the holders of a majority in value of the stock in said company, purchase and hold any other railroad in this or any other State, and may subscribe stock in, or aid in the building of, any other road, in or out of this State, whenever, in their judgment, it may be to the interest of the said railway company to do so. They may sell the said railway, or lease the same, and may build branches from said road, and branches from said branches. That said company may connect its said road, or any of its branches, with the railroad of any other company, in or out of this State, and may lease and operate any railroad connecting with the road or branches of said railway; and it may consolidate with, and make running and operating arrangements with, any other railroad company, upon such terms as may be agreed on by the contracting parties." By sections 44 and 45, it was provided that the company might issue its bonds for $1000 each, to an amount not exceeding $15,000,000, to be secured by "a mortgage or deed of trust conveying said railroad and its property franchises to a trustee or trustees."

The Great Eastern Company was organized in June, 1871. On the 15th of July, 1871, the owners of the Big Sandy road made the following written proposition, signed by all of them, to the Great Eastern Company: "To the Kentucky and Great Eastern Railroad Co.: The owners of the Maysville and Big Sandy Railroad propose to accept fifty-seven thousand and seven dollars for the road and all its rights and franchises held by them under their purchase, payable in cash or bonds of the county of Mason, or other good security. Should the payments be made in the bonds of the county of Mason, they will take the payments in such proportion as their debt bears to the sum voted by the county of Mason and the issuance of those bonds by the county to the Kentucky and Great Eastern Company. But it is hereby stipulated, that, upon the acceptance

of this proposition by the Kentucky and Great Eastern road, no unnecessary delay shall occur in taking the vote of the county of Mason upon their subscription to the railroad company. This proposition to remain open for acceptance for thirty days from 15th day of July, 1871; the work on the road to commence in good faith in six months from the 15th July, or this article to be void."

It is manifest, that, in this proposition, the owners of the Big Sandy property were providing for the completion of the Big Sandy road, under the charter of the Big Sandy Company and the act of 1866; for, the only authority for the issuing of bonds of the county of Mason was that given by the charter of the Big Sandy Company, and, by the proposition, the bonds of that county, to be taken in payment, were bonds to be issued for a subscription to stock by that county; and the work which was to commence in six months was work on the Big Sandy road.

The executive committee of the Great Eastern Company accepted this proposition and reported it to the board of directors of that company, at a meeting held by them, and it was, on the 23d of August, 1871, approved by that board. On the 24th of August, 1871, the board adopted a resolution, "that the question of submitting the proposition to the various counties between Newport and Catlettsburgh, for subscriptions to the stock of the company, be referred to the executive committee, with full powers vested in them to proceed and carry such propositions into effect." Newport is on the Ohio River, in Campbell County, and Catlettsburgh is on the Big Sandy River, in Boyd County, and the counties between Newport and Catlettsburgh are Campbell, Pendleton, Bracken, Mason, Lewis, Greenup and Boyd, all lying on the south bank of the Ohio River. Maysville is in Mason County, about half-way between the east and west lines of that county.

In the fall of 1871 Mason County voted to subscribe $400,000, and Lewis County voted to subscribe $100,000, to the stock of the Great Eastern Company, the subscriptions to be paid in the bonds of those counties.

There is no satisfactory evidence that any work on the road

between Maysville and Catlettsburgh, or on the old line of the Big Sandy Company, was commenced within six months from the 15th of July, 1871; or that even surveying on that line was done within that time.

On the 15th of February, 1872, the Great Eastern Company executed a mortgage to the Farmers' Loan and Trust Company (hereinafter called the Trust Company), a corporation of New York, as trustee. That mortgage recites as follows: "Whereas the said Kentucky and Great Eastern Railway Company, the party of the first part, has been duly chartered and organized, under and by virtue of the laws of the Commonwealth of Kentucky, with power to locate, construct, equip and operate a line of railway within the said Commonwealth of Kentucky, from the city of Newport, in Campbell County, State of Kentucky, upon, along and near the southern bank of the Ohio River, in said State of Kentucky, to a point on the State line between the State of Kentucky and West Virginia, at or near Catlettsburgh, Boyd County, State of Kentucky, a distance of one hundred and forty-six miles, be the same more or less." It then states that the company, "for the purpose of constructing, equipping, and completing its aforesaid line of railway," has determined to issue its bonds for an amount "not exceeding $15,000 per mile for the whole length of said railway in the State of Kentucky," being in all $2,190,000, and to secure the payment of said bonds "by a first mortgage upon the aforesaid railroad, franchises, and all the property, real and personal, rights and interests, now owned and possessed" by it in the State of Kentucky, or which it "may hereafter acquire therein." It then mortgages to the Trust Company "all and singular the entire line of the Kentucky and Great Eastern Railway Company's railroad, extending from the said city of Newport, in the State of Kentucky, to said point in said State, on the State line between the States of Kentucky and West Virginia, as hereinbefore described, as the same is now or may hereafter be located and constructed by the said party of the first part, with the right of way, and all the real and personal property, rights and interests of the said party of the first part to the said line of

railway in the State of Kentucky, whether the same is now owned or possessed or may hereafter be acquired by the said party of the first part, and all the privileges and franchises of the said party of the first part for the holding, operating, and maintaining its said line of railway." The mortgage trust was accepted by the trustee, in writing, March 5, 1872, and the mortgage was recorded in October, 1872, in Campbell, Pendleton and Bracken Counties; in November, 1872, in Lewis and Greenup Counties; and, in January, 1873, in Boyd County.

By an act of the Legislature of Kentucky, passed March 27, 1872, it was provided, sec. 1, that section 10 of the act of March 21, 1870, be amended so as to authorize the Great Eastern Company "to construct said road through the counties of Mason, Lewis, Greenup and Boyd, and the said Kentucky and Great Eastern Railway Company are hereby invested with all the rights, privileges and franchises necessary, as contained in their said charter, to construct their main stem line of railway through said counties, except as hereinafter provided." Section 2 provided that whenever the company should desire to submit any vote to the qualified voters of either of the four counties above named, "for any subscriptions to the capital stock of said railway, or any branch thereof," it should be submitted under the provisions of section 16 of the act of March 21, 1870, and not otherwise. Section 2 concluded with this proviso: "*Provided, further*, That said Kentucky and Great Eastern Railroad Company shall, previous to constructing their said road east of Maysville, through Mason County, and on through the counties of Lewis, Greenup and Boyd, purchase and pay for the Maysville and Big Sandy Railroad, or make such arrangements with the owners of said Maysville and Big Sandy Railroad as shall be satisfactory to each of said owners." Sections 5 and 6 were as follows: "§ 5. The president and directors of said railroad company shall have no authority, either under this charter or the charter of the Maysville and Big Sandy Railroad Company, to submit to voters of any county the question of a subscription by a county to the capital stock of said company; but said subscription may alone be submitted by the county court. § 6. Nothing in this act shall

be construed as making valid the votes in the counties of Lewis and Mason upon the propositions voted on in said counties to subscribe to the capital stock in said counties."

Undoubtedly because of the concluding proviso of section 2 of the act of March 27, 1872, and of the fact that any agreement growing out of the proposition of July 15, 1871, was considered to be at an end, a resolution was adopted at a meeting of the board of directors of the Great Eastern Company, on the 10th of February, 1873, authorizing the president of the company, then Nathaniel Sands, "to contract with the officers and owners of the Maysville and Big Sandy Railroad Company, for the purchase and transfer of said road to the Kentucky and Great Eastern Railway Company."

Prior to this, and on the 15th of January, 1873, all of the six owners of the Big Sandy property, except Poyntz (the Bank of Kentucky having succeeded to the interest of Ryan), had executed the following instrument:

"Whereas the General Assembly of the Commonwealth of Kentucky passed an act entitled 'An Act to authorize the sale of the Maysville and Big Sandy Railroad, and providing for the organization of a new company under its charter to construct said road,' approved February 17th, 1866; and whereas said road was duly sold by a decree of the Mason Circuit Court in pursuance to the provisions of said Act, and was purchased by M. Ryan, H. Taylor, Elizabeth Gray, W. H. Wadsworth, John B. Poyntz, and John G. Hickman, trustee of Charles B. Coons, deceased, and the sale and purchase was duly confirmed by said court; and whereas the said parties, as sole owners and corporators, having reorganized the said railroad company under their purchase and said act of the Legislature, did, on the 15th day of July, 1871, propose to sell and transfer to the Kentucky and Great Eastern Railway Company all the property, rights, and franchises of the said Maysville and Big Sandy Railroad Company held by them as the sole owners, stockholders, corporators, and officers of same, for the sum of ($57,007) fifty-seven thousand and seven dollars, payable in cash or bonds of the county of Mason, or other good security, in the way pointed out by the written proposition of that date, which was

duly accepted by said Kentucky and Great Eastern Railway Company; and whereas the said M. Ryan (and his assignee, the Bank of Kentucky), H. Taylor, Elizabeth Gray, W. H. Wadsworth, John G. Hickman, trustee of Charles B. Coons, deceased, are desirous to faithfully carry out said contract, and recognize its binding force, and for the purpose of securing the construction of the Maysville and Big Sandy road under its charter and that of the Kentucky and Great Eastern Railway Company, and with such modifications and explanations as may the better secure the interests of said proposers, and of said Maysville and Big Sandy Railroad Company, the Kentucky and Great Eastern Railway Company thereto consenting: Now it is agreed by M. Ryan and the Bank of Kentucky, his assignee, H. Taylor, Elizabeth Gray, W. H. Wadsworth, and John G. Hickman, trustee of Charles B. Coons, deceased, being all the owners, stockholders, and corporators of said Maysville and Big Sandy Railroad Company, except John B. Poyntz (who does not unite in or subscribe to this instrument), they being, however, all the officers of said railroad company, and the owners of nearly all of its stock, property, rights and franchises, that they will sell, and do hereby offer to sell, on the terms and conditions hereinafter named, all their rights, title, and interests in and to the stock held by them in the said Maysville and Big Sandy Railroad Company, and in and to its road-bed, bridges, material, rights of way, and property of all kinds whatsoever, and in and to the franchises and charter of said company, so far as they have any power or authority, in law or equity, so to do, as owners, stockholders, corporators, and officers of said company, owning the large majority of the stock, for the sum of fifty-seven thousand and sixty-five dollars, with interest at the rate of six per cent. per annum, until paid, from this date, and that they will, on full payment, transfer, and convey the property, stock, rights, and franchises aforesaid, so far as they lawfully can, by any and all instruments necessary or proper in the premises; the stock, ownership, and rights of the said John B. Poyntz in said company not being included herein, but left to stand upon the original proposition signed by him as aforesaid. And the said Kentucky and Great

Eastern Railway Company, wishing to assert and maintain the said contract of July 15th, 1871, but willing to furnish any additional guaranty in its power to the aforesaid parties for compliance therewith, now hereby binds and obliges itself to accept the foregoing offer, and to pay to said parties making the same the sum of fifty-seven thousand and sixty-five dollars aforesaid, with interest from the 15th day of January, 1873, until paid, in instalments of the bonds of Mason County, subscribed, or which may be subscribed, to its capital stock, to be delivered to said parties as received by said railway company, in amounts bearing the same ratio to the sum herein agreed to be paid as the instalments of bonds from time to time delivered by said county to said railway company bear to the whole number of bonds subscribed by said county as aforesaid, until the whole of said sum of fifty-seven thousand and sixty-five dollars and interest shall be fully paid. And it is agreed by said Kentucky and Great Eastern Railway Company, that if, from any cause, said bonds, or any instalments thereof, shall not be delivered to said railway company by said county, and by reason thereof said bonds, or any instalment thereof, cannot be paid to said parties as herein agreed, then, in that case, and to the extent of such failure, said railroad company shall make payment to said parties in cash, within one hundred and twenty days from the time such bonds should have been delivered by said county to the railway company, and, upon failure to deliver either bonds or cash, as aforesaid, to said parties, then this contract to be null and void. And it is further agreed, as this contract is made to secure the construction of the line of said Big Sandy road to Portsmouth by the Kentucky and Great Eastern Railway Company, that said company shall, within one hundred and twenty days from this date, commence the construction of said road in good faith, and shall continue to prosecute said construction in a reasonably diligent and effectual manner, and the failure to commence the construction, as aforesaid, or, after commencing, the failure to prosecute the same, as aforesaid, for the space of two hundred and forty days, shall, in either event, render this contract void; and, whenever this contract, by its terms, shall become void, then,

upon the happening of such event, said parties representing the Maysville and Big Sandy Railroad Company and their own interests may enter and take possession of the road, property rights, and franchises herein described and conditionally sold. It is finally expressly agreed, that this offer to sell and transfer on full payment shall not admit, under any circumstances, of the intervention of any prior lien on the rights, franchises, and property aforesaid in favor of other parties, a lien being now and always retained thereon in favor of the parties aforesaid until payment in full shall be made. In testimony whereof, all of the parties have hereunto signed, this 15th day of January, 1873."

On the 11th of June, 1873, the proposition so made was accepted by the Great Eastern Company, by the signature of Sands, as its president, to this memorandum at its foot:

"The foregoing proposition is accepted by the Kentucky and Great Eastern Railway Company, which hereby agrees to purchase said property on the terms and conditions expressed above."

On the 22d of May, 1873, at a meeting of the board of directors of the Great Eastern Company, a contract which had before been made by it for the construction of the road was cancelled, with the consent of the contractors, and a resolution was adopted authorizing the president to execute a new contract, similar in terms with the prior one, "with Frank Byrne, doing business under the name of Kentucky and Great Eastern Railroad Construction Company."

On the same day, the contract was executed by the Great Eastern Company and Byrne, as follows:

"This agreement, made and entered into by and between the Kentucky and Great Eastern Railway Company, by its president, under the authority of the board of directors, party of the first part, and Frank P. Byrne, of Ohio, doing business as railroad builder, under the name and style of the 'Kentucky and Great Eastern Railroad Construction Company,' or their assigns, parties of the second part, witnesseth:

"That the said parties of the second part, for and in consideration of the payment in hand of one dollar, received and hereby

acknowledged, and for the further stipulations, covenants, and agreements of the said party of the first part, hereinafter mentioned, hereby agree and bind themselves to construct, finish, and equip, or cause to be constructed, finished, and equipped, the line of railway designated by the charter of said party of the first part, to be known as the Kentucky and Great Eastern Railway, located along the banks of the Ohio River, in the State of Kentucky, commencing at the city of Newport and extending to Catlettsburgh, on the Big Sandy River, being about one hundred and forty-six (146) miles, by such route as may be necessary to fulfil the conditions of any donations to said party of the first part, or any subscriptions to the capital stock of said party of the first part, by municipal, county, or other corporations, or by individuals, as authorized by law; the construction of said road to commence as soon as the right of way therefor shall be procured by the said party of the first part, and the necessary subscriptions voted by the counties along the line, and the work shall be prosecuted so as to have the same completed ready for the running of trains by the 15th day of February, 1878, or as much sooner as it can be done by said parties of the second part. Said construction shall be carried on and made in good and workmanlike manner, with timber structures for crossings or trestling, and the track laid with iron rails not less than fifty-six pounds to the yard, lineal, for main tracks, and fifty-four pounds to the yard, lineal, for side tracks. The equipment shall be such as may be necessary to accommodate the business that may be offered said road on its completion.

"In consideration of the covenants and agreements aforesaid of said parties of the second part, the said party of the first part hereby agrees and binds itself as follows, to wit:

"First. That it will procure and furnish to said parties of the second part, free of cost, and in time to complete said road by the period hereinbefore fixed, the right of way of said road, and also such other property as it is authorized by the laws of Kentucky to procure by purchase or condemnation, for any purpose connected with the construction of bridges, embankments, excavations, spoil banks or borrow pits, turnouts, depots,

engine-houses, shops, turntables, water stations, or other things necessary to the completion and maintenance of said road.

"Second. That it will transfer and deliver to said parties of the second part, or cause to be transferred and delivered to them, all the money, bonds of municipal corporations and counties, or other property or evidences of obligation which have been given or issued, or which may be hereafter given or issued, in payment of any subscription to the capital stock of said party of the first part, or which may have been, or may hereafter be, given by way of donation, including lands, to the said party of the first part, the said transfer and delivery to be made when and as the conditions upon which such subscriptions or donations may be or may have been made are complied with.

"Third. That it will, in part payment of the work of construction agreed to be performed as aforesaid by said parties of the second part, issue or transfer and deliver, or cause to be delivered and transferred, to said parties of the second part, or their assigns, all of the capital stock of the said party of the first part, issued, or to be issued, except so much as may be necessary to maintain, according to the law of the State of Kentucky, the corporate character and powers of the said party of the first part, and such stock as shall have to be issued in payment for the subscriptions to the capital stock of said party of the first part, by the counties and municipal corporations along the line of said road, equalling in no case the amount held by said party of the second part, without their consent. Said issue or transfer of stock to the said parties of the second part to be made in proportionate installments as each or any mile of the track of said road is laid with iron rails, as aforesaid, the said installments, respectively, to be in the proportion to the whole amount as one mile is to the entire length of the road; and each issue or transfer shall be regularly made on the books of said company, and the certificates for said stock delivered to said parties of the second part or their assigns.

"Fourth. That it will, for the consideration aforesaid, further pay to said parties of the second part, or their assigns, the sum

of two million one hundred and ninety thousand ($2,190,000) dollars, in the coupon seven per cent. gold bonds of said party of the first part, secured by mortgage or deed of trust, a first lien upon its corporate property and franchises, which said bonds shall be issued in one series, which shall be for two million one hundred and ninety thousand (2,190,000) dollars, in the aggregate, and shall be in such form and on such terms and conditions as may be authorized by law and as may be approved by said parties of the second part. The payment of said mortgage bonds shall be made as follows, to wit: The said parties of the second part shall be entitled to receive, if they so desire, two hundred and fifty thousand (250,000) dollars of the first mortgage bonds aforesaid in advance of regular payments, as hereinafter stated, giving accountable receipts therefor, which receipts shall be cancelled on the completion of the road and final settlement of the bond payments. Regular payments of said bonds shall be made absolutely to said parties of the second part, or their assigns, in *pro rata* instalments, respectively, to be in proportion to the whole amount as one mile is to the whole length of the road, except in the purchase of iron rails, when said party of the second part will be entitled to the use of such an amount of bonds (first mortgage) as will be necessary to make such purchase, to use either for absolute payment or as security on time purchase.

"Fifth. That it will pay, in further consideration aforesaid, to the parties of the second part, or their assigns, for construction of said road, the bonds of the counties along the line of road, issued in payment of the subscription made to the capital stock of the party of the first part, to be not less in amount than one million two hundred thousand (1,200,000) dollars, the deficit, if any, to be paid in cash, or its equivalent.

"Sixth. That it will pay, in further consideration aforesaid, to the parties of the second part, in cash, or, in lieu thereof, in an equipment bond, secured by mortgage on the equipment of the road, its earnings, and the road itself, if the legal consent of the stockholders can be obtained thereto, for the sum of one million two hundred thousand (1,200,000) dollars.

"Seventh. That it will give and use its corporate credit to aid

said parties of the second part in purchasing material, or supplying means, to carry on the said work, and to that end will issue its notes in the name of said party of the first part, in its corporate capacity, from time to time, as the same may be necessary, and will deliver the same to said parties of the second part, to be used for the purposes aforesaid, and such obligations, if met by said party of the first part, shall be made good by said parties of the second part, and all such notes so issued and delivered to said party of the second part shall be regularly and satisfactorily accounted for.

"Eighth. That it further agrees that such parties of the second part have all the earnings of said road during construction, until accepted by said party of the first part.

"Ninth. That it will maintain its corporate organization, and, through its proper officers and agents, do and perform every act or thing necessary or proper to be performed by it, or in its name, in order to protect the rights and interests of said parties of the second part, their heirs and assigns, as stockholders in said railway company, to the extent as hereinbefore provided, and as may be necessary to conform to the requirements of the laws of the State of Kentucky."

The Construction Company represented by Byrne proceeded to do work in constructing the road, and continued till December, 1873, when it ceased work, through pecuniary embarrassment, and never resumed it, being a creditor of the Great Eastern Company, to a large amount, for work done and materials furnished under the contract of May 22, 1873.

On the 19th of April, 1878, Frank P. Byrne and John Byrne were, on their own petition, adjudged bankrupts by the District Court of the United States for the Southern District of Ohio, Frank P. Byrne being described in the petition as "doing business as the Kentucky and Great Eastern Railway Construction Company," and John Byrne as "interested in profits." A. J. Hodder was appointed assignee of the bankrupts, and the proper assignment was executed to him by the register in bankruptcy, on the 22d of May, 1878.

On the 17th of April, 1880, Hodder, as such assignee, filed a petition in equity, in the Circuit Court of Mason County,

Kentucky, against the Great Eastern Company, the Trust Company, the Big Sandy Company, sundry former stockholders of that company, the owners of the interests purchased under the foreclosure sale of 1869, and sundry judgment creditors of the Great Eastern Company. The gravamen of the petition is, that the Construction Company had, under its contract, expended large sums of money, and incurred much debt, in work on part of the line from Maysville to Catlettsburgh, completing about seven miles of it, and purchasing and putting down the iron rails and other materials; that the road and improvements, as far as completed, and all the improvements put upon it by the Construction Company, are the exclusive property of the plaintiff, and no part of the line and improvements, finished or unfinished, was surrendered or delivered by the Construction Company to the Railway Company; that the value of the improvements so put into the road-bed and road is $350,000, and they are of a permanent and fixed nature; that the plaintiff has a first and prior lien on the entire line of railway and said improvements for the $350,000; that the labor performed, and materials furnished, and improvements made, in the construction of the line of railway, by the Construction Company, under its contract, were on the part of the line which the Great Eastern Company acquired from the Big Sandy Company; that, at the time the contract of the Construction Company was made, the Great Eastern Company had possession and exclusive control of the line of railway purchased from the Big Sandy Company, with the consent of that company and of the defendants who were former stockholders in it, and they knew of the construction contract and of the improvements which were being made under it, and made no objection, but gave express consent, and are estopped from claiming ownership of the line formerly owned by them, and especially as to the improvements made by the Construction Company; that the mortgage to the Trust Company was made after the Great Eastern Company had purchased and taken possession of the Big Sandy road, and, as between the Trust Company and the former stockholders of the Big Sandy road, the Trust Company has priority, but its mortgage lien, if any,

is inferior to that of the plaintiff; and that the Great Eastern Company has abandoned work on the road, and it is being destroyed. The petition asserts that the plaintiff has a first and prior lien on the entire property of the Great Eastern Company, including road, franchises, rights, privileges, improvements, and everything appertaining to the defendant's property, for the $350,000 and interest, and especially a first and prior lien on that part of the line on which the labor was performed, and the materials were furnished, and the improvements were made, by the Construction Company, under its contract, to the value of the same, in case of a sale; that he has no adequate remedy at law; and that the Great Eastern Company is insolvent. The petition prays judgment against the Great Eastern Company for $350,000 and interest; that the plaintiff's claim may be declared a first lien on the road, franchises, and improvements, or a first lien on that part of the line known as the Old Maysville and Big Sandy Railroad, and on the funds derived from its sale; that a receiver be appointed of all the property; and that the road, franchises and improvements, and all property involved in the controversy, be sold by the court and the proceeds distributed as prayed.

On October 28, 1880, the Trust Company appeared and filed its answer and cross-petition. It sets up that the construction contract was void, because several of the directors of the Great Eastern Company who voted to authorize its execution, and to ratify it after it was executed, and whose votes were requisite for the purpose, were partners in the Construction Company. It avers that, under the contract, as soon as the materials and improvements were placed on the line of the railway, they became the property of the Great Eastern Company, and the lien of the mortgage to the Trust Company attached to them and became the first lien on them. It denies the alleged ownership and lien of the plaintiff, and avers that the improvements made were surrendered and delivered to the Great Eastern Company. It asserts a first lien, on behalf of the Trust Company, and the holders of bonds secured by the mortgage, as against the plaintiff, and as against the former owners of the Big Sandy franchises and property, and as against the other defendants, on

the property and franchises of the Great Eastern Company and the Big Sandy Company, and on the improvements made by the Construction Company. It sets up the agreements of July 15, 1871, and January 15, 1873, and avers that, after the first one was made, the Great Eastern Company began work in good faith on the road from Newport to Catlettsburgh, including all the line of the Big Sandy road, and executed the mortgage to the Trust Company; and that, under the mortgage which authorized $2,190,000 of bonds, $443,000 were issued to persons for materials furnished and work done in and about the building of the railway, and for money procured and expended for that purpose. It alleges that a default in the payment of interest on the bonds has occurred, under the terms of the mortgage, and its conditions have become operative, and the Trust Company is entitled to have possession of the mortgaged property and to have it sold, to pay the whole amount of the principal and interest due on the bonds issued. It prays that the plaintiff be decreed to have no lien or one inferior to that of the Trust Company; that the property, rights and franchises of the Great Eastern Company, including those of the Big Sandy Company, be sold, and the bondholders be first paid in full; and that a receiver be appointed of all the property.

On the same day, the Trust Company filed in the State Court a petition and bond for the removal of the cause into the Circuit Court of the United States for the District of Kentucky, on the ground of diversity of citizenship, but no transcript of the record from the State Court appears to have been certified until December 4, 1880, nor filed in the Federal Court until two days later, and meantime proceedings went on in the State Court.

On the 19th of November, 1880, Wadsworth and others filed in the State Court an answer to the petition of Hodder. It alleges that the Construction Company did not perform the construction contract; that the road and improvements are not the property of the plaintiff; that it is not true they were to remain the property of the Construction Company till they were surrendered or delivered to the Great Eastern Company or paid for by it; that the plaintiff does not own and has no

lien on any part of the property, or franchises, or line, or road of the Big Sandy Company, or of any improvements thereon, or on any part of the line of the Great Eastern Company; that, by the agreement of July 15, 1871, the Great Eastern Company, then having no right to construct a line of railway in the counties of Mason, Lewis, Greenup and Boyd, and having no line in those counties, arranged with the stockholders of the Big Sandy Company to buy their stock and property rights in that company, and to construct the Big Sandy line from Maysville to Catlettsburgh; that neither that agreement, nor the one of January 15, 1873, was performed by the Great Eastern Company; that the Construction Company had knowledge of the terms of those agreements at the date of the construction contract; that, after the construction company stopped work, the Big Sandy Company took possession of that part of the line on which the work had been done, and had always been in possession of the rest of the line; and that the Great Eastern Company, after the agreement of January 15, 1873, came to an end, surrendered to the Big Sandy Company the property on the line of that company. It denies that the Great Eastern Company is indebted to the Construction Company.

After the transcript of the record was filed in the Federal Court, Wadsworth and others made a motion to remand the cause, which was denied. The plaintiff then filed a demurrer to the cross-bill of the Trust Company, and Wadsworth and others, and Poyntz, filed separate demurrers to the answer and cross-bill of the Trust Company. In June, 1881, the Court sustained the demurrers and gave the Trust Company leave to amend the cross-bill.

In the decision on the demurrers, 7 Fed. Rep. 793, these points were ruled: (1.) It was not necessary that the stockholders of the Great Eastern Company should authorize the execution of the mortgage to the Trust Company. (2.) The president could legally acknowledge in Ohio the execution of the mortgage. (3.) The cross-bill sufficiently averred that the bonds were held by *bona fide* holders. (4.) The application to foreclose was not premature. (5.) At the date of the mortgage, the Great Eastern Company had no right to build the mort-

gaged road from Newport to Catlettsburgh, unless as a branch of its main stem. (6.) There is nothing in the mortgage or the cross-bill indicating that any part of the line mortgaged is a branch of the main road authorized to be built, but the mortgage describes the mortgaged line as the "main line." (7.) The Great Eastern Company had no right to acquire the Big Sandy property without the assent of the holders of a majority in value of its stock, and the cross-bill does not allege such assent. (8.) Under the terms of the mortgage, and the allegations of the cross-bill, the Big Sandy property was not intended to be mortgaged as future-acquired property.

On the 12th of July, 1881, the Trust Company filed an amended cross-bill, in which it alleged that the purchase made by the agreement of July 15, 1871, was made with the consent and approval of the several stockholders of the Great Eastern Company, or a majority in number and interest of them, and was authorized and accepted by them; and that the line of the Great Eastern Railway, as it existed when the mortgage was executed, acknowledged, and delivered, was located and ran through the seven counties in which the mortgage was recorded. The prayer of the amended cross-bill asks that out of the proceeds of sale the unpaid purchase money of the Big Sandy property be paid before the bondholders are paid.

On the 30th of July, 1881, the plaintiff filed an amended bill, conforming to the equity rules of the Federal Court, and asking for a reformation of the contract of May 22, 1873, if necessary, so as to make it provide that the Construction Company be and remain the sole owner of the improvements put on the line of the railroad, until paid for. The amended bill also claims a substitution of the plaintiff in the claims of the Great Eastern Company against the Big Sandy Company and Wadsworth and his associates, to the amount of his claim.

On the same day the plaintiff demurred to the cross-bill and amended cross-bill of the Trust Company. On the 5th of September, 1881, the Great Eastern Company demurred to the same. On the same day the Trust Company answered the amended bill. On the 29th of September, 1881, Wadsworth and others and the Big Sandy Company answered the amended

bill, and also the amended cross-bill. There were then exceptions by the plaintiff to the answer of the Trust Company to the amended bill, and to the answer of the Big Sandy Company to that bill. All of these exceptions and demurrers were, on hearing, overruled, in December, 1881. On the 6th of February, 1882, the plaintiff answered the amended cross-bill of the Trust Company. Issues being joined on all the answers, proofs were taken, and the plaintiff's amended bill was taken as confessed by the defendants who had not answered it, including the Great Eastern Company. The cause was heard on pleadings and proofs, and a decision rendered, on which a decree was made August 8, 1882, the material parts of which are as follows:

"The case having been fully argued by counsel and submitted to the court, and the court being fully advised in the premises, finds and decrees, that no just claim for relief is shown against the Maysville and Big Sandy Railroad Company, or against the Bank of Kentucky, William H. Wadsworth, John G. Hickman, assignee of Charles B. Coons, John B. Poyntz, Elizabeth Gray, executrix of Hamilton Gray, deceased, C. B. Childs, as shareholder in said Maysville and Big Sandy Railroad Company, H. L. Wilson, administrator of Harrison Taylor, deceased, as shareholders or part owners of said Maysville and Big Sandy Railroad Company, or otherwise, or against any of the other defendants, and that said amended bill is dismissed, with costs to be taxed; that no just claim for relief is shown against any of the before-mentioned defendants, or any of the defendants, under the amended cross-bill of the Farmers' Loan and Trust Company, except or other than the mortgage asserted in said amended cross-bill may be shown to cover the line of railroad of the Kentucky and Great Eastern Railway Company lying west of the west line of Mason County, Kentucky, and the franchises of said railroad company as organized, as to which excepted property the complainant in said amended cross-bill is allowed time until the next term of this court to make a further showing and prepare for the approval of the court such decrees as he may be advised, but, as to all other claims of relief under said amended cross-bill it is dis-

missed, with costs to be taxed; without prejudice, however, to the right of said Farmers' Loan and Trust Company to bring such other suit, if any, as it shall be advised, to recover any rights of way which may have been acquired by or for the Kentucky and Great Eastern Railway Company, for its line of railroad east of the west line of Mason County, other than such rights of way as were acquired by or for the Maysville and Big Sandy Railroad Company, under its charter or by the exercise of its franchises, and which rights of way, if any such there are, may be found to be covered and included in the mortgage by said Kentucky and Great Eastern Railway Company to the said Farmers' Loan and Trust Company."

From that decree the plaintiff and the Trust Company took separate appeals to this court. Since the cases came into this court Rogers Wright has been appointed assignee in bankruptcy, in place of Hodder, and been substituted in the appeals.

The Circuit Court, in its opinion, on final hearing, reached the following conclusions: Even if the construction contract is valid, the plaintiff has no lien on the road-bed, or what was put upon it, either by that contract, or by possession, or under any statute of Kentucky. The work on the road was not commenced in good faith, within six months from July 15, 1871, under the contract of that date. Neither Poyntz, nor the other parties, can take advantage of his refusal to unite in the contract of January 15, 1873. Mr. Sands was authorized to make that contract, and the Great Eastern Company took possession of the Big Sandy property under it. The Construction Company had actual notice of the terms and conditions of that contract, when it entered into the construction contract. The parties making the conditional sale provided for by the contract of January 15, 1873, declared the contract to be void, according to its terms, and re-entered into possession of their property, and their right to do so was recognized by a resolution of the board of directors of the Great Eastern Company; and, as the Construction Company made its contract with actual notice of the terms and conditions of the conditional purchase from the Big Sandy owners, the construction contract was subject to

those terms and conditions, and the Construction Company and the Great Eastern Company are bound by them. The grading, iron, ties, culverts, etc., and all that had become a part of the road-bed of the Big Sandy road, went with it when it was re-taken. The plaintiff shows no reason for not enforcing this forfeiture. If the Construction Company is to be regarded as a distinct company from the Great Eastern Company, having interests adverse to it, then, in view of the evidence, and of the principles laid down in *Wardell* v. *Railroad Co.*, 103 U. S. 651, the construction contract should not be enforced. The plaintiff cannot have relief in this suit, even in respect to rights of way which the Big Sandy Company did not own, or in respect to that part of the track which was re-located. The bill must be dismissed. In respect to the cross-bill, the agreement of July 15, 1871, is shown to have been made with the assent of the holders of a majority of the stock of the Great Eastern Company. If the language of the mortgage embraces the property rights which the Great Eastern Company had at the date of the mortgage, and those subsequently obtained under the contract of January 15, 1873, still only such rights as the Great Eastern Company had were conveyed, and the mortgagee took subject to the same conditions as the Great Eastern Company. When the mortgage was made, the contract of July 15, 1871, had become voidable at the option of the Big Sandy owners, the contract of January 15, 1873, was made before any of the mortgage bonds were issued, and the mortgagee took only those rights which the mortgagor had, as against the persons who made a conditional sale of the Big Sandy road. The mortgagee cannot separate the contract of July 15, 1871, from that of January 15, 1873, but must take them as the mortgagor took them. The title was never in the mortgagor, and, when the Big Sandy Company resumed the possession of its property, under the contracts, the mortgagee was bound thereby. If the mortgagee had, within a reasonable time, sought to set aside the forfeiture, and to be allowed the benefit of any enhancement in the value of the property by reason of improvements, this might have been allowed, but, as the work stopped in 1873, and the mortgagee could have sought a remedy under the

mortgage at any time after that year, the delay has been unreasonable. The delay would not have been so material if the provisions in the contract of January 15, 1873, for re-entry, had been made solely to secure the purchase money, but the speedy construction of the road was a reason, if not the chief one, why the original owners retained the right to declare the contract void and to re-enter into possession. As to any rights of way which the Great Eastern Company obtained along the line of the Big Sandy road, other than those purchased from the Big Sandy Company, although Wadsworth and his associates are not entitled to them, the cross-bill is not so drawn, nor the evidence such, that those rights can be subjected to the mortgage in this proceeding.

This comprehensive statement of the conclusions reached by the Circuit Court, as indicating the views it took of the facts and the law in this case, may be taken as an announcement of the results at which this court has arrived, in affirmance of the decree of the Circuit Court in all particulars. It is necessary to add only a few observations.

By the terms of the contract of January 15, 1873, the purchase money of the Big Sandy property was to be paid in bonds of the county of Mason, or in cash, within specified times, and, on failure to do so, the contract was to become null and void. Mason County never delivered any bonds to the Great Eastern Company, and no payment of bonds or cash was made to the Big Sandy owners. The sale was conditional. No ownership or title passed, and it was expressly provided that, until full payment should be made, no prior lien should intervene on the Big Sandy property, as against the lien of the vendors.

The terms of the construction contract are inconsistent with the idea of any ownership of the constructed road by the Construction Company, or any lien on it by that company. That company was to have all the money, municipal bonds, and property given or issued in payment of subscriptions to stock, and all stock not necessary to maintain the charter or not issued to municipal corporations for subscriptions to stock, and also the $2,190,000 of mortgage bonds, secured by the mort-

gage as "a first lien," and $1,200,000 in an equipment bond, secured by an equipment mortgage. In other words, it was to have everything except the road, and the Great Eastern Company was necessarily to have and own that, so as to be able to give a mortgage on it, as a "first lien." Nor is there anything in the construction contract suggesting a direct lien in favor of the Construction Company. The provision for giving to that company all the earnings of the road "during construction" and "until accepted" by the Great Eastern Company, is vague and indefinite, but it cannot be construed as giving a lien, for that would be inconsistent with the whole tenor of the instrument.

Many questions were discussed by counsel at the bar, and in their briefs, and we have given attention to all the views and arguments on the part of the respective appellants, but the considerations above stated, on which the case was disposed of by the Circuit Court, seem to us to be controlling, and to make it unnecessary to say anything further.

Decree affirmed.

Mr. Justice Matthews did not sit in these cases or take any part in their decision.

LEATHER MANUFACTURERS' BANK *v.* MORGAN & Others.

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

Argued November 3, 1885.—Decided March 1, 1886.

A depositor in a bank, who sends his pass-book to be written up and receives it back with entries of credits and debits and his paid checks as vouchers for the latter, is bound personally or by an authorized agent, and with due diligence, to examine the pass-book and vouchers, and to report to the bank, without unreasonable delay, any errors which may be discovered in them; and if he fails to do so, and if the bank is thereby misled to its pre-

Statement of Facts.

judice, he cannot afterwards dispute the correctness of the balance shown by the pass-book.

If a depositor in a bank delegates to a clerk the examination of his written up pass-book and paid checks returned therewith as vouchers, without proper supervision of the clerk's conduct in the examination, he does not so discharge his duty to the bank as to protect himself from loss, if it turns out that without his knowledge the clerk committed forgery in raising the amounts of some of those checks, and thereby misled the bank to its prejudice, in spite of due care on the part of its officers.

In this case it was held that the question whether the depositor exercised in regard to such examination the degree of care required of him in the circumstances disclosed by the evidence, including the relations of the parties, and the established usages of business, and the question whether the endorsement of a particular check was, under the evidence, an endorsement in blank or one for deposit to the credit of the depositor, were for the jury to determine, under proper instructions as to the law.

This was an action commenced by defendants in error, as plaintiffs below, against the bank, to recover an alleged balance of account. The facts are thus stated by the court.

The defendants in error, subjects of the Queen of Great Britain, and partners under the name of Ashburner & Co., brought this action to recover a balance alleged to be due on a deposit account opened at the Leather Manufacturers' National Bank of New York City, in the name of "Wm. B. Cooper, Junior, agent for Ashburner & Co." The main dispute is as to the right of the depositor to question the account rendered by the bank, so far as it charges him with certain checks which he signed, but which, before payment, were materially altered by his clerk, without his knowledge or assent. The claim of the plaintiffs is, that, after deducting all payments to them, or for their use, there was due to them, April 8, 1881, the sum of $9,996.38, for which they ask judgment. They also ask judgment, upon a second cause of action, for the sum of $280.97, the amount of a check which, it is contended, was endorsed specifically for deposit to the credit of their agent, and was not placed to his credit. The bank denies its liability upon either cause of action, except for the sum of $141.91, which, it contends, is the entire balance due to the plaintiffs on March 22, 1881.

Statement of Facts.

Numerous requests for instructions, in behalf of the bank, were denied; and, under the order of the court, the jury returned a verdict, upon which judgment was entered, in favor of the plaintiffs for the sum of $10,741.09. To this action of the court exception was duly taken, and the bank brings the case here for review.

The record contains a large amount of testimony, the details of which cannot well be embodied in this opinion; but the more important facts and circumstances which the evidence tended to establish, and upon which the decision of the case must turn, are those which will be now stated.

1. One Berlin entered the service of Cooper on the first day of January, 1878, when about seventeen years of age. He and his family were well known to his employer. From that date until March, 1881, as confidential clerk, he had the entire management of Cooper's office, kept his books, and had full charge of the account which Cooper, as agent of Ashburner & Co., kept with the defendant. With the knowledge and under the direction of Cooper he filled up all checks drawn upon that account, entering on the stub of the check-book the date and amount of each check, the name of the payee, and the purpose for which it was drawn. He states in his deposition that he was well known to the teller of the defendant bank, and as the representative of Mr. Cooper.

2. Pursuant to Cooper's instructions, or in the regular course of business, he filled up certain checks between September 11, 1880, and February 13, 1881, which, being signed by his employer and delivered to him, were altered by him before they were taken from the office. The alterations were by erasure and by re-writing the body of the checks, and were made, he states, "with great care, and could not be detected without very careful scrutiny, or a very close examination." The teller of the bank testifies that the checks when presented by Berlin were always carefully examined by him as to signature, amount, date, and indorsement, and that there was nothing about them to excite suspicion, or to suggest alteration or erasure. Upon the checks so altered, Berlin received from the bank the "full raised amount," out of which he paid to Cooper,

or to his use, the several amounts for which they were originally drawn, and appropriated the balance to the discharge of gambling debts which he had contracted. The entries in the check-book were made by Berlin and were correct; but he "forced the footings of the stubs" by making false additions equal to the increase of the altered checks.

3. The numbers and dates of the altered checks and the nature of the several alterations are as follows:

No. of Check.	Date of Check.	Character of Alteration.
8356	Sept. 11, 1880.	Check to cash or bearer, raised from $90 to $500.
8377	Sept. 28, 1880.	Check to cash or bearer, raised from $10 to $400.
8424	Oct. 30, 1880.	Check to cash or bearer, raised from $105 to $405.
8431	Nov'r 3, 1880.	Check to cash or bearer, raised from $17.25 to $600.25.
8468	Nov'r 26, 1880.	Check to cash or bearer, raised from $10 to $1,000.
8480	Dec. 10, 1880.	Check to order of Marston & Son, raised from $7.75 to $700.25, and the words "or bearer" written in after payee's name.
8492	Dec. 18, 1880.	Check to order of C. H. Clayton, raised from $15 to $1,500, and words "or bearer" written in after payee's name.
8498	Dec. 24, 1880.	Check to cash or bearer, raised from $80 to $600.
8501	Dec. 28, 1880.	Check to order of W. S. Daland, raised from $24.08 to $1,000, Daland's name erased, and that of Julius Brandies inserted, and words "or bearer" written in after payee's name.
8504	Dec. 31, 1880.	Check to cash or bearer, raised from $80 to $400.
8508	Jan'y 5, 1881.	Check to cash or bearer, raised from $10 to $2,000.
8518	Jany 14, 1881.	Check to order of Charles G. Hanks, raised from $33.60 to $1,100, words "or bearer (duty)" written in after payee's name, and "14th" erased and "27th" written over it.
8550	Feb'y 13, 1881.	Check to order of W. S. Daland, raised from $17.72 to $100.72, and words "or C. Clifford Berlin," written in after payee's name, and date changed to February "14."

4. Cooper's pass-book was written up at the bank October 7, 1880, November 19, 1880, and January 18, 1881, and a balance struck, showing to his credit on those dates, respectively, $10,821.64, $4,568.68, and $5,566.61. Upon each occasion, the book was returned with all checks that had been paid subsequent to the previous balancing, including the altered checks. Across the face of the pass-book, on the first balancing, was

written "62 vouchers returned"; on the second "79 vouchers returned"; and on the last "66 vouchers returned." Each time the pass-book was returned, with the vouchers, Berlin destroyed such of the checks in the lot as he had altered. He remembers to have shown the rest of the vouchers to Cooper on the balancing of October 7, 1880, but does not remember of pursuing that course on the other occasions.

5. Berlin states that Cooper "was in the habit of examining his check-book from time to time." It is clear that the latter knew of these balancings; for, he testifies that his account with the bank "was balanced from time to time, which was done by the bank writing up the pass-book, and returning the checks that had been paid by it; that when the pass-book was so returned it went to the clerk, Berlin, who then balanced the check-book, that being one of the duties imposed upon him; that the witness took no part in such balancings, but Berlin generally showed him the vouchers that were returned, because he used to like to look at them; but he never gave Berlin any particular instructions so to do. That he was in the habit of looking over his check-book and kept track of the balance, which, during the months of August, September, November and December, 1880, and January, 1881, he understood to be about $10,000; and that, when he asked Berlin as to the balance, his answer agreed with about what he supposed was in the bank." He also knew the object of such balancings; for he testifies "that he had been a dealer with the defendant bank for upwards of eighteen years, and that he knew that it was its custom, as well as the custom of all banks, to balance at intervals the pass-books of its depositors and to return the same when balanced, accompanied by the checks drawn by the depositor and charged to the account, as the vouchers of the bank for such payments."

6. Cooper states that the forgeries were discovered by him "about the first or second day of March, 1881." Berlin, having stayed away from the office for a day, he compared his pass-book with the stubs of the check-book, and ascertained that a certain number of checks, appearing on the stubs, were not charged against him in his pass-book, and did not appear

to have been returned by the bank, while others, which appeared on the pass-book to have been charged against and returned to him, did not appear, by the stub of the check-book, to have ever been drawn. He "thereupon sent his pass-book to the bank to be balanced, and it was balanced on March 2, 1881; and among the vouchers then returned were the aforesaid checks 8518 and 8550, which had been altered from their original amounts." This, he states, was the first knowledge he had of the forgeries. After receiving the last balancing, he "then notified the bank that his clerk had absconded, and that alterations had taken place, and requested them not to pay any more of his checks, the bodies of which were filled up in the handwriting of his clerk Berlin." Whether this notification was given as soon as he saw those two checks, or on the same day, or after the expiration of several days, the record does not show.

7. Cooper admits that, if on any of the several balancings, he had made such examinations of his check-book and pass-book as was done on March 1, 1881, he would have "easily discovered" that his account had been charged with altered checks; and that for the previous five or ten years he knew of various means adopted by bankers and merchants to prevent the raising or alteration of checks, but he had not employed or used any of them. Upon one occasion, the date not given, he discovered, by adding up the "footings of the check-book," an error, and spoke to Berlin about it. The latter having replied that it was very seldom he was caught in a mistake, Cooper believed him and looked no further into the matter.

Cooper did not surrender the altered checks, except 8518 and 8550, because they had been destroyed by his clerk. The teller states that the latter one came through the clearing-house, while the former was not, when paid, in the condition in which it appeared to be at the time of the trial. After the lapse of time and frequent handling, the alteration, he said, was now apparent.

It was upon this state of case, substantially, that the Circuit Court instructed the jury to find for the plaintiffs upon both causes of action.

Judgment was entered accordingly, and the bank sued out this writ of error to review it.

Mr. Charles M. DaCosta for plaintiff in error. *Mr. Noel B. Sanborn* was with him on the brief

Mr. John M. Bowers for defendant in error.

I. A bank paying a forged or altered check is liable to the depositor therefor for the full amount, if forged, and to the raised amount, if altered. The balancing of the depositor's account, and the rendition of the vouchers, including the altered ones, only make an account stated. The depositor is not bound personally to examine the same. If the examination be confided to a clerk, it is sufficient. If this clerk uses his position to perpetrate forgery, the loss is still on the bank. *Weisser* v. *Denison*, 10 N. Y. 68; *Welsh* v. *German American Bank*, 73 N. Y. 424; *Frank* v. *Chemical Bank*, 84 N. Y. 209; *Manufacturers' Bank* v. *Barnes*, 65 Ill. 69; *National Bank* v. *Tappan*, 6 Kansas, 456.

II. The only effect of an account stated is to cast the burden of proof upon the complaining party to show fraud, error or mistake. This is the doctrine of all the above cases, and of the following: *National Bank* v. *Whitman*, 94 U. S., 343, 346; *Manhattan Company* v. *Lydig*, 4 Johns., 377; *Phillips* v. *Belden*, 2 Edwds. Ch. 1; *Kinsman* v. *Barker*, 14 Ves., 579; *Bullock* v. *Boyd*, 2 Edwds. Ch. 293; *Barrow* v. *Rhinelander*, 1 Johns. Ch. 550. The same rule applies in law and equity. *Perkins* v. *Hart*, 11 Wheat. 237. And, after holding that after lapse of reasonable time an account rendered becomes admitted as correct, the court, in *Hardy* v. *Chesapeake Bank*, 51 Maryland, 562, says: "The presumption is liable to be repelled by showing that the error or fraud complained of was not discoverable by the exercise of reasonable care and diligence, or that there was no such appearance of things as to excite the suspicion of a reasonable man, or that, for any reason, the party had not had an opportunity to examine the account." p. 587. See also *Wiggins* v. *Burkham*, 10 Wall. 129, 132; *Hutchinson* v. *Market Bank*, 48 Barb. 302. Even the acknowledgment by

the depositor or maker that the forged signature is genuine does not cut him off from recovery, if such an acknowledgment be made after the bank has paid the money. *Hall* v. *Huse*, 10 Mass. 39; *Salem Bank* v. *Gloucester Bank*, 17 Mass. 1, 27.

III. A bank is liable to its depositor for any material alteration in a check drawn thereon. *Hall* v. *Fuller*, 5 B. & C., 750. Nor is the depositor bound to suspect that the person with whom he deals will commit forgery whenever the opportunity arises, and, therefore, it is not necessary for a person drawing a check to exclude the possibility of any addition or alteration. It is sufficient to fill in the ordinary way. *Société Générale* v. *Metropolitan Bank*, 27 Law Times, N. S., 849; *Manhattan Co.* v. *Lydig*, 4 Johns. 377; *Goddard* v. *Merchants' Bank*, 4 Coms. 147; *Bank of Commerce* v. *Union Bank*, 3 Coms. 230; *Bank of Albany* v. *Farmers' and Mechanics' Bank*, 10 Vt. 141; *Cases* collected in *Hardy* v. *Chesapeake Bank* above cited. The alteration of a check is the same thing as its forgery. *White* v. *Continental Bank*, 64 N. Y. 316; *Marine Bank* v. *City Bank*, 59 N. Y. 67. See also *Wood* v. *Steele*, 6 Wall. 80; *Oddie* v. *City Bank*, 45 N. Y. 735; and *Crawford* v. *West Side Bank*, decided in the Court of Appeals in New York in 1885, not yet reported; *Belknap* v. *National Bank*, 100 Mass. 376.

IV. The principal is only bound by his agent while acting in the course of an employment, affecting a third person. Agencies are of many kinds: from a general agency where the agent stands in the place of the principal, to that in which the most limited power is deputed for a specially defined purpose. A depositor in a bank could intrust to a confidential clerk as his agent the duty of examining his account, and if that clerk fraudulently performs the duty, the depositor was guilty of no negligence. For parallel cases see *Schmidt* v. *Blood*, 9 Wend. 268; *Warner* v. *Erie Railway Co.*, 39 N. Y. 468; *Wright* v. *New York Central Railroad Co.*, 25 N. Y. 562; *Hardy Brothers* v. *Chesapeake Bank* and *Weisser* v. *Denison* cited above. A man cannot be convicted of a crime because of his agent's knowledge being imputed to him. *The Queen* v. *Stephens*, L. R. 1 Q. B. 702; *Deerfield* v. *Delano*, 1 Pick. 465.

V. The only duty that the depositor owed was to acquaint the bank with the fact of the forgery as soon as he learned it. *White* v. *Continental Bank*, 64 N. Y. 316; *Corn Exchange Bank* v. *Nassau Bank*, 91 N. Y. 74.

VI. There is no estoppel. (a). Estoppel in pais can only avail where the position of the parties is changed. (b). Each forgery was an independent one. Each payment was a wrongful one on the part of the bank. They have no right to claim that they would have ceased doing wrong if the depositor had informed them of the wrongful acts of their clerks. (c). The plea cannot avail because there is no evidence to show that, had the bank had earlier knowledge, they could have recouped against the forger. *Ketchum* v. *Duncan*, 96 U. S. 659, 666; *Dezell* v. *Odell*, 3 Hill, 215, 222; *People* v. *Brown*, 67 Ill. 435; *Martin* v. *Zellerbach*, 38 Cal. 300, 315; *McKenzie* v. *British Linen Co.*, H. L. 44 Law Times, 431; *Continental Bank* v. *Bank of the Commonwealth*, 50 N. Y. 575; *Bank of Commerce* v. *Mechanics Banking Association*, 55 N. Y. 211; *White* v. *Continental Bank*, 64 N. Y. 316; *Knights* v. *Whiffen*, L. R. 5 Q. B. 660; *Hopkins* v. *Ware*, 38 Law Journal, Ex. 147.

VII. There was no negligence on the part of the depositor. The bank was guilty of gross negligence. The depositor's position has been fully stated under the fourth point. The position of the bank will be best seen by an examination of the two checks last paid by them, which were not destroyed by Berlin. The forgeries were palpable at sight. They have been in possession of counsel preparing this brief, since their return by the bank to Mr. Cooper, and we assert that there has been no change of any kind. The bank should be held liable for its gross negligence in paying checks where the alteration is so plain.

VIII. The defendant in error was entitled to a direction in his favor on his second cause of action. The endorsement is plain, and was a special endorsement, and reads, "For deposit in Leather Manufacturers' National Bank to the credit of W. B. Cooper, Jr., Agent for Ashburner & Co." The endorsement was restrictive. The bank could only make one use of the check, namely, credit the account of Ashburner & Co. with the

proceeds. *Lee* v. *Chillicothe Bank*, 1 Bond, 387; *First National Bank* v. *Reno County Bank*, 3 Fed. Rep. 257. With the endorsement in question on the check Berlin could make no use of it for his own benefit. The endorser could recover against any person who made or assisted Berlin to make any use of it except to credit the depositor's account. *Hook* v. *Pratt*, 78 N. Y. 371; *Claflin* v. *Wilson*, 51 Iowa, 15; *Sigourney* v. *Lloyd*, 8 B. & C. 622; *Treuttel* v. *Barandon*, 8 Taunt. 100; *White* v. *National Bank*, 102 U. S. 658; *Mechanics' Bank* v. *Valley Packing Co.*, 4 Missouri App. 200; 70 Missouri, 643.

IX. There being no conflict of evidence, and the evidence being of such a character as to compel the setting aside of a verdict in favor of the defendant, the court was bound to direct in favor of the plaintiff. Where the facts are clear, it is always a question exclusively for the court. Where the proofs are conflicting, the question is a mixed one of law and fact. In such cases the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties. *Wiggins* v. *Burkham*, 10 Wall. 129, 132; *Toland* v. *Sprague*, 12 Pet. 300, 335; *Baylis* v. *Travelers' Ins. Co.*, 113 U. S. 316; *Randall* v. *Baltimore & Ohio Railroad Co.*, 109 U. S. 478; *Pleasants* v. *Fant*, 22 Wall. 116; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241. While it is true that the court did not make use of the expression that the direction was given because any verdict would have to be set aside yet such was the intent and fact. Negligence may be a question of fact or of law or both. What is due care is for the court. Whether that due care was exercised is for the jury. Smith's Leading Cases, note to *Coggs* v. *Bernard*, Vol. 1, pt. 1, p. 471, 8th ed.; *Rowland* v. *Jones*, 73 N. C. 52; *Poole* v. *Railroad Co.*, 56 Wisc. 227. That when on the most favorable construction of the facts the evidence is insufficient to sustain a finding of negligence it becomes the duty of the court to direct that there is no negligence as matter of law; see *Randall* v. *Baltimore & Ohio Railroad Co.*, 109 U. S. 478, 482.

Mr. Justice Harlan delivered the opinion of the court. After stating the facts as above reported, he continued:

Opinion of the Court.

The court below, as shown by its opinion, proceeded upon the ground that Cooper was under no duty whatever to the bank to examine his pass-book and the vouchers returned with it, in order to ascertain whether his account was correctly kept. For this reason, it is contended, the bank, even if without fault itself, has no legal cause of complaint, although it may have been misled to its prejudice by the failure of the depositor to give timely notice of the fact—which, by ordinary diligence, he might have discovered on the occasion of the several balancings of the account—that the checks in question had been fraudulently altered. This view of his obligations does not seem to the court to be consistent with the relations of the parties, or with principles of justice.

While it is true that the relation of a bank and its depositor is one simply of debtor and creditor, (*Phœnix Bank* v. *Risley*, 111 U. S. 125, 127,) and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a pass-book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass-book to be written up and returned with the vouchers, is, therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it. In *Devaynes* v. *Noble*, 1 Meriv. 530, 535, it appeared that the course of dealing between banker and customer, in London, was the subject of inquiry in the High Court of Chancery as early as 1815. The report of the master stated, among other things, that for the purpose of having the pass-book "made up by the bankers from their own books of account, the customer returns it to them from time to time as he thinks fit; and, the proper entries being made by them up to

the day on which it is left for that purpose, they deliver it again to the customer, who thereupon examines it, and if there appears any error or omission, brings or sends it back to be rectified; or, if not, his silence is regarded as an admission that the entries are correct." This report is quite as applicable to the existing usages of this country as it was to the usages of business in London at the time it was made. The depositor cannot, therefore, without injustice to the bank, omit all examination of his account, when thus rendered at his request. His failure to make it or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass-book. It was observed in *First National Bank* v. *Whitman*, 94 U. S. 343, 346—although the observation was not, perhaps, necessary in the decision of the case—that the ordinary writing up of a bank book, with a return of vouchers or statement of accounts, precludes no one from ascertaining the truth and claiming its benefit. Such undoubtedly is a correct statement of a general rule. It was made in a case where the account included a check in respect to which it was subsequently discovered that the name of the payee had been forged. But it did not appear that either the bank or the drawer of the check was guilty of negligence. The drawer was not presumed to know the signature of the payee; his examination of the account would not necessarily have disclosed the forgery of the payee's name; therefore his failure to discover that fact sooner than he did was not to be attributed to want of care. Without impugning the general rule that an account rendered which has become an account stated, is open to correction for mistake or fraud, *Perkins* v. *Hart*, 11 Wheat. 237, 256; *Wiggins* v. *Burkham*, 10 Wall. 129, 132, other principles come into operation, where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself, or to have it made, in good faith, by another for him; by reason of which negligence, the other party, relying upon the account as having been acquiesced in or approved,

has failed to take steps for his protection which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness.

The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In the consideration of the question before us aid will be derived from an examination of some of the cases in which it has been defined and applied. In *Morgan* v. *Railroad Company*, 96 U. S. 716, 720, it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed, if the latter has acted upon that belief. "The doctrine," the court said, "always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." In *Continental Bank* v. *Bank of the Commonwealth*, 50 N. Y. 575, 583, it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. "Indeed," said Folger, J., "it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped. And it has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. *Gaylord* v. *Van Loan*, 15 Wend. 308." The general doctrine, with proper limitations, was well expressed in *Freeman* v. *Cooke*, 2 Exch. 654, 663, and in *Carr* v. *London & Northwestern Railway Co.*, L. R., 10 C. P. 307. In the first of those cases it was said by Parke, B., for the whole court, that "if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast

upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect." And in the other case, Brett, J., speaking for the court, said: "If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist." See also *Manufacturers' & Traders' Bank* v. *Hazard*, 30 N. Y. 226, 229; *Blair* v. *Wait*, 69 N. Y. 113, 116; *McKenzie* v. *British Linen Co.*, 6 App. Cas. 82, 101; *Miles* v. *McIlwraith*, 8 App. Cas. 120, 133; *Cornish* v. *Abington*, 4 H. & N. 549, 556.

Upon this doctrine, substantially, rests the decision in *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333, 343, where the question was as to the right of the Bank of Georgia to cancel a credit given to the Bank of the United States, in the general account the latter kept with the former, for the face value of certain bank notes purporting to be genuine notes of the Bank of Georgia, and which came to the hands of the other bank in the regular course of business and for value. The notes were received by the Bank of Georgia as genuine, but being discovered nineteen days thereafter to be counterfeits, they were tendered back to the Bank of the United States, which refused to receive them. This court held that the loss must fall upon the Bank of Georgia. Mr. Justice Story, who delivered the opinion of the court, after observing that the notes were received and adopted by the Bank of Georgia as its genuine notes, and treated as cash, and that the bank must be presumed to use all reasonable care, by private marks and otherwise, to secure itself against forgeries and impositions, said: "Under such circumstances, the receipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty which the public have a right to require. And in respect to persons equally inno-

cent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank, in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time." "Even," he added, "in relation to forged bills of third persons received in payment of a debt, there has been a qualification engrafted on the general doctrine, that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility." It was, therefore, held that, as the Bank of Georgia could by ordinary circumspection have detected the fraud, it must account to its depositor according to the entry made in its books at the time of receiving the notes.

The same principle was recognized in *Cooke* v. *United States*, 91 U. S. 389, 396. One of the questions there was as to the effect, on the rights of the government, of the receipt by an assistant treasurer of the United States in New York of certain treasury notes, endorsed by the holders to the order of the Secretary of the Treasury for redemption in accordance with an act of Congress, and which notes, when examined at the Treasury Department, were ascertained to be forgeries, of which prompt notice was given. This court, speaking by the Chief Justice, said: "It is undoubtedly, also, true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption of the paper as genuine by its apparent maker. . . . He must repudiate as soon as he *ought* to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not." Again: "When, therefore, a party is entitled to

something more than a mere inspection of the paper before he can be required to pass finally upon its character—as, for example, an examination of accounts or records kept by him for the purpose of verification—negligence sufficient to charge him with a loss cannot be claimed until this examination ought to have been completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without it will have the effect of an acceptance and adoption. . . . What is reasonable must in every case depend upon circumstances; but, until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay."

This court, in the two cases last cited, refers, with approval, to *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33, 42. In that case it appeared that the Salem Bank exchanged with the Gloucester Bank, for value, certain bank notes which purported to be, and which both banks at the time believed to be, the genuine notes of the Gloucester Bank, and which the latter bank did not, until about fifty days after the exchange, discover to be forgeries. The question was whether the Salem Bank was bound to account for the value of the notes so ascertained to be counterfeit. Chief Justice Parker, speaking for the whole court, observed that the parties being equally innocent and ignorant, the loss should remain where the chance of business had placed it, and that in all such cases the just and sound principle of decision was, that, if the loss can be traced to the fault or negligence of either party, it should be fixed upon him. He said: "And the true rule is that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent; and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received; but certainly with more strength when the party receiving them is the one purporting to be bound to pay. For he knows better than any other, whether they are his notes or not; and if he pays them, or receives them in payment, and continues silent, after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that, where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth—which he has the means, by ordinary diligence, of ascertaining—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficent; for, as observed by the Supreme Court of Ohio in *Ellis & Morton* v. *Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628, 667, while in the forum of conscience there may be a wide difference between intentional injuries and those arising from negligence, yet no man conducts himself "quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling every one to pay a proper regard to the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty. In almost every department of active life rights are in this manner daily lost and acquired, and we know of no reason for making the commercial classes an exception."

Recurring to the facts of this case, there was evidence tending to show—we do not say beyond controversy—that Cooper failed to exercise that degree of care which, under all the circumstances, it was his duty to do; he knew of the custom of the defendant to balance the pass-books of its depositors and return their checks "as vouchers" for payments; yet he did not examine his pass-book and vouchers to see whether there were any errors in the account to his prejudice, and, therefore, he could give no notice of any. Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account. But if by such care

and skill they could not have discovered the forgeries, then the only person unconnected with the forgeries who had the means of detecting them was Cooper himself. He admits that by such an examination as that of March, 1881, he could easily have discovered them on the balancings of October 7, 1880, November 19, 1880, and January 18, 1881. If he had discovered that altered checks were embraced in the account, and failed to give due notice thereof to the bank, it could not be doubted that he would have been estopped to dispute the genuineness of the checks in the form in which they were paid; upon the principle stated by Lord Campbell in *Cairncross* v. *Lorimer*, 3 Macq. 827, 830, that "if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." This, however, could not be, if, as claimed, the depositor was under no obligation whatever to the bank to examine the account rendered at his instance, and notify it of errors therein in order that it might correct them, and, if necessary, take steps for its protection by compelling restitution by the forger. But if the evidence showed that the depositor intentionally remained silent, after discovering the forgeries in question, would the law conclusively presume that he had acquiesced in the account as rendered, and infer previous authority in the clerk to make the checks, and yet forbid the application of the same principle where the depositor was guilty of neglect of duty in failing to do that, in reference to the account, which he admits would have readily disclosed the same fraud? It seems to the court that the simple statement of this proposition suggests a negative answer to it.

There was, also, evidence tending to prove—we do not say conclusively—that the depositor gave, practically, no attention to the account rendered by the bank, except to that one rendered March 2, 1881; that very slight diligence would have disclosed the fact that the vouchers, which he knew to be in

the possession of his clerk, were not all that the account upon its face showed had been returned; and that he intrusted the entire business to an inexperienced boy, in whose integrity he seemed to place implicit confidence, and of whose conduct he neglected to exercise that supervision which ordinary prudence suggested as both necessary and proper. Upon one occasion, as we have seen, he discovered an error in the footings of the check-book, and failed to look farther, because of the assurance of his clerk that he was seldom caught in a mistake. He was in the habit of looking over his check-book and keeping track of his balance in bank, and yet he did not observe that he was improperly charged in the balancing of October 7, 1880, with checks for $500 and $400; in that of November 19, 1880, with checks for $405 and $600.25; and in that of January 18, 1881, with checks for $1,000, $700.25, $1,500, $600, $1,000, $400, and $2,000. He finally discovered, in March, 1881, that there was something radically wrong in his account, and sent his pass-book to the bank to be balanced, without intimating, so far as the record shows, that he had then discovered anything to excite suspicion or to call for explanation. The book having been balanced and returned to him on March 2, 1881, he then notified the bank that his clerk had absconded, and forbade the payment of any more checks the bodies of which were in Berlin's handwriting. Whether the clerk had absconded and left the State prior to this sending of the pass-book to the bank does not appear. But, when next heard of, so far as the record shows, he was at Wilmington, Delaware, in June, 1881, when and where he gave his deposition, *de bene esse*, in behalf of his former principal. The numerous checks which he confesses to have forged have been destroyed, and the bank is thereby put at disadvantage upon any issue as to the fact of forgery, or as to whether the checks may not have been so carelessly executed at the time they were signed by the depositor, as to have invited or given opportunity for these alterations by his confidential clerk. *Van Duzen* v. *Howe*, 21 N. Y. 531, 538; *Redlich* v. *Doll*, 54 N. Y. 234, 238; *Young* v. *Grote*, 4 Bing. 253; *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196, 202. Still further, if the depositor was guilty of

negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. An inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper if this were an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect to falsify a stated account, to the injury of the bank, whose defence is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it. *Continental Bank* v. *Bank of the Commonwealth*, above cited; *Voorhis* v. *Olmstead*, 66 N. Y. 113, 118; *Knights* v. *Wiffen*, L. R. 5 Q. B. 660; *Casco Bank* v. *Keene*, 53 Maine 103; *Fall River Bank* v. *Buffinton*, 97 Mass. 498.

It seems to us that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered by the bank, the verdict could not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to rigid responsibility. But the principles governing those relations ought not to be so extended as to invite or encourage

such negligence by depositors in the examination of their bank accounts, as is inconsistent with the relations of the parties or with those established rules and usages, sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors.

We must not be understood as holding that the examination by the depositor of his account must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that the depositor is wanting in proper care, when he imposes upon some competent person the duty of making that examination and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor, and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination—without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal, cannot be deemed the equivalent of performance by the latter. While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business.

It was insisted in argument that the grounds upon which the Circuit Court proceeded are sustained by the settled course of decision in the highest court of New York, as manifested in *Weisser* v. *Denison*, 10 N. Y. 68, 70; *Welsh* v. *German-American Bank*, 73 N. Y. 424; and *Frank* v. *Chemical Bank*, 84 N. Y. 209, 213. We are also referred to *Manufacturers' Bank* v.

Barnes, 65 Ill. 69, and *National Bank* v. *Tappan*, 6 Kansas, 456, 467. There are, it must be conceded, some expressions in the first two cases which, at first glance, seem to justify the position of counsel. But it is to be observed, in reference to the case of *Weisser* v. *Denison*, that it is said in the opinion of the court that, as the bank had not taken any action, nor lost any rights, in consequence of the silence of the depositor, the only effect of such silence was to cast the burden upon him to show fraud, error, or mistake in the account rendered by the bank. From *Welsh* v. *German-American Bank*, it is clear that the comparison by the depositor of his check-book with his pass-book would not necessarily have disclosed the fraud of his clerk; for the check when paid by the bank was, in respect of date, amount, and name of payee, as the depositor intended it to be, and the fraud was in the subsequent forgery by the clerk of the payee's name. As the depositor was not presumed to know, and as it did not appear that he in fact knew, the signature of the payee, it could not be said that he was guilty of negligence in not discovering, upon receiving his pass-book, the fact that his clerk, or some one else, had forged the payee's name in the endorsement.

The latest expression of the views of the Court of Appeals of New York is in *Frank* v. *Chemical National Bank*. From what is there said it is evident that that learned tribunal does not give its sanction to the broad proposition that a depositor who obtains periodical statements of his account, with the vouchers, is under no duty whatever to the bank to examine them, and give notice, within a reasonable time, of errors discovered therein. The court in that case, speaking by Judge Andrews, who delivered the opinion in *Welsh* v. *German-American Bank*, refers to *Weisser* v. *Denison*. After observing that it was unnecessary to restate the grounds of that decision, and adverting to the argument that where a pass-book was kept, which was balanced from time to time and returned to the depositor, with the vouchers for the charges made by the bank, including forged checks, the latter is under a duty to the bank to examine the account and vouchers, with a view to ascertain whether the account is correct, he proceeds: "It does

not seem to be unreasonable, in view of the course of business and the custom of banks to surrender their vouchers on the periodical writing up of the accounts of depositors, to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the bank, which it would not have suffered if such examination had been made and the bank had received timely notice of objections, preclude the depositor from afterwards questioning its correctness. But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank to so conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally, and is himself deceived by the skilful character of the forgery, his omission to discover it will not shift upon him the loss which, in the first instance, is the loss of the bank. Banks are bound to know the signatures of their customers, and they pay checks purporting to be drawn by them at their peril. If the bank pays forged checks it commits the first fault. It cannot visit the consequences upon the innocent depositor who, after the fact, is also deceived by the simulated paper. So, if the depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to clerks or agents, and they fail to discover checks which are forged, the duty of the depositor to the bank is discharged, although the principal, if he had made the examination personally, would have detected them. The alleged duty, at most, only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger."

In *Manufacturers' National Bank* v. *Barnes*, the Supreme Court of Illinois, while expressing its approval of the decision in *Weisser* v. *Denison*, shows that the bank was itself guilty of negligence in paying checks drawn by the depositor's clerk; for it had in its possession, placed there by the depositor, written evidence that the authority of the clerk to draw checks against the depositor's account was restricted to a designated period,

which had expired when the checks there in dispute were paid. Nor does the case cited from the Supreme Court of Kansas militate against the views we have expressed, although it refers with approval to *Weisser* v. *Denison*. The question there was as to the right of the bank to charge the depositor with the amount of a certain forged acceptance. The court found that the depositors were not guilty of neglect, and gave notice of the forgery as soon as it was discovered.

An instructive case is that of *Dana* v. *Bank of the Republic*, 132 Mass. 156, 158, where the issue was between a bank and its depositor in reference to a check, which the latter's clerk altered after it had been signed and before it was paid by the bank. The court said that the plaintiffs, who were the depositors, owed to the bank "the duty of exercising due diligence to give it information that the payment was unauthorized; and this included not only due diligence in giving notice after knowledge of the forgery, but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence, will disclose it, they failed in their duty; and adoption of the check and ratification of the payment will be implied. They cannot now require the defendant to correct a mistake to its injury from which it might have protected itself but for the negligence of the plaintiffs. Whether the plaintiffs were required, in the exercise of due diligence, to read the monthly statements or to examine the checks, and how careful an examination they were bound to make, and what inferences are to be drawn, depend upon the nature and course of dealing between the parties, and the particular circumstances under which the statements and checks were delivered to them." So in *Hardy* v. *Chesapeake Bank*, 51 Maryland, 562, 591, which was also a case where checks forged by the confidential clerk of the depositor had been paid by the bank, and, as shown by the pass-book, were charged to his account, the court, upon an elaborate review of the authorities, said, upon the general question, that "there is a duty owing from the customer to the bank to act with that ordinary diligence and care that prudent business men gen-

erally bestow on such cases, in the examination and comparison of the debits and credits contained in this bank or pass-book, in order to detect any errors or mistakes therein. More than this, under ordinary circumstances, could not be required."

What has been said applies mainly to the issue between the parties in relation to the altered checks embraced in the balancings of October and November 1880, and January 1881. The case in reference to checks 8518 and 8550 presents a somewhat different aspect. Cooper, we infer from the evidence, became aware, on March 2, 1881, when these checks were returned with his pass-book, balanced as of that date, that they were forgeries. But it is not clear from the evidence at what time, or on what day, he gave the bank notice of that fact, or generally of the fact that there had been alterations in his checks. It may be that the account rendered on March 2, 1881, did not, by reason of any unnecessary delay, become an account stated, as to items subsequent to the balancing of January 18, 1881, and, consequently, there may be no ground to charge the depositor with negligence in not giving due notice to the bank of the alleged alterations of those two checks.

It remains only to consider the action of the court below in reference to the second cause of action. Touching this branch of the case the essential facts are: Cooper, on August 25, 1880, in his capacity as "Agent for Ashburner & Co.," made his check upon the Leather Manufacturers' National Bank for $280.97, payable to the order of "W. B. Cooper, Jr., Agent." On the side of the check were the printed words "Wm. B. Cooper, Agent." Across its face was the word "Gold." Upon the back of the check, before it was endorsed, were the following words, printed or stamped:

"For deposit in
Leather Manf's Nat. Bank
to the credit of

_____

Ag't for Ashburner & Co."

Cooper endorsed the check in question by writing "W. B.

Cooper, agent," on the line immediately below the words "Leather Manf's Nat. Bank," that is, on the line occupied by the words "to the credit of," and so as almost to obliterate the latter words. Thus endorsed, the check was delivered by Cooper to Berlin for the purpose, as the former states, of having it deposited to his credit, as agent of Ashburner & Co. Berlin presented it at the bank and received the money on it, but never accounted therefor to his principal. When Cooper first discovered that his clerk collected the amount of that check does not appear. He makes no statement on that subject.

The peremptory instruction to find against the bank upon this cause of action was, perhaps, based mainly upon the assumption that the endorsement imported a direction to place the amount of the check to the credit of Cooper, as agent for Ashburner & Co. But there is ground to contend that such was not the intention of Cooper. Evidently he had, for use, a stamp by which he could print the foregoing words upon checks which he desired placed to his credit, as agent for Ashburner & Co., leaving a blank line for his own signature. The object of this was to save time and writing. It might be asked why should he, as agent for Ashburner & Co., draw a check payable to his own order as such agent, and then direct the bank, by his endorsement as agent, to place the money to the credit of himself, as agent for Ashburner & Co.; with one hand taking the money out of his account, as agent, and with the other putting it back immediately into the same account? And it might be argued that if he intended, by his endorsement, to direct the money to be placed to the credit of himself, as agent of Ashburner and Co., he would have written his name in the blank line underneath the words "to the credit of;" but that, to prevent any such disposition of the money, he obliterated the operative words in the stamped lines on the back of the check by writing his name across the words "to the credit of," thus making, what the bank claims was intended, an endorsement in blank, entitling the bearer of the check to receive the money. Or, if his purpose was to take out of his account, as agent, the sum specified in his check, and at the same time show that the money was not to be used by him for his personal benefit, but

for his principals, what he did would naturally effect that object. If the endorsement was made in such manner as fairly to indicate that it was intended to be in blank, the loss should fall on the depositor whose negligence caused the mistake. These observations are not intended as an expression of opinion as to the weight of evidence upon this branch of the case. They are intended only to show that the case, as to the check for $280.97, was not clearly for the plaintiffs, and ought to have been submitted to the jury.

It results from what has been said that the court erred in peremptorily instructing the jury to find for the plaintiffs. Both causes of action are peculiarly for a jury to determine, under such instructions as may be consistent with the principles announced in this opinion. Whether the plaintiffs are estopped, by the negligence of their representative, to dispute the correctness of the account as rendered by the bank from time to time, is, in view of all the circumstances of this case, a mixed question of law and fact. As there is, under the evidence, fair ground for controversy as to whether the officers of the bank exercised due caution before paying the altered checks, and whether the depositor omitted, to the injury of the bank, to do what ordinary care and prudence required of him, it was not proper to withdraw the case from the jury. *Railroad Co.* v. *Stout*, 17 Wall. 657, 663, and *Cooke* v. *United States*; *Wiggins* v. *Burkham*; *Dana* v. *Bank of the Republic*; and *Hardy* v. *Chesapeake Bank*, *ubi supra*.

The judgment is reversed, and the cause remanded for a new trial, and for further proceedings in conformity with this opinion.

Mr. Justice Blatchford did not sit in this case or take any part in its decision.

CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* OHLE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

Submitted January 25, 1886.—Decided March 1, 1886.

A citizen of one State who in good faith gives up his residence there, goes to another State, and takes up a permanent residence therein, loses his former citizenship and acquires citizenship in the new place of domicil.

On the facts in this case the court properly left it to the jury, and by proper instructions, to decide whether the defendant in error had acquired a citizenship in Illinois, and if so when that citizenship was acquired.

An affidavit made by an officer of a railway company on information and belief as to the citizenship of the plaintiff, in a suit in a State court against the company, and filed therein for the purpose of requiring security for costs, is admissible against the company in an issue made in the Circuit Court of the United States after removal of the cause there, on the motion of the plaintiff to have it remanded.

The facts which make the case are stated in the opinion of the court.

Mr. N. M. Hubbard and *Mr. Charles A. Clark* for plaintiff in error.

Mr. George G. Wright and *Mr. S. S. Burdett* for defendant in error.

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

This is a writ of error brought under section 5 of the act of March 3, 1875, 18 Stat. 470, ch. 137, to reverse an order of the Circuit Court remanding a case which had been removed from a State court. The suit was brought in a State court of Iowa on the 19th of November, 1883, by Ohle, the defendant in error, described in the petition as a citizen of Illinois, against the Chicago and Northwestern Railway Company, an Illinois corporation, to recover damages for an injury sustained by him

while a laborer on a construction train of the railway company in Iowa. On the 21st of March, 1884, the company petitioned for the removal of the suit to the Circuit Court of the United States, on the ground that Ohle was a citizen of Iowa and the railway company a citizen of Illinois. The case was docketed in the Circuit Court of the United States May 13, 1884, and the next day, May 14, Ohle moved to remand, because both he and the company were citizens of the same State. On the 22d of May he was given leave to file a plea in abatement or to the jurisdiction, which he did August 29, 1884, alleging that both he and the company were citizens of Illinois. Upon this plea issue was joined, and a trial had with a jury, October 30, 1884. On the trial it appeared that, at the time of the injury, Ohle was a minor, having his home with his parents, who were citizens of Iowa, residing at Burlington, in that State. While still a minor, he brought suit, by his next friend, in a State court of Iowa, against the company to recover damages for his injury. This suit was removed by the company to the Circuit Court of the United States. Before any trial was had, and in April, 1883, Ohle went to Janesville, Wisconsin, to attend school for the purpose of learning telegraphy. In October, 1883, he went from the school to Des Moines, Iowa, to attend a trial of his suit, and the trial resulted in a disagreement of the jury. He then went to visit his parents in Burlington, and stayed about a week. After the disagreement of the jury, he discontinued his suit, and, about the 6th of November, went to Chicago, Illinois, where he remained until about the 27th of November. While he was in Chicago at this time, the present suit was begun, and the simple question presented on the trial of the issue, made by the reply to the plea to the jurisdiction, was, whether he had actually, and in good faith, given up his citizenship in Iowa and acquired a new citizenship in Illinois before this suit was brought. He was the only witness sworn. He testified in substance, that when he went to Chicago he intended to make that his home. It is true, in a subsequent part of his testimony, he said this was done so as to prevent the railroad company from removing any other suit he might bring in Iowa to the courts of the United States; but, according to

his testimony, he then, being of full age, did leave Iowa with the *bona fide* intention of abandoning his citizenship in that State and gaining another in Illinois. He has never gone back to Iowa to reside. He was of age, and had the right to abandon one residence and take up another. He took a room in Chicago, and remained there three weeks. Before this was done, the manager of the school in Janesville, where he was being taught, had engaged employment for him in Chicago, which he was to enter upon as soon as he had finished his education. After his suit was brought he went from Chicago to the school in Janesville, with the intention, as he says, of returning when he had got through with his education. He did go back on the 13th of March, 1884, took up the work for which he had been engaged, and remained there all the time doing that work until he was sworn at the trial of the issue on the plea to the jurisdiction in this case. He was examined fully by counsel for both parties. Some things which he testified to had a tendency to prove that he did not, in good faith, go to Chicago with the intention, at that time, of abandoning his citizenship in Iowa and acquiring another in Illinois.

In the course of the trial, also, Ohle offered in evidence an affidavit, filed in the case on behalf of the company, for the purpose of requiring him to give security for costs because he was a non resident of Iowa. That affidavit was as follows:

"I, H. G. Burt, being first duly sworn, on oath say: That I am the superintendent of the Iowa Division of the Chicago & Northwestern Railway Company, which includes the main line from Clinton, Iowa, to Council Bluffs, Iowa, together with several branches; that I am acquainted with the facts in regard to the injury of Gus. B. Ohle, for which the above suit is brought, and that the defendant has a good defence to the entire claim made by the plaintiff in said cause, and that the plaintiff is a non-resident of the State of Iowa, as he claims in his petition in this case, and as I believe."

To the introduction of this affidavit the railway company objected. This objection was overruled, and an exception taken.

When the evidence was closed the railway company asked the court to charge the jury as follows:

"2. In order to acquire a domicile and citizenship in Illinois the defendant must have gone there in November, 1883, with the intention of remaining there permanently then; it was not enough if his intention was to go on to Janesville and finish his education there and then return to Illinois to remain permanently. If such was not his intention his citizenship in Illinois would only date from the time he in fact went there to stay permanently, which, according to his own testimony, was March 13th, 1884.

"3. It is shown by the uncontroverted testimony of the plaintiff that he was a citizen of Iowa before he went to Janesville for the temporary purpose of acquiring an education in telegraphy; that in November, 1883, when it is claimed he changed his citizenship, he went to Chicago, in the State of Illinois, on his way to Janesville to complete his studies; that he remained in Chicago only temporarily at that time, and did not go to Illinois permanently until March 13th, 1884. Under these circumstances the jury are instructed as a matter of law that plaintiff did not become a citizen of Illinois until the date last named, namely, March 13th, 1884."

These requests were refused, but the court did charge, among other things, in these words:

"12. Now the point that you are to decide, gentlemen, is this: Did the plaintiff, Gus. B. Ohle, at any time leave the State of Iowa for the purpose of taking up, actually and in good faith, his residence and citizenship in Illinois? Now, I use the word residence, meaning this: It would not be sufficient merely to show that he went and resided in the sense of living in Illinois. Residence is evidence of the citizenship. You are ultimately to find whether he became a citizen of Illinois. In deciding that question you have a right to consider what he did in the matter of residence; that is, where he actually lived; the place he occupied, what we ordinarily mean by the term living. Now, it is claimed on the part of Ohle that he went to Chicago in November, 1883; that it was his intent to remove to the State of Illinois, and with the purpose of completing his

education by going through this school at Janesville, and then pursuing his vocation in life in the State of Illinois. Now, if he did in good faith leave the State of Iowa, give up the citizenship here, going to Chicago, Illinois, with the idea of taking up his citizenship there, did actually do that in good faith, although he may at that time have had it in his mind, and he did actually go to Janesville to complete his education, that would not defeat his acquiring his citizenship in the State of Illinois at the time he actually went there in November, provided you find, remember, gentlemen, that he had the intent at that time, *bona fide*, actual intent, of settling in Illinois. Now, you are to determine this under the evidence that has been submitted to you; you are to determine whether, at that time, he then had the honest intent of changing his residence. If he did, and he went over there with that purpose, with that intent, and remained in Chicago for whatever time the evidence shows, some two or three weeks, it is for you to determine the question as to that. If that was his object and intent it would justify you in finding that he had acquired a citizenship there. The fact that he then went to Janesville to complete his education would no more defeat his citizenship in Illinois than it would defeat his citizenship in Iowa if he had still retained that citizenship.

"It then remains for you to determine the object and intent that he then had.

"13. Now, it is contended on the part of the defendant that he did not acquire citizenship in Chicago until he went there in March, 1884, after he had completed his schooling in Janesville. Now, if he did not, if that was the first time that he actually went to Chicago with the intent to remain there and take up his citizenship and his residence there, why then you would have to find that that was the time that he lost his citizenship in Iowa and acquired it in Illinois. Therefore, as I say, the question is what was his intent. By way of illustration, if when he went to the city of Chicago in November, 1883, his object and purpose were simply to go through Chicago to Janesville to complete his education, with the intention some time in the future, after he had completed his education, of going

back to Illinois, then he would not acquire his citizenship until he actually went there; but if, when he went in 1883, he went with the intention of actually changing his residence and acquiring a citizenship in Chicago, Illinois, then, if you find that to be the fact, you are justified in finding that at the time he changed his citizenship within the meaning of the questions involved in this case."

The company in due time excepted to the last paragraph in the charge beginning with the words "By way of illustration" and continuing until the end, and to the refusals to charge as requested.

The jury found that Ohle was a citizen of Illinois when the suit was begun, and the court thereupon remanded the cause. This writ of error was brought to reverse an order to that effect, and the errors assigned are:

1. That the court erred in refusing to charge as requested;

2. That it erred in that part of the charge as given which was excepted to; and

3. That it erred in admitting the affidavit objected to in evidence.

The charge as given covered the requests that were made. It stated clearly to the jury what was necessary in order to make a change of citizenship, and we are unable to find anything wrong in the rules which were laid down. The jury were told as distinctly as it could be expressed in words that Ohle did not gain a citizenship in Illinois when he went there on the 6th of November, unless he did in good faith leave Iowa, and giving up his residence there go to Illinois, and actually and in good faith take up his permanent residence in that State at that time. Clearly this covers the whole case, and as the jury found that he had gained his citizenship in Illinois when the suit was begun, the error, if any, was with the jury in its verdict on the evidence and not with the court in its charge on the law. There is nothing in the requests to charge that is not in the charge as given, except those parts of the requests which imply a state of facts different from what the jury must have found. There was certainly some evidence that when Ohle went to Chicago on the 6th of November he intended to take

up his home there at that time and actually did so. Such being the case, it was not error to refuse to charge the jury that this was not the fact. It is not for us to decide that the jury brought in a wrong verdict under a correct charge if the record shows, as it does, that there was some evidence to support the finding which was made.

We see no error in the admission of the affidavit in evidence. The affidavit having been filed in the cause by the company as a ground for obtaining an order of the court in its favor, was competent evidence against it on the trial of another issue; and the fact that it was sworn on information and belief affected only its weight and not its competency. *Pope* v. *Allis*, 115 U. S. 363.

After the verdict the court had nothing to do but to remand the suit; its order to that effect is consequently

Affirmed.

TENNESSEE *v.* WHITWORTH.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Argued January 22, 1886.—Decided March 1, 1886.

A State statute incorporating a railroad company, which provides that the capital stock of the company shall be forever exempt from taxation and that the road with all its fixtures and appurtenances shall be exempt from taxation for the period of twenty years and no longer, exempts the road its fixtures and appurtenances from taxation only for the term named in the act; but forever exempts shares in the capital stock of the company, in the hands of the various holders, from taxation in the State.

When two railroad corporations, whose shares are by a State statute exempt from taxation in the State, consolidate themselves into a new company under a State law which makes no provision to the contrary, and issue shares in the new company in exchange for shares in the old company, the right of exemption from taxation in the State passes into the new shares and into each of them.

This was a suit in mandamus brought by the State of Tennessee, in the Circuit Court of Davidson County, against

George K. Whitworth, the trustee and tax collector of that county, to require him to assess for taxation the shares of stock in the Nashville, Chattanooga and St. Louis Railroad Company. After the suit had been begun in the State court it was removed by Whitworth to the Circuit Court of the United States for the Middle District of Tennessee, under the act of March 3, 1875, ch. 137, 18 Stat. 470, on the ground that the suit was one arising under the Constitution of the United States.

The case was as follows: The Nashville and Chattanooga Railroad Company, now, by consolidation with the Nashville and Northwestern Railroad Company and a change of name, the Nashville Chattanooga and St. Louis Railroad Company, was incorporated by the Legislature of Tennessee, December 11, 1845, to build and operate a railroad. Section 38 of its charter was in these words:

"SEC. 38. The capital stock of said company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer."

The act incorporating the Nashville and Northwestern Railroad Company contained a provision identical with this.

The question was whether this provision had the effect of a contract by the State for the exemption from taxation in Tennessee of the shares of the capital stock of the corporation. The capital stock was by the charter divided into shares of $25 each, to be subscribed for on books opened for that purpose. It was also provided that, as soon as the requisite number of shares had been subscribed, "the Nashville and Chattanooga Railroad Company shall be regarded as formed," and "the said subscribers to the stock shall form a body politic and corporate in deed and in law by the name and for the purpose" specified. Fifty cents on each share was to be paid in money at the time of subscribing.

Sections Nine, Twelve, Fifteen, Sixteen, and Seventeen were as follows:

Statement of Facts.

"SEC. 9. As soon as the number of forty thousand shares shall have been subscribed, it shall be the duty of the commissioners appointed to declare the same, to appoint a time for the stockholders to meet in Nashville, and give notice thereof by publication in some of the newspapers of Nashville, at which time and place the said stockholders, in person or by proxy, shall proceed to elect the directors of the company, and to enact all such regulations, rules, and by-laws as may be necessary for the government of the corporation and the transaction of its business. The persons elected directors at this meeting shall serve for such period, not exceeding one year, as the stockholders may direct; and at this meeting the stockholders shall fix on the day and place or places where the subsequent elections of directors shall be held; and such elections shall thenceforth be annually made. But if the day of annual election should pass without any election of directors, the corporation shall not be thereby dissolved, but it shall be lawful on any other day to hold and make such election in such manner as may be prescribed by a by-law of the corporation."

"SEC. 12. The board of directors shall not exceed, in their contracts, the amount of the capital of the corporation, and of the funds which the company may have borrowed and placed at the disposal of the board; and in case they should do so, the president and directors who may be present at the meeting at which such contract or contracts so exceeding the amount aforesaid shall be made, shall be jointly and severally liable for the excesses, both to the contractor or contractors and the corporation: *Provided*, that any one may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be recorded on the minutes of the board, and giving notice thereof to the next general meeting of the stockholders."

"SEC. 15. The board of directors may call for the payment of twenty-four and a half dollars on each share of stock in sums not exceeding two dollars in every thirty days: *Provided*, that twenty days' notice be given of such call in at least one public newspaper of the State in which any of the stockholders may reside; and a failure to pay, or secure to be paid,

according to the rules of the company, any of the instalments so-called, as aforesaid, shall induce a forfeiture of the share or shares on which default shall be so made, and all payments thereon, and the same shall vest in and belong to the company, and may be restored to the owner or owners by the board of directors, if they deem proper, on the payment of all arrears on such shares, and legal interest thereon; or the directors may waive the forfeiture after thirty days' default, and sue the stockholders for the instalments due, at their discretion.

"SEC. 16. The stock of said company may be transferred in such manner and form as may be directed by the by-laws of the said corporation.

"SEC. 17. The said company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with everything necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works; and the manner in which the same shall be done in either case shall be prescribed by the stockholders at a general meeting; and any State, or any citizen, corporation or company of this or any other State or country, may subscribe for and hold stock in said company, with all the rights and subject to all the liabilities of any other stockholder."

On the 21st of January, 1848, but before the corporation was organized by the election of directors, the charter was amended as follows:

"SEC. 3. *Be it enacted*, That the charter of the company be further so amended that the said company be required to estimate and pay semi-annually to the several holders thereof a sum equal to six per cent. per annum on the capital stock of said company actually paid in, to be charged to the cost of construction: *Provided*, a majority of the stockholders at their first regular meeting agree thereto."

The Circuit Court was of opinion that the shares of stock were by the charter exempt from taxation, and gave judgment accordingly. To reverse that judgment this writ of error was brought.

Argument for Plaintiff in Error.

Mr. Samuel Watson, *Mr. J. B. Heiskell* and *Mr. James M. Head* for plaintiff in error.

I. The capital stock of a corporation is a distinct thing from the shares of stock, and owned by different persons. The exemption of one does not necessarily exempt the other from taxation. *Farrington* v. *Tennessee*, 95 U. S. 679; *City of Memphis* v. *Ensley*, 6 Baxter, 553; *Nashville Gaslight Co.* v. *Nashville*, 8 Lea, 406; *Van Allen* v. *Assessors*, 3 Wall. 573; *People* v. *Commissioners*, 4 Wall. 458; *Memphis* v. *Farrington*, 8 Baxter, 539.

II. It was not the intention of the legislature, in granting this charter, that the exemption of the capital stock should embrace the shares of stock.

1. Circumstances surrounding the legislature, at the time the charter was granted, show that it had a clear appreciation of the distinction between capital stock and shares of stock: as (*a*) Act of 1836 taxing stocks—passed nine years before the act incorporating the Nashville & Chattanooga Railroad Company. (*b*) *Union Bank* v. *The State*, 9 Yerger, 490, decided in 1836, declaring distinction between capital stock and shares of stock for taxation purposes. (*c*) Act of 1844 taxing all stock of individual resident stockholders in all the incorporated companies in the State.

2. The contract of exemption was made with the railroad company, and not with the stockholders. The word "company" is used in the charter.

3. The words "capital stock" are not used in the charter as synonomous with "shares" of stock.

4. Nor is there any substantial distinction between "capital stock" and "capital" as used in the charter. *Railroad Co.* v. *Gaines*, 97 U. S. 697; *Memphis & Charleston Railroad Co.* v. *Gaines*, 3 Tenn. Ch. 604, 611; *Chattanooga* v. *Railroad Co.*, 7 Lea, 561.

5. Although the shares of stock and the property of the company be taxed, it yet has a valuable privilege left in the exemption of the capital stock. *Louisville & Nashville Railroad Co.* v. *State*, 8 Heiskell, 663, 795; *State Railroad Tax Cases*, 92 U. S. 603; *Farrington* v. *Tennessee*, 95 U. S. 679. The

legislature may tax capital stock, as such, separately. Such a tax would be, not a property tax, but in the nature of a privilege tax. *Delaware Railroad Tax Cases*, 18 Wall. 206. *Bank of Commerce* v. *New York City*, 2 Black, 620, 628; *People* v. *Home Insurance Co.*, 92 N. Y. 328.

6. No reliance can be placed by defendant upon contemporaneous construction, because the stock has never been taxed. Mere nonuser of the taxing power by the State does not destroy the power, or form any reason for not exercising it. *Chicago, Burlington & Quincy Railroad Co.* v. *Iowa*, 94 U. S. 155.

III. The State has the power to tax the stock of nonresident stockholders.

1. Act of February 4, 1848, taxing stock owned by nonresident stockholders; passed before any subscriptions had been made by nonresidents. (*a*) Changed by implication. Code, section 541; subsections 7, 9, 10. (*b*) Changed back to taxation of stock of nonresidents, Acts of March 7, 1869, March 25, 1873, and now the law of the State.

2. Legislature may fix the *situs* of personal property. *Green* v. *Van Buskirk*, 5 Wall. 307, and 7 Wall. 139.

3. Whatever property the State can, through its courts, seize and validly deprive the owner of his title thereto, such property it can subject to taxation. *Cooper* v. *Reynolds*, 10 Wall. 308; *Miller* v. *United States*, 11 Wall. 268.

4. Not only has the legislature the power to change or destroy the legal fiction that movables follow the person, but for purposes of taxation this fiction does not exist. *Hoyt* v. *Commissioners*, 23 N. Y. 224; *People* v. *Smith*, 88 N. Y. 576; *People* v. *Gardner*, 51 Barb. 352; *Catlin* v. *Hull*, 21 Vt. 152; *People* v. *Home Insurance Co.*, 29 Cal. 533; *Maltby* v. *Reading & Columbia Railroad Co.*, 52 Penn. St. 140; *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Railroad Co.* v. *Jackson*, 7 Wall. 262; *Murray* v. *Charleston*, 96 U. S. 432; *Railroad Co.* v. *Collector*, 100 U. S. 595.

5. Stock in a corporation has an actual *situs*, the place where the corporation is located. *Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286; *Muller* v. *Dows*, 94 U. S. 444; *Mayor*,

etc., of Nashville v. *Thomas*, 5 Coldwell, 600, 604; *Bedford* v. *Mayor, etc., of Nashville*, 7 Heiskell, 409, 412; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Tappan* v. *Merchants' Bank*, 19 Wall. 460; *Faxon* v. *McCosh*, 12 Iowa, 527.

Mr. Edward H. East for defendant in error.

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

It is apparent from the charter that the subscribers of shares and those claiming under them were to be the holders of the stock of the corporation, and that the money paid into the treasury upon subscriptions was to be used by the corporation in building and equipping its railroad. In this way the capital of the corporation was to be converted into the railroad and its appurtenances. A tax upon the railroad, therefore, after its completion, is necessarily a tax upon the capital, because, practically, the capital and that into which it has been converted are the same. The railroad of the corporation may be worth more than its capital, but all its capital is in its railroad. Such being the case, the taxation of both railroad and capital would be, so far as the corporation is concerned, double taxation.

In *Railroad Companies* v. *Gaines*, 97 U. S. 697, it was held that a provision in the charter of the Memphis & Charleston Railroad Company, precisely like that now under consideration, did not exempt the railroad of that corporation and its appurtenances from taxation after twenty years from the time of its completion, even though the capital stock of the corporation had all been invested in the railroad, because, taking the whole section together, it was apparent such was not the intention of the legislature. The property was taxable, but the capital stock was exempt.

It is no doubt true that the legislature may make a difference, for the purposes of taxation, between the capital stock of a corporation in the hands of the corporation itself, and the shares of the same capital stock in the hands of the individual stockholders. That has often been done, and the cases are

numerous where the exemption of shares from taxation has been claimed because of a charter exemption of the capital stock. Notably this was the case with the national banks. The capital stock of such banks invested in United States securities is not taxable by the States, but shares of the stock in the hands of the individual stockholders may be taxed without deduction on account of such an investment. This has been held from the beginning. *Van Allen* v. *The Assessors*, 3 Wall. 573; *Bradley* v. *The People*, 4 Wall. 459, 462; *The People* v. *The Commissioners*, 4 Wall. 244; *Lionberger* v. *Rouse*, 9 Wall. 468. The capital stock in the hands of the bank is exempt because invested in securities which are not to be taxed, Rev. Stat. § 3701, but the shares in the hands of the stockholders are, by the very terms of the banking act, put, for the purposes of State taxation, on the same footing as other moneyed capital. Rev. Stat. § 5219. This, it was said, showed the intention of Congress to exempt the bank for what was invested in government securities, but to charge the stockholder. In *Farrington* v. *Tennessee*, 95 U. S. 679, the charter of the Union and Planters' Bank provided that "said company shall pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes," and the question was, whether this exempted the shares in the hands of the stockholders from any further taxation by the State. The court, three Justices dissenting, held that it did, because, as the charter tax was laid on each share subscribed, the further exemption must necessarily have been of the shares in the hands of the holders, although the tax as imposed was payable by the corporation. In all cases of this kind the question is as to the intent of the legislature, the presumption always being against any surrender of the taxing power.

In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a State, when

not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but if they do, it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition.

This brings us to an examination of the present charter to see what the legislature has expressed its intention of doing. "The capital stock of said company" is exempt from taxation. That has been expressly enacted, and the owner or owners of the stock are necessarily relieved from all taxation on this account. The important question is, therefore, who are the owners of the capital stock of this corporation within the meaning of the term "capital stock" as used in this charter, because, in construing statutes which are binding on States as contracts, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. In this respect there is no difference between a contract of a State and a contract of a natural person. If the words employed are capable of more than one meaning, that meaning is to be given them which, taking the whole statute together, it is apparent the parties intended they should have.

Returning to the charter, we find that the "capital stock" is divided into shares. These shares are to be subscribed and paid for, and the money raised in this way constitutes the "capital" of the corporation spoken of in section 12, where it is said, "the board of directors shall not exceed in their contracts the amount of the capital of the corporation," &c., and in section 17, where it is provided "that said company may at any time increase its capital to a sum sufficient to complete the said road." This capital is to be used by the corporation to build and equip its road, and if more capital is needed for

that purpose it may be raised "by opening books for new stock, or by selling such new stock." The manner of doing this may "be prescribed by the stockholders at a general meeting; and any State, or any citizen, corporation or company, . . . may subscribe for and hold stock in the said company, with all the rights and subject to all the liabilities of any other stockholder." Sec. 17. Payments of subscriptions are to be made on each share of stock, and if default is made in a payment when demanded "the share or shares on which default shall be so made and all payments thereon" are forfeited, "and the same shall vest in and belong to the company," but the board of directors may, if they deem proper, restore them to the "owner or owners," "on payment of all arrears on such shares and the legal interest thereon." Sec. 15. So, too, "The Stock of said company may be transferred in such manner and form as may be directed by the by-laws of the corporation," sec. 16; and, under the amending act of 1848, interest was to be paid semi-annually at the rate of six per cent. per annum "to the several holders thereof . . . on the capital stock of said company actually paid."

From this it is clear to us that while the money paid in by the subscribers of the shares of the capital stock of the corporation constituted the capital of the corporation which was to be used in building and equipping the railroad, the stock created by such subscription and payment was to belong to and remain as the property of the several holders of the shares so subscribed and paid for. As was shown in *Railroad Companies* v. *Gaines*, above cited, the words "capital stock of said company," and the words "the road with all its fixtures and appurtenances," were used in the charter to describe different things. The "capital," which upon the payment by the subscribers belonged to the corporation, has been converted into the railroad and its appurtenances, and it had no separate existence as a taxable thing after the road was built and equipped. But the "capital stock," divided into shares, subscribed and paid for by the persons to whom the shares were originally issued, still has, and was by the charter intended to have, an existence separate and distinct from the property into which

the money paid for it has been converted. It can now be bought, sold, and transferred. Its holders and owners are the owners of the corporation. They may meet and elect directors, who are to manage its affairs. The profits of the corporation are to be divided among them in proportion "to the stock each may hold," sec. 30, and upon the dissolution of the corporation they will be entitled to receive in like proportion the proceeds of what remains of the corporate property after all the corporation debts and liabilities are paid or satisfied. In effect the contributions of subscribers of the shares were stocked as the capital of the corporation. The aggregate of the subscriptions made the aggregate of the stock. Each subscriber owned that part of the stock which his shares represented, and the aggregate of the shares represented the aggregate of the stock. It was evidently called the "capital stock of the company," because it was the stock which, when subscribed and paid for, furnished the corporation with the capital to build its road. As capital it belonged to the corporation, but as stock it belonged to the several holders of the shares into which it was divided. The charter exempted the stock from taxation clearly because the property which represented the stock had been put in its place as a taxable thing. The exemption is of the thing called the "capital stock" divided into shares. As the whole thing is exempt, so must necessarily be its several parts or shares.

It follows that the judgment of the Circuit Court was right, and it is consequently

Affirmed.

TENNESSEE *v.* WHITWORTH.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Argued January 22, 1886.—Decided March 1, 1886.

The right to have shares in its capital stock exempt from taxation within the State is conferred upon a railroad corporation by State statutes granting to it "all the rights, powers and privileges" or granting it "all the powers

and privileges," conferred upon another corporation named, if the latter corporation possesses by law such right of exemption : and there is nothing in the provision of Art. XI. Sec. 7 of the Tennessee Constitution of 1834 to change this general rule when applied to a statute of that State.

A State statute enacted that a railroad company should "for its government be entitled to all the powers and privileges, and be subject to all the restrictions and liabilities imposed" upon another railroad company : *Held*, That the words "for its government" implied for its regulation and control.

When two railroad corporations whose shares are by a State statute exempt from taxation within the State, and a third company created under the laws of another State and whose road is in the latter State, consolidate into a new company, and issue shares in the new company in exchange for shares in the old company, the right of exemption from taxation in the first State passes into the new shares and into each of them, unless a law of the first State makes provision to the contrary.

This, like the case between the same parties just decided, *ante* 129, was a suit in mandamus brought by the State of Tennessee to require the trustee and tax collector of Davidson County to assess for taxation the shares of the capital stock of the railroad company, and the only question not already disposed of was, whether the Nashville and Decatur Railroad Company had the same charter contract for the exemption of its capital stock from taxation as the Nashville and Chattanooga Railroad Company. The facts were these :

The Tennessee and Alabama Railroad Company was incorporated by the legislature of Tennessee on the 23d of January, 1852, to build a railroad from Nashville, by the way of Franklin, to the line between Tennessee and Alabama in the direction of Florence, Alabama. This company was granted by its charter "all the rights, powers and privileges," and subjected "to all the liabilities and restrictions conferred and imposed upon the charter of the Nashville and Chattanooga Railroad Company."

The Central Southern Railroad Company was incorporated by the legislature of Tennessee on the 30th of November, 1853, to build a railroad from a point of intersection with the Tennessee and Alabama Railroad at Columbia, by way of Pulaski, to the Alabama State line, in the direction of Athens and Decatur, Alabama, to connect with any railroad that might be

constructed from Decatur to the State line in the direction of Pulaski. This company also was given "all the powers and privileges," and subjected to "all the restrictions and liabilities prescribed in the charter of the Nashville and Chattanooga Railroad Company."

The Tennessee and Alabama Central Railroad Company was incorporated by the legislature of Alabama on the 19th of December, 1853, to build a railroad from Montevideo, Alabama, in a northeasterly direction, through Decatur, to some point on the boundary between Alabama and Tennessee, to connect with a railroad leading through Pulaski to Columbia, Tennessee. This company was by its charter authorized "to unite and consolidate into one road all or such part of the said road with any railroad that may connect with the said Tennessee and Alabama Central Railroad at the Tennessee line."

Each of these corporations completed its railroad in accordance with the requirements of its charter, and on the 19th of April, 1866, the legislature of Tennessee passed another act, Acts of Tenn. 1865–6, pp. 217, 220, §§ 5, 6, 9, and 10 of which are as follows:

"Sec. 5. *Be it further enacted*, That for the purpose of uniting and consolidating the Tennessee and Alabama Railroad Company and the Central Southern Railroad Company into one, the directors of said companies be, and they are hereby, authorized to agree upon the terms thereof, and to adopt all necessary and proper measures, agreements, and obligations to effect the same: *Provided*, said terms of consolidation, when perfected by the directors of said companies, shall be submitted to a vote of the stockholders of said companies, and if assented to by a majority of the stockholders, the same shall be binding upon said companies, and that thereafter, and upon official report thereof to the president of the respective companies and the comptroller of the State, said consolidated and united companies shall be known and styled the "Nashville and Decatur Railroad Company," by which name it shall sue and be sued, and be entitled to all the rights and privileges, and be subject to all the liabilities and restrictions of a body corporate.

"SEC. 6. *Be it further enacted*, That the said Nashville and Decatur Railroad shall, for its government, be entitled to all the rights and privileges, and subject to all the restrictions and liabilities conferred and imposed upon the Nashville and Chattanooga Railroad Company: *Provided*, that no State aid is intended to be extended to said Nashville and Decatur Railroad: *And provided further*, that no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company and the Central Southern Railroad Company."

"SEC. 9. *Be it further enacted*, That the Tennessee and Alabama Railroad and the Central Southern Railroad, thus consolidated, may, through their directors thus elected, be consolidated with the Alabama and Tennessee Central Railroad upon such terms as may be agreed upon between them, and approved by the stockholders of said roads, to be hereafter known as the Nashville and Decatur Railroad, such terms not to be in conflict in anywise with those herein contained, but may be supplementary or in addition thereto: *Provided*, the consolidation herein provided for be approved by act of the legislature of the State of Alabama, heretofore or hereafter passed, and said railroad, thus consolidated, may, by their stockholders, regularly convened, upon thirty days' notice in the newspapers of Nashville and Huntsville, elect directors to serve them for the term of twelve months, and until their successors shall be elected.

"SEC. 10. *Be it further enacted*, That the capital stock of said united companies shall be the aggregate amount of their respective charters, with the addition thereto of —— dollars; and that this act shall take effect from and after its passage."

Under the authority of this act, and of section 22 of the act to incorporate the Tennessee and Alabama Central Company, the three companies were "united and consolidated under the style of the Nashville and Decatur Railroad," upon the terms indicated in the following resolution confirmed at a convention of the stockholders:

"*Resolved*, That under the authority delegated to the executive committee by the respective stockholders of the Ten-

nessee and Alabama, Central Southern, and Tennessee and Alabama Central Railroad Companies, the committee have agreed that the capital stock of each company shall represent the value of its road, and that therefore each of the companies herein mentioned shall surrender to the Nashville and Decatur Railroad Company, all of its rights, franchises, and property; the Nashville and Decatur Railroad Company assuming to pay all debts owing by the several companies, and being hereby especially pledged to protect all persons who have made themselves individually liable for the debts of any of the several companies, and that the stockholders of each company shall be entitled to, and receive credit for, the same amount of stock in the Nashville and Decatur Railroad Company that they own in any of the several companies; these constituting and comprising the whole basis of settlement."

This union was afterwards confirmed and declared valid by the legislatures of Tennessee and Alabama. The capital stock of the Nashville and Decatur Company was the aggregate of the stock of all three of the original companies.

Upon these facts the Circuit Court held that the shares of the capital stock of the Nashville and Decatur Company were exempt from taxation, and gave judgment accordingly. To reverse that judgment this writ of error was brought.

Mr. Samuel Watson, *Mr. James M. Head* and *Mr. S. A. Champion* for plaintiff in error made the points urged on behalf of plaintiff in error in *Tennessee* v. *Whitworth, ante* 129, and the following points in addition:

I. The charter of the Nashville and Decatur Railroad Company confers no exemption from taxation whatever. 1. The Central Southern and the Tennessee and Alabama Railroad Companies acquired no exemption from taxation whatever, for the reason that the grant to them of all the "rights, powers, and privileges" of the Nashville and Chattanooga Railroad Company was not intended to, and did not carry with it any exemption from taxation. (*a*) It has been decided by the Supreme Court of Tennessee that the grant to one company of

the "privileges" of another company does not carry an exemption from taxation. *Wilson* v. *Gaines*, 9 Baxter, 546. (*b*) This decision is not contrary to the decisions of this court on that point. The question has never been definitely raised in any of the cases decided by this court. *Humphrey* v. *Pegues*, 16 Wall. 244; *Tomlinson* v. *Branch*, 15 Wall. 460; *Southwestern Railroad Co.* v. *Georgia*, 92 U. S. 676; *Chesapeake & Ohio Railroad Co.* v. *Virginia*, 94 U. S. 718; *Railroad Co.* v. *Gaines*, 97 U. S. 697; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Railroad Co.* v. *County of Hamblen*, 102 U. S. 273; *Wilson* v. *Gaines*, 103 U. S. 417.

II. The consolidation of the Central Southern and the Tennessee and Alabama Railroad Companies worked a dissolution of those companies, and thereby destroyed whatever exemption from taxation they may have originally possessed. *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Shields* v. *Ohio*, 95 U. S. 319; *Railroad Co.* v. *Maine*, 96 U. S. 499; *St. Louis, &c., Railway Co.* v. *Berry*, 113 U. S. 465.

III. The new company, the Nashville and Decatur Railroad Company, derived all its rights and privileges from the act of April 19, 1866, creating it a corporation. That act declares that the company "for its government be entitled to all the rights and privileges" of the Nashville and Chattanooga Railroad Company. It was not the intention of the legislature to confer upon the new company any exemptions from taxation whatever. The Nashville and Decatur Railroad Company was not incorporated for the purpose of building a new road, but of taking charge of, and operating, a road already constructed and equipped. There could, therefore, have been no motive on the part of the legislature to grant an exemption from taxation to the new company. *Chesapeake & Ohio Railway Co.* v. *Miller*, 114 U. S. 176. The words "for its government" in the Nashville and Decatur Charter are words of limitation, and definitely exclude the idea of exemption from taxation. *Railroad Co.* v. *Gaines*, 97 U. S. 697; *Railroad Co.* v. *Commissioners*, 103 U. S. 1.

Mr. Edward Baxter for defendant in error.

Opinion of the Court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court. After stating the facts as above reported, he continued:

The question whether the capital stock of the Nashville and Decatur Company is entitled to the same exemption as that of the Nashville and Chattanooga Company depends, 1, on whether the grant to the Tennessee and Alabama Company of "all the rights, powers and privileges," and to the Central Southern Company of "all the powers and privileges" of the Nashville and Chattanooga Company, carried with it to the new companies the exemption from taxation provided for in section 38 of the Nashville and Chattanooga charter, and, if it did, 2, whether the Nashville and Decatur Company and its stockholders are entitled to the same exemptions as the original Tennessee corporations and their stockholders had.

As early as 1850, before either the charter of the Tennessee and Alabama Company or that of the Central Southern Company was granted, this court said in *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Maryland*, 10 How. 376, 393, speaking by Mr. Chief Justice Taney, that a statute which authorized the union of two railroad companies, and secured to the united company the "property, rights and privileges which that law, or other laws, conferred on them [the separate companies], or either of them," extended to the united company an exemption from taxation in the charter of one of the uniting companies, and this although it was at the same time said that "the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." This has been expressly reaffirmed in *Tomlinson* v. *Branch*, 15 Wall. 460; *Humphrey* v. *Pegues*, 16 Wall. 244; *Southwestern Railroad* v. *Georgia*, 92 U. S. 676; and the correctness of the decision was recognized in *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665; *Morgan* v. *Louisiana*, 93 U. S. 217; *Railroad Companies* v. *Gaines*, 97 U. S. 697, 711; *Railroad Co.* v. *Georgia*, 98 U. S. 359, 360; *Railroad Co.* v. *Hamblen*, 102 U. S. 273, 277; *Railroad Co.* v. *Commissioners*, 103 U. S. 1, 4; *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville Railroad Co.*

v. *Palmes*, 109 U. S. 244, 253; and *Chesapeake & Ohio Railroad Co.* v. *Miller*, 114 U. S. 176, 185.

From this it is clear that, under the settled rule of decision in this court, the exemption from taxation, which was one of the "rights and privileges" of the Nashville and Chattanooga Company, formed part of the charters of the Tennessee and Alabama Company and the Central Southern Company, unless a different rule is to be applied in Tennessee, because of a supposed limitation on the popular meaning of the words "rights," "powers" and "privileges" when used in statutes, on account of a peculiar provision of the constitution of that State. That constitutional provision is as follows:

"The legislature shall have no power . . . to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law: *Provided, always*, that the legislature shall have power to grant such charters of corporations as they may deem expedient for the public good." Constitution 1834, Art. XI, sec. 7.

In view of this the Supreme Court of Tennessee decided in effect, at its December Term, 1877, in *Wilson* v. *Gaines*, 9 Baxter, 546, that as the State in its constitution used in the same connection all the words "rights," "privileges," "immunities," and "exemptions," each of these words must be given in statutory interpretation a meaning so limited as not to include anything expressed by the others, and that when any one of them is found in a statute the legislature must be conclusively presumed to have used it in this restricted sense. To this we are unable to agree. As has already been seen, the word "privilege," in its ordinary meaning, when used in this connection, includes an exemption from taxation. This court so decided a year before the charter of the Tennessee and Alabama Company was granted, and nearly three years before that of the Central Southern. In fact the Supreme Court of Tennessee does not seem to doubt that such would be its meaning but for the constitution, for in the opinion it is said, "However comprehensive a meaning may have been given the word 'privilege' by

the courts of other States, or by lexicographers, we are constrained to use it in the restricted sense and meaning given it by our laws and the constitution of the State. . . . A legislature acting under this constitution for its powers, and as defining its duties, must be conclusively presumed to have used a word or term of the constitution in the sense and with the meaning given it by that constitution." We see nothing in the constitution which gives to the word "right," or "privilege," or "immunity," or "exemption," any different meaning than that which it has among the people at large. There may be, and probably are, some immunities, and some exemptions, which would not be considered as either rights or privileges in the popular acceptation of those terms. It was to reach such immunities and such exemptions, as it seems to us, that this particular form of expression was used in the constitution, and not to provide that under no circumstances should the word privilege in a statute of Tennessee be held to include a privilege of exemption from taxation. Words in a constitution, as well as words in a statute, are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary. We find no such reasons in this case, and, as an exemption from taxation is a privilege in the popular sense of that term, we feel ourselves compelled to decide that both the Tennessee and Alabama Company and the Central Southern Company were granted such an exemption by their charters, notwithstanding the contrary opinion of the Supreme Court of Tennessee, which, although entitled to great respect, is not binding upon us as authority under the circumstances of this case.

It only remains to consider whether the Nashville and Decatur Company is entitled to the same exemption. When two railroad companies unite or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of those out of which it was created. *Tomlinson* v. *Branch*, 15 Wall. 460; *Branch* v. *Charleston*, 92 U. S. 677, 682; *County of Scotland* v. *Thomas*, 94 U. S. 682, 690; *Railroad Co.* v. *Maine*,

96 U. S. 499, 512; *Green County* v. *Conness*, 109 U. S. 104. From this it follows, that, as the capital stock of both the original Tennessee corporations was exempt from taxation, the capital stock of the united or consolidated company, formed by the simple aggregation of that of the two old ones, is also exempt, unless it has been provided to the contrary. Is there, then, anything in the statute authorizing the union which rebuts this presumption? We think there is not. The language relied on to show the contrary intention is this: "That the said Nashville and Decatur Railroad shall, for its government, be entitled to all the powers and privileges, and be subject to all the restrictions and liabilities, conferred and imposed upon the Nashville and Chattanooga Railroad Company." This is the exact language of the corresponding provision in the charter of the Tennessee and Alabama Company, one of the original companies, save only that the words "for its government" have been added. As we hold that this was sufficient to exempt the capital stock of the original companies from taxation, it follows that the new company is also exempt, unless the added words were intended as a limitation upon the effect of the others.

The rule is imperative that a relinquishment of the taxing power is never to be presumed. *Vicksburg, Shreveport & Pacific Railroad* v. *Dennis*, 116 U. S. 665. Under this rule, it was held in *Railroad Companies* v. *Gaines*, 97 U. S. 711, that the capital stock of the Knoxville and Charleston Railroad Company was not exempt from taxation, although by its charter that company was (p. 702) "invested, for the purpose of making and using said road, with all the powers, rights, and privileges, and subject to all the disabilities and restrictions that have been conferred and imposed upon the Nashville and Chattanooga Railroad Company," because (p. 712) "the grant was not of all the rights and privileges of the Nashville and Chattanooga Company, but of such as were necessary for the purpose of making and using the road, or, in other words, the franchises of the company which do not include immunity from taxation." To the same effect is *Railroad Co.* v. *Commissioners*, 103 U. S. 1, where the Annapolis and Elk Ridge Rail-

road Company was "invested with all the rights and powers necessary for the construction and repair" of its railroad, and for that purpose was to have and use all the powers and privileges, and be subject to all the obligations contained in the enumerated sections of the Baltimore and Ohio charter. This we held "was not a grant of all the powers and privileges of the Baltimore and Ohio Company, . . . but only of such as were necessary to carry into effect the objects for which the new company was incorporated," or, in other words, "such as were necessary to the construction, repair, and use of its railroad," and this did not include the privilege of exemption from taxation.

In all this class of cases the question is one of legislative intent, with a presumption against an intent to grant an exemption from taxation. Here there is no charter of a new corporation with power to build a new railroad. No new taxable property is created. The legislation contemplates nothing more than the making of one railroad corporation out of two old ones, each of which has a completed railroad and the privilege of an exemption of its capital stock from taxation. If nothing at all had been said about the powers and privileges of the new corporation, the presumption would have been that it took all which were possessed by the two original companies at the time of their union. To rebut this presumption it is necessary that a contrary intention should appear. The question is not as to a grant of new powers, but as to the taking away of old ones.

Such being the case, we cannot believe that the phrase "for its government" in the consolidating act was intended as a limitation on the powers and privileges of the new corporation. The natural meaning of the word government in such a connection is regulation and control, and we think it was used in that sense here. In reality it neither adds to nor takes from the force of the other words, and simply implies that the new corporation shall have the same charter rights and privileges, and be subject to the same charter restrictions and liabilities, as the Nashville and Chattanooga Company. Such were the charters of the old companies, and such was intended to be the

charter of the new; no more, no less. As was said in the court below, "the government of the corporation embraces every part of the conduct and business of the company in all its relations to the State, to the general public, to individuals, to its own stockholders," and consequently the grant of powers and privileges for its government was in reality the grant of the powers and privileges of its corporate entity.

The fact that the Tennessee and Alabama Central Company was under the authority of the consolidating statute brought into the consolidated company does not in our opinion alter the case in any material respect. No new taxable property was in fact brought into Tennessee in this way. While it added to the amount of the capital stock of the consolidated company, it was only because of capital actually invested before the consolidation in the Alabama railroad, and, taking the whole statute together, it is apparent to us that the legislature intended to give the new corporation in Tennessee all the powers and privileges, including exemption from taxation, which the old corporations were entitled to. In fact we do not understand it is claimed that the rights of the parties, in respect to the present question, are changed because the two original Tennessee companies, after their union, were consolidated with the Alabama corporation.

We conclude, therefore, that the capital stock of the Nashville and Decatur Company is exempt from taxation in Tennessee, and consequently, for the reasons stated in the other case, that the shares cannot be assessed. The judgment of the court below to that effect is

Affirmed.

VAN BROCKLIN & Another *v.* STATE OF TENNESSEE & Others.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

Submitted November 17, 1885.—Decided March 1, 1886.

Property of the United States is exempt by the Constitution of the United States from taxation under the authority of a State.

Land in a State which, pursuant to acts of Congress for the laying and collecting of direct taxes, is sold, struck off and purchased by the United States for the amount of the tax thereon, and is afterwards sold by the United States for a larger sum, or redeemed by the former owner, is exempt from taxation by the State, while so owned by the United States; and, for nonpayment of taxes assessed by the State during that time, cannot be sold afterwards.

The amended bill in this case was filed in the Chancery Court of Shelby County in the State of Tennessee, by the State and its proper officers and municipalities, against Van Brocklin, Stacy and others, to enforce by sale a lien for State, county and city taxes, assessed for the years from 1864 to 1877 inclusive on lot 21 in block 6, and for the years from 1864 to 1878 inclusive on lots 13 and 14 in block 13, in Fort Pickering, a suburb of the city of Memphis.

Van Brocklin and Stacy answered that at the times of the assessments of these taxes the lands were the property of the United States, and therefore not subject to taxation under State authority.

The case was heard upon pleadings and proofs, by which it appeared to be as follows: In June, 1864, these three lots, then owned by one Glenn, with other lots, were sold by auction and struck off and conveyed to the United States, under the act of Congress of June 7, 1862, ch. 98, § 7, 12 Stat. 423, for nonpayment of direct taxes assessed thereon, with a penalty of fifty per cent. and interest. The amount so bid for lot 21 was $2.75, and the amount bid for lots 13 and 14, together with other lots not now in question, was $14. In or before 1870, Glenn conveyed the three lots to Van Brocklin, who thereupon

took possession of them, and kept possession of lot 21 ever since, and of lots 13 and 14 until March 30, 1877. The United States in 1872 brought actions of ejectment against Van Brocklin, and therein, on March 30, 1877, obtained judgments and writs of possession for the three lots, and were put in possession of lots 13 and 14. The execution of the writ of possession for lot 21 was suspended until February 3, 1878; and meanwhile, in June, 1877, this lot was redeemed by Van Brocklin in the name of Glenn from the sale for taxes, by paying $2.75, the amount of the tax, penalty and interest, and was released by the United States. In May, 1878, lots 13 and 14 were sold by the United States and bought by Stacy for the price of $54, and in July, 1878, were conveyed to him by the United States, under the acts of Congress of June 8, 1872, ch. 337, § 4, 17 Stat. 331, and February 8, 1875, ch. 36, § 26, 18 Stat. 313.

The Chancery Court held that the taxes assessed under authority of the State of Tennessee on lot 21 were valid, and that those assessed on lots 13 and 14 were invalid, and entered a decree accordingly. Both parties appealed to the Supreme Court of Tennessee, which held that all the taxes assessed under the authority of the State were valid, and entered a decree for the sale of the three lots to pay them. Thereupon Van Brocklin and Stacy sued out this writ of error.

The provisions of the Constitution and laws of Tennessee, referred to in the opinion of that court, and in force at the time of the assessment of these taxes, were as follows: By the Constitution of 1870, art. 2, § 28, "All property, real, personal, or mixed, shall be taxed; but the legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational; and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct products of the soil in the hands of the producer and his immediate vendee." By the statutes of 1866–67, ch. 40, and 1867–68, ch. 28, lands of which the exclusive jurisdiction is ceded by the State to the United States for cemeteries, or for public buildings, shall be "exonerated and free from any

taxation or assessment, under the authority of this State, or of any municipality therein," while so used. Compiled Laws of 1871, pp. 92, 245 *& seq.* The statute of 1875, ch. 108, entitled, "An act to define what property is by the Constitution exempt from taxation, and what the legislature under the power conferred upon it does exempt, and what is taxable," enacts that "all property, real, personal, and mixed, shall be assessed and taxed," with certain exceptions, among which are the following: "All property belonging to the United States, or the State of Tennessee." "All property belonging to any county, city or town, and used exclusively for public or corporation purposes." Acts of 1875, p. 177.

Mr. George Gillham and *Mr. W. K. Poston* for plaintiffs in error.

Mr. J. B. Heiskell and *Mr. Lee Thornton* for defendants in error.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

The question presented by this writ of error is whether lands in the State of Tennessee, which, pursuant to acts of Congress for the laying and collecting of direct taxes, are sold, struck off and purchased by the United States for the amount of the tax thereon, and are afterwards sold by the United States for a larger sum, or redeemed by the former owner, are liable to be taxed, under authority of the State, while so owned by the United States.

The judgment of the Supreme Court of Tennessee rests upon the position that these lands, although lawfully purchased by the United States, and owned by the United States at the time of being taxed under the laws of the State, were not exempt from State taxation, because they had not been expressly ceded by the State to the United States.

We are unable to reconcile this position with a just view of the rights and powers conferred upon the national government by the Constitution of the United States. The importance of

the subject, and the consideration due to the opinion of that learned court, make it proper to state somewhat fully the grounds of our conclusion.

In the words of Chief Justice Marshall, "The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the objects of its institution." *United States* v. *Maurice*, 2 Brock. 96, 109. The United States, for instance, as incident to the general right of sovereignty, have the capacity, within the sphere of their constitutional powers, and through the instrumentality of the proper department, to enter into contracts and take bonds, not prohibited by law, and appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any legislative act; and likewise to take mortgages of real estate to secure the payment of debts due to them, notwithstanding Congress has enacted that "no land shall be purchased on account of the United States, except under a law authorizing such purchase." Act of May 1, 1820, ch. 52, § 7, 3 Stat. 568; Rev. Stat. § 3736; *Neilson* v. *Lagow*, 12 How. 98, 107, 108, and cases there cited. So the United States, at the discretion of Congress, may acquire and hold real property in any State, whenever such property is needed for the use of the government in the execution of any of its powers, whether for arsenals, fortifications, light-houses, custom-houses, court-houses, barracks or hospitals, or for any other of the many public purposes for which such property is used; and when the property cannot be acquired by voluntary arrangement with the owners, it may be taken against their will, by the United States, in the exercise of the power of eminent domain, upon making just compensation, with or without a concurrent act of the State in which the land

is situated. *Harris* v. *Elliott*, 10 Pet. 25; *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *Fox*, 94 U. S. 315, 320; *United States* v. *Jones*, 109 U. S. 513; *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645; *Fort Leavenworth Railroad* v. *Lowe*, 114 U. S. 525, 531, 532.

While the power of taxation is one of vital importance, retained by the States, not abridged by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet even this power of a State is subordinate to, and may be controlled by, the Constitution of the United States. That Constitution and the laws made in pursuance thereof are supreme; they control the constitutions and laws of the respective States, and cannot be controlled by them. The people of a State give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the Union are not given by the people of a particular State, but by the people of all the States; and being given by all, for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation

or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.

Such are the outlines, mostly in his own words, of the grounds of the judgment delivered by Chief Justice Marshall in the great case of *McCulloch* v. *Maryland*, in which it was decided that a statute of the State of Maryland, imposing a tax upon the issue of bills by banks, could not constitutionally be applied to a branch of the Bank of the United States within that State. 4 Wheat. 316, 425–431, 436.

In *Osborn* v. *Bank of United States*, 9 Wheat. 738, 859–868, that conclusion was reviewed in a very able argument of counsel, and reaffirmed by the court, and a tax laid by the State of Ohio upon a branch of the Bank of the United States was held to be unconstitutional. See also *Providence Bank* v. *Billings*, 4 Pet. 514, 564. Upon the same grounds, the States have been adjudged to have no power to lay a tax upon stock issued for money borrowed by the United States, or upon property of State banks invested in United States stock. *Weston* v. *City Council of Charleston*, 2 Pet. 449, 467; *Bank of Commerce* v. *New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Banks* v. *Mayor*, 7 Wall. 16.

To guard against any misunderstanding of the scope and effect of the decision in *McCulloch* v. *Maryland*, Chief Justice Marshall added: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State." 4 Wheat. 436. And in *Osborn* v. *Bank of United States*, speaking of contractors with the United States, he said: "It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank." 9 Wheat. 867.

But the only taxes thus spoken of as valid are those upon

property not owned by the United States, but either real estate owned by the bank, or bank stock or other property owned by individuals. Throughout the discussion, both by the counsel and by the court, in *McCulloch* v. *Maryland*, State taxes upon any property of the United States had been treated as not distinguishable in principle from the particular tax whose validity was in controversy. This will be clearly shown by referring to a few passages of the arguments and the opinion.

Not only did each of the counsel for the State of Maryland, Mr. Hopkinson, Mr. Jones, and Mr. Martin, make it a cornerstone of his argument in support of the validity of the tax on the bank, that the property of the United States as such was not exempt from taxation by the State in which it was situated. 4 Wheat. 343, 369, 375. But the opposing counsel frankly accepted the issue.

Mr. Webster, in opening the argument against the validity of the tax, said: "The government of the United States has itself a great pecuniary interest in this corporation. Can the States tax this property? Under the Confederation, when the national government, not having the power of direct legislation, could not protect its own property by its own laws, it was expressly stipulated, that 'no impositions, duties or restrictions should be laid by any State on the property of the United States.' Is it supposed that property of the United States is now subject to the power of the State governments in a greater degree than under the Confederation? If this power of taxation be admitted, what is to be its limit? The United States have, and must have, property locally existing in all the States; and may the States impose on this property, whether real or personal, such taxes as they please?" 4 Wheat. 328.

Mr. Pinkney, in the closing argument on the same side, said: "There is no express provision in the Constitution, which exempts any of the national institutions or property from State taxation. It is only by implication that the army, and navy, and treasure, and judicature of the Union are exempt from State taxation. Yet they are practically exempt; and they must be, or it would be in the power of any one State to destroy their use. Whatever the United States have a right to

do, the individual States have no right to undo." 4 Wheat. 390, 391. "All the property and all the institutions of the United States are, constructively, without the local, territorial jurisdiction of the individual States, in every respect, and for every purpose, including that of taxation." 4 Wheat. 395.

Chief Justice Marshall, in delivering judgment, covered the whole ground by saying: "If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

"Gentlemen say, they do not claim the right to extend State taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it." 4 Wheat. 432.

So in *Weston* v. *City Council of Charleston*, the exemption of the public lands, while owned by the United States, from State taxation was assumed; both in the argument of counsel that a State tax on stock issued by the United States to individuals was equally valid with a tax on lands after they had been sold by the United States to private persons; and in the answer made by Chief Justice Marshall: "The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country, with no exemption from common burthens." 2 Pet. 459, 468.

The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, "to pay the debts and provide for the common

defence and general welfare of the United States." Constitution, art. 1, sect. 8, cl. 1; *Dobbins* v. *Erie County Commissioners*, 16 Pet. 435, 448. The principal reason assigned in *Buchanan* v. *Alexander*, 4 How. 20, for holding that money in the hands of a purser, due to seamen in the navy for wages, could not be attached by their creditors in a State court was, "The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be suspended."

The more thoroughly the proceedings by which the States became members of the Union, either by joining in establishing the Federal Constitution, or by admission under subsequent acts of Congress, are examined, the more strongly they confirm the same view.

In the Articles of Confederation of 1778, it had been expressly stipulated that "no imposition, duties or restriction shall be laid by any State on the property of the United States." And in the articles which the Ordinance of 1787 for the government of the Northwest Territory declared should "be considered as articles of compact between the original States and the people and States in said Territory, and forever remain unalterable, unless by common consent," it had been provided that "no tax shall be imposed on lands the property of the United States." Constitutions and Charters, 8, 432.

The Articles of Confederation ceased to exist upon the adoption of the Federal Constitution; and the Ordinance of 1787, like all acts of Congress for the government of the Territories, had no force in any State after its admission into the Union under that Constitution. *Permoli* v. *First Municipality of New Orleans*, 3 How. 589, 610; *Strader* v. *Graham*, 10 How. 82.

The Constitution creating a more perfect union, and increasing the powers of the national government, expressly authorized the Congress of the United States "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States;" "to exercise exclusive legislation over all places pur-

chased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;" and "to dispose of and make needful rules and regulations respecting the territory or other property belonging to the United States;" and declared, "This Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." No further provision was necessary to secure the lands or other property of the United States from taxation by the States.

Nor was any provision on this subject inserted in the acts of Congress for the admission into the Union of Vermont in 1791; of Kentucky, formed out of part of Virginia, in the same year; of Tennessee, formed out of part of North Carolina, in 1796; of Maine, formed out of part of Massachusetts, in 1820; of Texas, previously a foreign and independent republic, in 1845; or of West Virginia, formed out of part of Virginia, in 1862. Constitutions and Charters, 1875, 646, 1676, 810, 1764, 1992.

The first State formed out of territory not within the jurisdiction of an existing State was Ohio, admitted into the Union in 1802, under an act of Congress containing three propositions, offered by Congress for her acceptance or rejection, and which were accepted by the State, namely, that one section of land should be granted to each township for the use of schools, that certain salt springs should be granted to the State, and that one twentieth part of the net proceeds of lands lying within the State and sold by Congress after June 30, 1802, should be applied to the laying out of public roads: "Provided always, that the three foregoing propositions herein offered are on the conditions that the convention of the said State shall provide, by an ordinance irrevocable without the consent of the United States, that every and each tract of land sold by Congress from and after the thirtieth day of June next shall be and remain exempt from any tax laid by order or under authority of the State, whether for State, county, township, or any other purpose whatever, for the

term of five years from and after the day of sale." Constitutions and Charters, 1454, 1455.

The acts for the admission of Indiana in 1816, and Illinois in 1818, contained similar provisions to those in the act for the admission of Ohio. Constitutions and Charters, 499, 438.

Neither of these three acts contained any stipulation for the exemption of the lands of the United States from State taxation; but each, assuming that exemption as undoubted, and requiring no affirmance, so long as the United States owned the lands, only provided for its continuance for five years after the United States should have sold them, and thereby ceased to have any interest in them.

The statement of Mr. Justice McLean, in a case in the Circuit Court concerning land in Illinois, "In the admission of new States into the Union, compacts were entered into with the Federal Government, that they would not tax the lands of the United States," was therefore, as applied to the case before him, an inadvertence, which impairs the weight of his dictum, based upon it, that "this implies that the States had power to tax such land, if unrestrained by compact." *United States* v. *Railroad Bridge Co.*, 6 McLean, 517, 531–533.

The question in issue in that case was not of the State's right of taxation, but of its right of eminent domain for the construction of roads and bridges. The decision of the learned justice in favor of the validity of the exercise of that right by a State over lands of the United States, without the consent of the United States, manifested either by an express act of Congress, or by the assent of a department or officer vested by law with the power of disposing of lands of the United States, appears to have been based upon the theory that the United States can hold land as a private proprietor, for other than public objects, and upon a presumption of the acquiescence of Congress in the State's exercise of the power as tending to increase the value of the lands; and it finds some support in dicta of Mr. Justice Woodbury, in a case in which, however, the exercise of the power by the State was adjudged to be unlawful. *United States* v. *Chicago*, 7 How. 185, 194, 195. But it can hardly be reconciled with the views expressed by Congress, in acts con-

cerning particular railroads, too numerous to be cited, as well as in general legislation. Acts of August 4, 1852, ch. 80, and March 3, 1855, ch. 200, 10 Stat. 28, 683; July 26, 1866, ch. 262, § 8, 14 Stat. 253; Rev. Stat. § 2477. When that question shall be brought into judgment here, it will require and will receive the careful consideration of the court.

Upon the question of taxation of lands of the United States by the State of Illinois, two well considered opinions of the Supreme Court of that State are worthy of reference in this connection. In one of them, it was held that a lot of land in Chicago, owned by the United States, used by them for a custom-house, post-office and court-house, and which the legislature of the State had consented might be so used, and had ceded jurisdiction over, was not liable to assessment by the municipal authorities, under a statute of the State, for the amount of the benefit to the land from the laying out of a highway; and the court said: "Nor under our system of government can the States tax the general government, its agents or property, nor can the general government tax the States, their agents or property." "A municipal corporation has no power to assess or exact from the State or the general government any sum for benefits conferred. The power to levy taxes or impose assessments for benefits can only be exercised on the governed, and not on the governing power, whether State or Federal." *Fagan* v. *Chicago*, 84 Illinois, 227, 233, 234. In the other case, it was directly adjudged that from the very nature of the relation between the Federal and State governments, and without regard to any supposed compact contained in the Ordinance of 1787, or in any act of Congress, no property lawfully vested in the United States could be taxed by the State, and that therefore land sold, purchased and held by the United States for nonpayment of direct taxes was exempt from State taxation. *People* v. *United States*, 93 Illinois, 30.

In Louisiana, the first territory acquired by the United States from a foreign country, the act of March 26, 1804, establishing a territorial government over it by the name of the Territory of Orleans, provided that the legislative power should be vested in the governor and legislative council, and "shall extend to

all the rightful subjects of legislation; but no law shall be valid which is inconsistent with the Constitution and laws of the United States;" and that "the governor or legislative council shall have no power over the primary disposal of the soil, nor to tax the lands of the United States." Constitutions and Charters, 691.

On April 28, 1806, John Breckenridge, of Kentucky, Attorney General of the United States, gave to Mr. Madison, Secretary of State, a brief and comprehensive opinion, not based upon the restrictions imposed by the territorial act on the legislative council, or upon any considerations peculiar to Louisiana, but upon general principles applicable to all the States and Territories alike, and therefore, and as the earliest legal opinion upon the question, worthy of being quoted in full. It is in these words: "I am of opinion that there rests no power in the city council, nor in any department of the government of Orleans, to tax the property of the United States within that Territory. I believe the exercise of such power has never been before attempted in any part of the United States, and I think the general government ought not to admit the principle. Laying the tax will be harmless, for I see no means by which the payment of it can be enforced." 1 Opinions of Attorneys General, 157.

By the conditions of the acts of 1811 and 1812 under which the State of Louisiana was admitted into the Union, "the people inhabiting the said Territory do agree and declare that they forever disclaim all right or title to the waste or unappropriated lands lying within the said Territory, and that the same shall be and remain at the sole and entire disposition of the United States, and moreover that each and every tract of land sold by Congress shall be and remain exempt from any tax laid by the order or under the authority of the State, whether for State, county, township, parish, or any other purpose whatever, for the term of five years from and after the respective days of the sales thereof," "and that no taxes shall be imposed on lands the property of the United States." Constitutions and Charters, 699, 700, 710.

Upon the admission of every other State into the Union, the

exemption of the lands of the United States from taxation by the State has been declared—sometimes in the form of a condition imposed by Congress, and sometimes in the form of a proviso to a proposition to grant the State certain lands or money, offered for its acceptance or rejection—in phrases somewhat varying, but substantially similar to one another.

In the acts for the admission of Mississippi in 1817, Alabama in 1819, Missouri in 1820, Arkansas in 1836, Michigan in 1837, Iowa in 1845 and 1846, Wisconsin in 1847, Minnesota in 1857, and Oregon in 1859, the words are "no tax shall be imposed on lands the property of the United States," or words of exactly the same meaning. Constitutions and Charters, 1053, 31, 1103, 118, 995, 535, 552, 2027, 1028, 1508. In the acts of 1864 for the admission of Nevada, of 1864 and 1867 for the admission of Nebraska, and of 1875 for the admission of Colorado, the expression is somewhat fuller, "no tax shall be imposed by the State on lands or property therein, belonging to, or which may hereafter be purchased by, the United States." Ib. 1246, 1202, 1213, 218.

Florida was admitted in 1845, upon the express condition that it should never interfere with the primary disposal of the public lands lying within it, "nor levy any tax on the same whilst remaining the property of the United States;" and California in 1850, "upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States." Constitutions and Charters, 332, 208.

In the debate in the Senate in June, 1850, on the act for the admission of California, a motion to amend the act by requiring California before her admission to pass in convention an ordinance providing, among other things, "that she relinquishes all title or claim to tax, dispose of, or in any way to interfere with the primary disposal by the United States of the public domain

within her limits," was opposed by Mr. Douglas and Mr. Webster as unnecessary, and was defeated by a vote of thirty-six to nineteen. In the course of the debate, Mr. Douglas, after showing that the United States acquired title to the public lands, not by virtue of their sovereignty, but by deeds of cession from the old States, or by treaty of cession from France, Spain or Mexico, and referring to the provision of the Constitution authorizing Congress "to dispose of and make all needful rules and regulations concerning the territory or other property of the United States," said: "This provision authorizes the United States to be and become a land owner, and prescribes the mode in which the lands may be disposed of and the title conveyed to the purchaser. Congress is to make the needful rules and regulations upon this subject. The title of the United States can be divested by no other power, by no other means, in no other mode, than that which Congress shall sanction and prescribe. It cannot be done by the action of the people or legislature of a Territory or State." And he supported this conclusion by a review of all the acts of Congress under which States had theretofore been admitted. Mr. Webster said that those precedents demonstrated that "the general idea has been, in the creation of a State, that its admission as a State has no effect at all on the property of the United States lying within its limits;" and that it was settled by the judgment of this court in *Pollard* v. *Hagan*, 3 How. 212, 224, "that the authority of the United States does so far extend as, by force of itself, *proprio vigore*, to exempt the public lands from taxation, when new States are created in the Territory in which the lands lie." Congressional Globe, 31st Cong., 1st sess., vol. 21, p. 1314, vol. 22, pp. 848 *& seq.*, 960, 989, 1004; 5 Webster's Works, 395, 396, 405.

The Supreme Court of the State of California appears at one period to have assumed that the exemption of the lands of the United States from taxation depended upon the terms of the act of Congress admitting the State into the Union, or upon the statutes of the State. *People* v. *Morrison*, 22 California, 73; *People* v. *Shearer*, 30 California, 645. But in later cases it has taken broader ground, and has defined the meaning of

"taxation" as "a charge levied by the sovereign power upon the property of its subject. It is not a charge upon its own property, nor upon property over which it has no dominion. This excludes the property of the State, whether lands, revenues or other property, and the property of the United States." *People* v. *McCreery*, 34 California, 432, 456; *People* v. *Austin*, 47 California, 353, 361.

The recital, in the ordinance prefixed to the Constitution of Kansas, that the State would possess the right to tax the lands owned by the United States within its limits, and the conditional relinquishment of that right, were not assented to by Congress; and Kansas was admitted into the Union in 1861, only upon the passage by its legislature of another ordinance, irrevocable without the consent of Congress, accepting certain propositions, in which it was provided that the State should never interfere with the primary disposal of the soil within the same by the United States, and should never tax the lands of the United States. Constitutions and Charters, 613; Act of Congress of January 29, 1861, ch. 20, § 3, 12 Stat. 127; Joint Resolution of Legislature of Kansas of January 20, 1862, Compiled Laws of Kansas, 1862, p. 84. In 1865 the Supreme Court of the State, discussing and upholding the validity of a State tax upon Indian lands, said: "If the title to the lands be in the United States, they are not taxable. Not only are the lands of the general government exempt from taxation by express stipulation on the part of the State, but without such agreement they would not be liable to be taxed. The irrevocable ordinance of the legislature is merely the expression of what the law would have been without it." *Blue Jacket* v. *Johnson County Commissioners*, 3 Kansas, 299, 348, reversed by this court in 5 Wall. 737, only because even the Indian lands were exempt from taxation. See also *Parker* v. *Winsor*, 5 Kansas, 362, 367, 372. The statutes of the State of Kansas, ever since its admission into the Union, have enumerated, among the property exempt from taxation, all property, real and personal, of the United States. Compiled Laws 1862, ch. 198, § 2; Gen. Stat. 1868, ch. 107, § 3; Stat. 1876, ch. 34, § 3.

The taxation by the State of Kansas, the validity of which

was upheld by the decision of the Supreme Court of that State in *Fort Leavenworth Railroad* v. *Lowe*, 27 Kansas, 749, affirmed by this court in 114 U. S. 525, was not upon property of the United States, but upon property of a railroad corporation in lands situated within the boundaries of the Fort Leavenworth Military Reservation, yet not in that part of the lands occupied or used by the United States for a fort or military post. The civil and criminal jurisdiction over the Reservation had passed to the State upon its admission into the Union, and the cession of exclusive jurisdiction by the subsequent statute of Kansas of 1875, ch. 66, which, because it conferred a benefit, was presumed to have been accepted by the United States, expressly saved "to said State the right to tax railroad, bridge and other corporations, their franchises and property, on said Reservation."

It cannot be doubted that the provisions which speak of the exemption of property of the United States from taxation, in the various acts of Congress admitting States into the Union, are equivalent to each other; and that, like the other provision, which often accompanies them, that the State "shall not interfere with the primary disposal of the soil by the United States," they are but declaratory, and confer no new right or power upon the United States.

In *Gibson* v. *Chouteau*, 13 Wall. 92, 99, Mr. Justice Field, delivering the judgment of this court, said: "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislature can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made."

Upon the admission of a State into the Union, the State

doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high water mark, vest in the State, and not in the United States. *New Orleans* v. *United States*, 10 How. 662, 737; *Pollard* v. *Hagan*, 3 How. 212; *Goodtitle* v. *Kibbe*, 9 How. 471; *Doe* v. *Beebe*, 13 How. 25; *Barney* v. *Keokuk*, 94 U. S. 324. But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other States, or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no State can interfere with this right, or embarrass its exercise. *United States* v. *Gratiot*, 14 Pet. 526; *Pollard* v. *Hagan*, 3 How. 212; *Irvine* v. *Marshall*, 20 How. 558, 563; *Gibson* v. *Chouteau*, above cited.

In *McGoon* v. *Scales*, 9 Wall. 23, part of the public lands in Wisconsin being claimed under a sale for State taxes, this court, speaking by Mr. Justice Miller, said: "The answer to this is, that the land was then owned by the United States, and was not subject to State taxation." 9 Wall. 27. No reference was made to any act of Congress, or compact with the State; but the fact that the land was then owned by the United States was given as the only and conclusive reason why it could not be taxed by the State. So in *Tucker* v. *Ferguson*, 22 Wall. 527, in which it was decided that public lands in Michigan, granted by act of Congress to the State, to be held by the State to aid in the construction of a railroad, could not be taxed by the State, Mr. Justice Swayne, delivering judgment, said: "Upon general principles, she could not tax the lands while the title remained in the United States, nor while she held them as the trustee of the United States,

which, in the view of the law, was the same thing." 22 Wall. 572.

The cases in which it has been held that public lands, granted by the United States to a railroad company, continue to be exempt from State taxation so long as the costs of survey have not been paid and patents have not been issued, stand upon equally broad ground. *Railway Co.* v. *Prescott*, 16 Wall. 603, 608; *Railway Co.* v. *McShane*, 22 Wall. 444, 462; *Northern Pacific Railroad* v. *Traill County*, 115 U. S. 600, 610. And the reason why, after lands have been duly entered at the land office, and everything has been done to entitle the party to a patent, they have by long usage, confirmed by the decisions of this court, been considered, before the patent is actually taken out, as subject to State taxation, is that the United States have nothing but the naked legal title, and the lands are in truth no longer public property, but have become private property. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Deffeback* v. *Hawke*, 115 U. S. 392, 405.

Even in the courts of the several States, the decided and increasing preponderance of authority is in favor of the absolute exemption of all property of the United States from State taxation.

The only instances that have been brought to our notice, in which a State court has countenanced the right of a State to tax any property of the United States, are the judgment now under review; some remarks in *Louisville* v. *Commonwealth*, 1 Duvall, 295, in which the only matter in issue was a tax laid by the State of Kentucky on property of one of its own municipal corporations; a dictum in *People* v. *Shearer*, 30 California, 645, 658; and two cases in the Supreme Court of Pennsylvania, not found in the regular series of its reports, but only in law periodicals, and in a reprint of one of them in a collection of *nisi prius* and other cases. *Commonwealth* v. *Young*, 1 Hall's Journal of Jurisprudence, 47; *S. C.*, Brightly, 302; *Roach* v. *Philadelphia County*, 2 Am. Law Journal (N. S.), 444.

In *Commonwealth* v. *Young*, decided in 1818, a person employed by the President of the United States, with the author-

ity of Congress, to sell by public auction land in Pittsburgh, owned by the United States, was indicted and fined for so selling it, because he had not been licensed as an auctioneer under the statutes of the State. It was found by special verdict that the title to the land under the late proprietary of Pennsylvania was vested in fee simple in the United States; that the United States had erected a fort thereon, which had been used as a barrack, military depot, and place of defence, but had been disused as such a short time before the sale; and that the State had never ceded its jurisdiction over it to the Federal government. By the act of Congress of August 2, 1813, ch. 48, the President had been authorized to cause this land to be sold, and the proceeds of the sale were "appropriated, under the direction of the President, to the erection of arsenals, armories and laboratories." 3 Stat. 75. The ground of the decision, as assigned by the court, was that the United States held this lot as an individual, and therefore "the lot was subject to taxation for State purposes, to the laws directing the mode of alienation, and, in short, every other State regulation that could operate on the property of an individual." 1 Hall's Journal of Jurisprudence, 50; Brightly, 306. Of that decision it is perhaps enough to say that, even if the manner of transferring the property might lawfully be regulated by the State, it does not appear to us to follow that the State might take it by taxation; the decision was made before the judgment of this court in *McCulloch* v. *Maryland;* and the subsequent judgment of the Supreme Court of Pennsylvania in *Commissioners* v. *Dobbins*, 7 Watts, 513, sustaining the validity of a county tax upon the salary of an officer of the United States, was reversed by this court. *Dobbins* v. *Erie County Commissioners*, 16 Pet. 435.

In *Roach* v. *Philadelphia County*, above cited, a tax on the United States mint was held valid, but no opinion is reported.

On the other hand, the necessary exemption of all the property of the United States from State taxation has been recognized by the highest courts of Illinois, California and Kansas, in the cases already cited; and by those of Virginia, Connecticut, Iowa and Wisconsin. *Western Union Telegraph Co.* v.

Richmond, 26 Grattan, 1, 30; *Andrew* v. *Auditor*, 28 Grattan, 115, 124; *West Hartford* v. *Water Commissioners*, 44 Conn. 360, 368; *Chicago, Rock Island & Pacific Railroad* v. *Davenport*, 51 Iowa, 451, 454; *Wisconsin Central Railroad* v. *Taylor County*, 52 Wisconsin, 37, 51, 52.

The legislatures of most of the States have affirmed the same principle, by inserting in their general tax acts an exemption of property belonging to the United States. Such a provision, as has been well observed by the Supreme Court of Connecticut in *West Hartford* v. *Water Commissioners*, above cited, is not the foundation of the exemption, but is inserted only from abundant caution, and because the assessment of taxes is to be made by local officers skilled in the valuation of property, but presumably unlearned in legal distinctions. 44 Conn. 368.

An examination of the existing statutes of the several States (cited in the margin *) shows this result: In at least twenty-

*The express exemption of property of the United States in the general tax acts of each State is as follows:

ALABAMA. "All property belonging to the United States." Code 1876, § 358.

ARKANSAS. "All property, whether real or personal, belonging exclusively to the United States." Digest 1874, § 5055.

CALIFORNIA. "The property of the United States." Political Code 1872, § 3607.

COLORADO. None. Gen. Stat. 1883, § 2815.

CONNECTICUT. "All property belonging to the United States." Gen. Stat. 1875, tit. 12, ch. 1, § 12.

DELAWARE. "Property belonging to the United States." Rev. Stat. 1874, ch. 11, § 1.

FLORIDA. "All property, real and personal, of the United States." Digest 1872, ch. 138, § 4.

GEORGIA. "All property specially exempted by the Constitution of the United States." "All lands, mines and minerals belonging to the United States." Code 1873, § 798. "All public property." Code 1882, § 798.

ILLINOIS. "All unentered government lands, all public buildings or structures of whatever kind, and the contents thereof, and the land on which the same are located, belonging to the United States." Rev. Stat. 1880, ch. 120, § 2.

INDIANA. "The property of the United States." Rev. Stat. 1881, § 6276.

IOWA. "The property of the United States." Code 1873, § 797.

KANSAS. "All property belonging exclusively to the United States." Stat. 1876, ch. 34, § 3.

KENTUCKY. "The property of the United States, used for custom-houses, post-offices, docks, ship-yards, forts, arsenals or barracks." Gen. Stat. 1883, ch. 92, art. 1, § 3.

six States, namely, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, South Carolina, Vermont, Maine, Ohio, Indiana, Michigan, Wisconsin, Iowa, Kansas, Nebraska, Minnesota, Alabama, Mississippi, Louisiana, Arkansas, Texas, Florida, West Virginia, California, Oregon and Nevada, all property of the United States is expressly exempted from taxation. In Rhode Island, New York, Illinois and Missouri, "all

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LOUISIANA. "All lands and lots of ground, with their buildings, improvements and structures thereon, and all other property, belonging to the United States. Rev. Stat. 1870, § 3233.

MAINE. "The property of the United States." Rev. Stat. 1883, ch. 6, § 6.

MARYLAND. "Property belonging to the United States." Rev. Code 1878, art. 11, § 3.

MASSACHUSETTS. "The property of the United States." Pub. Stat. 1882, ch. 11, § 5.

MICHIGAN. "All the property of the United States." Compiled Laws 1871, ch. 21, § 5.

MINNESOTA. "All property, whether real or personal, belonging exclusively to the United States." Stat. 1878. ch. 11, § 5.

MISSISSIPPI. "All property, real or personal, belonging to the United States." Rev. Code 1871, § 1662.

MISSOURI. "Lands and lots, public buildings and structures, with their furniture and equipments, belonging to the United States." Rev. Stat. 1879, § 6659.

NEBRASKA. "The property of the United States." Gen. Stat. 1873, ch. 66, § 1.

NEVADA. "All lands or other property of the United States." Compiled Laws 1873, ch. 98, § 4.

NEW HAMPSHIRE. "The lots of land selected and purchased in this State by the United States for the purpose of erecting light-houses and other public buildings, with the buildings thereon." Gen. Laws 1878, ch. 53, § 2.

NEW JERSEY. "The property and the bonds and other securities of the United States." Rev. Stat. 1877, p. 1151, § 5.

NEW YORK. "1. All property, real or personal, exempted from taxation by the Constitution of this State, or under the Constitution of the United States. 2. All lands belonging to this State, or the United States." Rev. Stat. 1846, pt. 1, ch. 13, tit. 1, § 4.

NORTH CAROLINA. Parcels of land, containing not more than twenty acres each, purchased by the United States from any individual or corporation, and held "for the purpose of erecting thereon light-houses, light-keeper's dwellings, life-saving stations, buoys and coal depots, and buildings connected therewith." Code 1883, §§ 3080, 3082.

OHIO. "All property, whether real or personal, belonging exclusively to the United States." Rev. Stat. 1880, § 2732.

OREGON. "All property, real and personal, of the United States." General Laws 1874, ch. 57, § 4.

lands belonging to the United States" are exempted; and in New York also "all property, real or personal, exempted from taxation under the Constitution of the United States." In Georgia, the phrase is "all public property;" and in Tennessee, "all property belonging to the United States, used exclusively for public purposes." In New Hampshire, North Carolina and Kentucky, the exemption is of certain public buildings and the lands on which they stand. In three States only, namely, Pennsylvania, Virginia and Colorado, is no exemption of property of the United States expressly declared. But it may be remembered that the act of Congress for the admission of Colorado provided in the most sweeping terms that the State should impose no tax on lands or property then belonging to, or thereafter purchased by, the United States. Constitutions and Charters, 1246. And no State court has more strongly stated the absolute exemption of property of the United States from State taxation than the Court of Appeals of Virginia has in a recent case, saying: "It is very clear that the States are prohibited from taxing either the property of the Federal government or the instrumentalities by which its powers are carried into execution. This doctrine is well settled." *Western Union Telegraph Co.* v. *Richmond*, above cited.

General tax acts of a State are never, without the clearest words, held to include its own property, or that of its munici-

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PENNSYLVANIA. None. Stats. 1873, ch. 41; 1874, ch. 94.

RHODE ISLAND. "Lands ceded or belonging to the United States." Pub. Stat. 1882, ch. 41, § 2.

SOUTH CAROLINA. "All property owned exclusively by the United States." Rev. Stat. 1882, § 169.

TENNESSEE. "All property belonging to the United States, used exclusively for public purposes." Stat. 1883, ch. 105, § 2; Code 1884, § 601.

TEXAS. "All property, whether real or personal, belonging exclusively to the United States." Rev. Stat. 1879, art. 4673.

VERMONT. "Real and personal estate owned by the United States." Rev. Laws 1800, § 270.

VIRGINIA. None. Code 1873, ch. 33, § 14.

WEST VIRGINIA. "Property belonging to the United States." Code 1868, ch. 29, § 43.

WISCONSIN. "Property owned exclusively by the United States." Rev. Stat. 1878, § 1038.

pal corporations, although not in terms exempted from taxation. *Buckley* v. *Osburn*, 8 Ohio, 180, 187; *Piper* v. *Singer*, 4 S. & R. 354; *Directors of the Poor* v. *School Directors*, 42 Penn. St. 21; *People* v. *Doe*, 36 California, 220; *Worcester County* v. *Worcester*, 116 Mass. 193; *Trustees of Public Schools* v. *Trenton*, 3 Stew. (N. J.) 618, 667; *Rochester* v. *Rush*, 80 N. Y. 302; *State* v. *Hartford*, 50 Conn. 89. The reasons for this have been well stated in the cases in Massachusetts and New Jersey. Mr. Justice Devens, delivering the opinion of the Supreme Judicial Court of Massachusetts, said: "The property of the Commonwealth is exempt from taxation because, as the sovereign power, it receives the taxation through its officers or through the municipalities it creates, that it may from the means thus furnished discharge the duties and pay the expenses of government. Its property constitutes one of the instrumentalities by which it performs its functions." 116 Mass. 194. And Mr. Justice Depue, delivering the opinion of the Court of Errors of New Jersey, said: "The immunity of the property of the State, and of its political subdivisions, from taxation, does not result from a want of power in the legislature to subject such property to taxation. The State may, if it sees fit, subject its property, and the property owned by its municipal divisions, to taxation, in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the State or its municipalities. Such property is therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it." 3 Stew. (N. J.) 681.

In short, under a republican form of government, the whole property of the State is owned and held by the State for public uses, and is not taxable, unless the State which owns and holds it for those uses clearly enacts that it shall share the burden of taxation with other property within its jurisdiction.

Opinion of the Court.

Whether the property of one of the States of the Union is taxable under the laws of that State depends upon the intention of the State as manifested by those laws. But whether the property of the United States shall be taxed under the laws of a State depends upon the will of its owner, the United States, and no State can tax the property of the United States without their consent.

The only uncertainty in the decisions of this court upon the subject is to be found in two cases, the one argued at December term, 1847, and the other at December term, 1848, and both reargued by order of the court and decided at December term, 1849, by an equal division of the judges, and therefore not reported, but which appear by the records to have been as follows:

The first of those cases was *United States* v. *Portland*, which, as agreed in the statement of facts upon which it was submitted to the decision of the Circuit Court of the United States for the District of Maine, was an action brought by the United States against the City of Portland to recover back the amount of taxes assessed for county and city purposes, in conformity with the statutes of Maine, upon the land, wharf and building owned by the United States in that city. The building had been erected by the United States for a custom-house, and had always been used for that purpose, and no other. The land, building and wharf were within the legislative jurisdiction of the State of Maine, and had always been so, not having been purchased by the United States with the consent of the legislature of the State. The case was heard in the Circuit Court at May term 1845, and was brought to this court upon a certificate of division of opinion between Mr. Justice Story and Judge Ware on several questions of law, the principal one of which was, whether the building, land and wharf, so owned and occupied by the United States, were legally liable to taxation; and this court, being equally divided in opinion on those questions, remanded the case to the Circuit Court for further proceedings. The action therefore failed. The legislature of Maine having meanwhile, by the statute of 1846, ch. 159, § 5, provided that the property of the United States should be exempted from taxation, the question has never been renewed.

The second case was that of *Roach* v. *Philadelphia County*, above mentioned, a suit brought by the county of Philadelphia against the treasurer of the mint of the United States to recover State, county and city taxes, which were found by special verdict to have been assessed, pursuant to the statutes of Pennsylvania, upon a certain marble building and a lot of ground upon which it stood, the property of the United States, and the building having been erected and used by the United States, from the time of its completion, under the Constitution and laws of the United States, as a mint for coining money, regulating the value thereof and of foreign coin, and for fixing the standard of weights and measures, and now used for that purpose. The judgment rendered by the Supreme Court of Pennsylvania on March 31, 1845, holding the building and land to have been subject to the assessment and payment of the taxes, was brought to this court by writ of error, and affirmed by an equal division of opinion.

The division of opinion here in those cases was evidently the reason for the guarded form in which the general doctrine was stated, while those cases were pending, by Mr. Justice Woodbury in *United States* v. *Ames*, 1 Woodb. & Min. 76, 85, and presently afterwards by Mr. Justice Grier in *United States* v. *Weise*, 2 Wall. Jr. 72, and by Mr. Crittenden, as Attorney General, in 5 Opinions of Attorneys General, 316, as well as by Mr. Justice McLean, when, in delivering the judgment of this court upholding the validity of a State law taxing all money or exchange brokers, he said: "The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the Federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government." *Nathan* v. *Louisiana*, 8 How. 73, 82. Somewhat similar language was used by Mr. Justice Clifford in later cases, in which it did not become necessary to define what could properly be considered as "means of the general government." *Society for Savings* v. *Coite*, 6 Wall. 594, 605; *State Tonnage Tax Cases*, 12 Wall. 204, 224; *Ward* v. *Maryland*, 12

Wall. 418, 427; *Transportation Co.* v. *Wheeling*, 99 U. S. 273, 279.

But the two decisions above mentioned, by an equal division of this court, and with no evidence of the reasons which influenced any of the judges, have no weight as authority in any other case; and we have no hesitation in saying that a tax imposed under authority of a State upon a building used as a custom-house or a mint, and the land on which it stands, owned by the United States, cannot be supported, consistently with the principles affirmed in *McCulloch* v. *Maryland*, especially in 4 Wheat. 432, above cited, or with the recent judgments of this court, some of which have been already referred to.

The liability of the property of the Pacific Railroad Companies to State taxation has been upheld, on the distinction stated in *McCulloch* v. *Maryland*, 4 Wheat. 436, and in *Osborn* v. *Bank of United States*, 9 Wheat. 867, already cited, and reasserted in *National Bank* v. *Commonwealth*, 9 Wall. 353, 362, namely, that although the railroad corporations were agents of the United States, the property taxed was not the property of the United States, but the property of the agents, and a State might tax the property of the agents, provided it did not tax the means employed by the national government. *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Railroad Co.* v. *Peniston*, 18 Wall. 5. In *Railroad Co.* v. *Peniston*, Mr. Justice Strong, who delivered the principal opinion, dwelt upon the consideration, that the property taxed was not owned by the United States, as essential to support the validity of the tax. 18 Wall. 32, 34. And Mr. Justice Bradley, in a dissenting opinion in which Mr. Justice Field joined, said: "The States cannot tax the powers, the operations, or the property of the United States, nor the means which it employs to carry its powers into execution." 18 Wall. 41.

The cases in which this court has held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State have a direct and important bearing upon the question before us.

In *Collector* v. *Day*, 11 Wall. 113, it was adjudged that Congress had no power, even by an act taxing all incomes, to levy

a tax upon the salaries of judicial officers of a State, for reasons similar to those on which it had been held in *Dobbins* v. *Erie County Commissioners*, 16 Pet. 435, that a State could not tax the salaries of officers of the United States. Mr. Justice Nelson, in delivering judgment, said: "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States, within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States." 11 Wall. 124.

Applying the same principles, this court, in *United States* v. *Railroad Co.*, 17 Wall. 322, held that a municipal corporation within a State could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States. The revenues thus adjudged to be exempt from federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the State or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of a State, or of a municipal corporation, which is a political division of the State, from federal taxation, equally require the exemption of all the property and income of the national government from State taxation.

The latest utterance of this court upon this subject is in a case decided at the present term, in which Mr. Justice Bradley, delivering the judgment of the whole court, upon a question of the extent of the taxing power of a State, said: "We take it to be a point settled beyond all contradiction or question, that

a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States." *Coe* v. *Errol*, 116 U. S. 517, 524.

The United States acquired the title to all the land now in question under the express authority of acts of Congress, and by proceedings the validity of which is clearly established by a series of decisions of this court. Acts of June 7, 1862, ch. 98, § 7, 12 Stat. 423; June 8, 1872, ch. 337, § 4, 17 Stat. 331, and February 8, 1875, ch. 36, § 26, 18 Stat. 313; *Bennett* v. *Hunter*, 9 Wall. 326; *De Treville* v. *Smalls*, 98 U. S. 517; *Keely* v. *Sanders*, 99 U. S. 441; *United States* v. *Taylor*, 104 U. S. 216; *United States* v. *Lawton*, 110 U. S. 146. The imposition of direct taxes upon the land by those acts of Congress was a lawful exercise of the power conferred by the Constitution to lay and collect taxes. The provisions authorizing the United States to sell the land for nonpayment of the taxes assessed thereon, and to purchase the land for the amount of the taxes if no one would bid a higher price, were necessary and proper means for carrying into effect the power to lay and collect the taxes; and so were the provisions authorizing the United States afterwards to sell the land, to apply the proceeds to the payment of the taxes, and to hold any surplus for the benefit of the former owner. While the United States owned the land struck off to them for the amount of the taxes because no one would pay more for it, and until it was sold by the United States for a greater price, or was redeemed by the former owner, the United States held the entire title as security for the payment of the taxes; and it could not be known how much, if anything, beyond the amount of the taxes the land was worth. To allow land, lawfully held by the United States as security for the payment of taxes assessed by and due to them, to be assessed and sold for State taxes, would tend to create a conflict between the officers of the two governments, to deprive the United States of a title lawfully acquired under express acts of Congress, and to defeat the exercise of the constitutional power to lay and collect taxes, to pay the debts and

provide for the common defence and general welfare of the United States.

The question whether the taxes laid under authority of the State can be collected in this suit depends upon the question whether they were lawfully assessed. But all the assessments were unlawful, because made while the land was owned by the United States. The assessments, being unlawful, created no lien upon the land. Those taxes, therefore, cannot be collected, even since the plaintiffs in error have redeemed or purchased the land from the United States.

Whether the Supreme Court of Tennessee rightly construed the provisions of the Constitution and statutes of the State as not exempting from taxation land belonging to the United States, exclusive jurisdiction over which had not been ceded by the State, is quite immaterial, because, for the reasons and upon the authorities above stated, this court is of opinion that neither the people nor the legislature of Tennessee had power, by constitution or statute, to tax the land in question, so long as the title remained in the United States.

The result is, that the judgment of the Supreme Court of the State of Tennessee must be reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

GRAFFAM & Another *v.* BURGESS.

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

Argued December 3, 1885.—Decided March 1, 1886.

A judicial sale of real estate will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness.

Great inadequacy of price at a judicial sale of real estate requires only slight circumstances of unfairness in the conduct of the party benefited by the sale, to raise a presumption of fraud.

If the inadequacy of price paid for the purchase of real estate at a sale on an

execution be so gross as to shock the conscience, or if in addition to gross inadequacy the purchaser has been guilty of unfairness or has taken any undue advantage, or if the owner of the property or the party interested in it has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, and the party injured will be permitted to redeem the property sold.

Looking at the whole facts in this case the court finds traces of design on the part of plaintiff in error to mislead defendant in error, to lull her into security, and thus prevent her from redeeming her property sold on execution within the period allowed by the Statute of the State; and the court sustains the action of the court below in making a decree allowing redemption of the same after the expiration of that period.

After hearing of the proofs, a bill in equity may be amended so as to put in issue matters in dispute and in proof, but not sufficiently put in issue by the original bill.

This was a bill to redeem from a sale of real estate in Massachusetts under an execution issued from one of the State courts. The suit was commenced after the expiration of the period allowed by the Statutes of that State for redeeming from such a sale. The facts which make the case are stated in the opinion of the court.

Mr. A. A. Ranney for appellants.

Mr. John Lowell for appellee.

Mr. Justice Bradley delivered the opinion of the court.

This was a bill in equity filed on the 10th of July, 1880, by Christine J. Burgess, the appellee, against Peter Graffam, Samuel M. Fairfield, Edward B. Newhall, and others, to compel Graffam to deliver up to her certain lands and premises unlawfully held by him (as alleged), and for other and further relief.

The bill alleged that the complainant had for many years been the owner in fee simple of the premises in question, a house and lot in the town of Melrose, Middlesex County, Massachusetts, unencumbered and worth at least $10,000; that complainant generally occupied the property as a summer residence, and, when not occupying it herself, rented it out to tenants with the furniture therein; and that her general residence was with her husband in Providence, Rhode Island. It

was further alleged that in the fall of 1877 the complainant had some mason work done by Peter Graffam, one of the defendants, the bill for which was $23; that the complainant objected to paying the bill on the ground that the work was badly done; that in January, 1879, Graffam employed Samuel M. Fairfield, an attorney, one of the defendants, to sue the complainant for this bill, by attachment, in the Middlesex District Court, and that on the 10th of March, 1879, he recovered judgment against her for $28.95 damages and $16.15 costs:—That execution was issued on this judgment, and the whole property was sold by the sheriff, at his office in Malden, on the 17th of May, 1879; and that Graffam became the purchaser for $73.10, and the sheriff gave him a deed:—That in January, 1879, Edward B. Newhall, a real estate agent, pretending to have a claim of $30 against the complainant for services, employed Fairfield to sue the same, and an attachment was issued, and judgment recovered on the same 10th of March, 1879, and execution issued and levied on the interest of complainant remaining in the premises after the sale to Graffam:—And that a sale was made of said interest to Newhall on the 13th of August, 1879, for $81.21, and a deed was given to him by the sheriff accordingly. The complainant alleges that neither of these claims was valid against her, and that the parties knew it:—That when the levies and sales were made the complainant had $3000 worth of furniture and personal property in the house entirely unencumbered; and had a well-known agent in the neighborhood, and a tenant in the house until June 1, 1879, after which she occupied it herself until the fall; that she also had an attorney in Massachusetts known to the defendants; but that no notice of such sale was ever communicated to her, her attorney, agent, or tenant:—That in 1880, from and after the 1st of May, the complainant expended $1200 in repairs to the house and grounds:—That Graffam and the other defendants meanwhile conspired together to keep her in ignorance of the sale until the year, allowed by the statutes of Massachusetts for redeeming the property, had expired:—That in pursuance of this scheme Graffam bought out Newhall, who, by his subsequent

purchase, had a right to redeem the property from the sale to Graffam:—That the year for redemption having expired on the 17th of May, 1880, on the 22d of June thereafter, Graffam, Fairfield and others, during the temporary absence of the complainant from the house, seized their opportunity, entered upon the premises, broke into the house, and took possession of it in behalf of Graffam, removed all the funiture and other personal property, including the wearing apparel of complainant, of her husband and servant, took possession of her private correspondence and papers, and the sum of $170 in money, and still held possession of all of said property at the time of filing the bill:—That complainant, on being informed of this proceeding, immediately caused an investigation to be made, and for the first time learned of the sales made under the executions:—That she thereupon entered into negotiation with Graffam to try to get a settlement, and offered to pay him all that the property had been sold for, and such reasonable costs and charges as he had sustained; but that he refused any arrangement unless she would pay him $1100, which he claimed was due him by reason of the large sums he had expended to employ counsel and men to watch and advise him of the complainant's absence, so that he could take possession. The bill states that Graffam still had keepers in possession of the house, who were injuring it by their wanton conduct, and that the complainant was informed that Graffam intended to sell the property, and was soliciting offers for it. An answer under oath was waived. On the 16th of June, 1880, an amendment to the bill was filed, alleging that Graffam, to carry out his fraud, had conveyed the property to one Herbert F. Doble for the nominal consideration of $5000; and stated several circumstances to show that it was not a *bonâ fide* transaction. The deed was dated before the filing of the bill, but it was charged that it was not executed till afterwards, and that the date was a false one. Doble was made a party.

The defendants severally answered, but as the answers were not required to be under oath, it is unnecessary to recite them. The parties went into proofs, and the cause was heard before the court below, which, in January, 1882, announced its opinion,

that the case was one for redemption, but not for entire annulment of proceedings and unconditional surrender of the property on account of fraud; therefore, dismissing the bill against all the defendants except Graffam and Doble, the court gave the complainant leave to amend her bill on payment to the defendants of costs and reasonable counsel fees. The complainant amended her bill accordingly, by adding an offer to pay into court the amount of the two judgments recovered against her by Graffam and Newhall, with interest, and praying for permission to redeem the property, and that Graffam and Doble might be required to account for rents and profits, and to reconvey to her. This amendment was first objected to, and then demurred to, but objections and demurrer being overruled, the defendants filed an answer, setting up that the application to redeem came too late, and that no sufficient offer was made to entitle complainant to redeem; that defendants were entitled to $2000 for expenses, &c. The complainant paid into court the defendants' costs, $215.45, a counsel fee of $150 allowed by the court, and $181.24, the amount of the two judgments and sales under the same, with interest.

Thereupon, the court made a decree, dated April 21, 1882, whereby, after reciting the payment of the money into court by the complainant, and that the defendants, Graffam and Doble, had collected certain rents and made certain payments, and had made charges for services, and for the custody and care of the premises, and that these accounts and items had been submitted directly to the court without reference to a master, and the court having found and declared that the defendants, Graffam and Doble, were sufficiently paid by the rents received by them for all said charges and expenses, it was then decreed as follows, namely, "that the complainant is entitled to redeem the premises without further payments for such redemption; that the said defendants, Graffam and Doble, are entitled to receive the sums already paid into court for their benefit, and to retain the rents received by them; and that the said defendants, Graffam and Doble, make conveyance of the real estate described in the bill to the complainant, free from all encumbrances made or suffered by or through them." It

was also referred to a master to determine the form of conveyance to be made pursuant to the decree, to receive said conveyance, duly executed, and to deliver the same to the complainant, and report proceedings. The master reported the form of a deed, which was approved, and the defendants were ordered to execute it. From this decree the defendants, Graffam and Doble have appealed.

We do not propose to review the evidence in the case in detail. We have carefully examined it and find the principal allegations of the bill to be true, and are convinced that, whilst the complainant was apprised of the suits of Graffam and Newhall instituted against her by attachment, in her absence, in January, 1879, and employed counsel to defend them, yet that she was totally ignorant of the issue of executions on the judgments in those cases, and of the sale of her property under the same and of the legal rights which Graffam acquired, or might acquire, by the lapse of a year's time after the sale. We are satisfied that she was unconscious of the position in which her property stood, and that Graffam knew that she was unconscious of it, and endeavored to keep her so, and took an inequitable advantage of her ignorance to get possession of her property, and to get her in his power. Even if it be true, as the court below supposed, that the evidence was insufficient to make out a case of conspiracy and fraud, that would sustain a decree for unconditional delivery of the property as originally prayed, we think it is abundantly sufficient to justify the decree which the court below did make, allowing the complainant to redeem upon payment of debt, interest, costs, and counsel fees. In our judgment of the case, the defendants ought to be well satisfied with this disposition of the case.

It is a principle of law, as well as of natural justice, that greater consideration and care are due to persons known to be unable to take care of themselves, than to those who are fully able to do so. The driver of a team, seeing a child or a woman, or a person of known feeble intellect, in the street, is bound to exercise greater care and diligence to avoid doing them harm, than would be obligatory if it was a grown and capable man. In dealing with a man, whose rights, without his knowledge,

but which by due diligence he might know, are passing away by lapse of time into another's hands, the latter may, perhaps, justify himself in the eye of the law (though not in conscience) in preserving a wary and crafty silence, so as to put his victim off his guard and bring him into his own power, whilst he would be perfectly inexcusable in taking such advantage of a woman, unskilled in business, and unused to the stratagems which are sometimes resorted to by unscrupulous persons.

In view of this just standard of human action, which a court of equity always recognizes, the conduct of the defendant, Graffam, appears in a very unenviable light.

What is the scheme which has been carried out, and is now sought to be sustained in this court? Nothing more nor less than to get and keep possession of the complainant's property, worth $10,000, to satisfy a paltry claim of less than $200; and this has been accomplished by keeping from her all knowledge of the device, lulling her into security until the year for redemption passed by, having her operations watched and her footsteps dogged, and clandestinely seizing possession in her temporary absence.

It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law.

Considering the amount of the stake to be won, and the overwhelming injury to be inflicted upon an unsuspecting woman, it is difficult to regard with equanimity the proceedings of the defendant as the year of redemption drew to its close, and after it had terminated. The fact is virtually admitted that he kept up a regular corps of spies to watch her movements whilst she was laying out hundreds of dollars in repairs on the property, in order to find a favorable moment, when she was absent, to take possession of her home; and that he seized such a moment, and did take possession, and removed all her furniture and chattels, even to her clothing and private papers, and virtually turned her into the streets. These admitted facts are enough of themselves to show the animus and

intent of the defendant. No man with an honest purpose could have done this, whatever aggravation he may have had relating to the payment of his claim. There were other methods to which he could and would have resorted. A piano or a mirror would probably have satisfied his whole claim.

The pretence that, before striking the blow, he gave the complainant warning, by calling upon her and telling her that he had bought the premises, and that she must settle the case, does not palliate the defendant's conduct, or change its bearing on the case. It was evidently done, not for the purpose of getting his money, or getting an arrangement, but to give a better coloring to his proceedings. We only have his story as to what he said. The instructions of his lawyer were "to ask her for a settlement of the claims which he held, and to tell her that, unless they were paid immediately, he would have to take it out of her property." This is probably what he said; and it was well calculated to mislead the complainant as to her real position and the defendant's intentions and power. She would not understand, from what he said, that her property was in any immediate peril. Why did he not tell her that the property was sold at sheriff's sale, and that the time for redeeming it was about expiring, and that if it expired he could retain the whole property forever? He evidently did not wish it redeemed, for then she would only have had to pay the debts, or the amounts bid. He wanted to get her into his power. He was willing to let her go on and spend some few more hundreds of dollars in repairs. These were certainly all, or mostly, made after the 17th of May. Standing by and seeing her doing this, and letting her go on without informing her of her position and of his rights, considering the character of the respective parties, was itself a fraud.

Mr. Brown, the complainant's counsel, having called upon Fairfield, as Graffam's attorney, after the seizure of the premises, to ascertain what arrangement could be made, testifies that the latter demanded for his client $750, and a full discharge of all liability on account of the removal of the personal property, and that one reason assigned by him for demanding such a large amount was that Graffam had spent a great deal

of his time in watching the property, and should be paid liberally. The witness continued, "I asked him what was the occasion of watching the property. He said they watched the property to see what Mrs. Burgess was doing with it until the year expired, and that since that he had employed men to watch the property in order to ascertain when Mrs. Burgess was away, so that they could get in and take possession. He said that arrangement continued until the 22d of June, when he received a dispatch at his office in Boston stating that Mrs. Burgess was away; that then he took some person with him from Boston, as a keeper, went to Melrose on the next train, and assisted in opening one of the back windows of the house, and went in and took out the property. I said to him, 'what was the need of your watching the property? Did you not understand that before the year had expired from the date of the sale on the execution of Peter Graffam against Mrs. Burgess, Edward B. Newhall, the purchaser of the right of redemption under the subsequent sale on his execution, was bound to come in and redeem from the sale to Peter Graffam or lose his debt?' To which he replied that he understood that very well; that he advised his client, Peter Graffam, to purchase the Newhall title by sheriff's sale, and wait until the expiration of the year from the sale to Newhall before the matter was stirred up, and he added—I give his language almost *verbatim*—'Mr. Brown, we have had trouble enough with this woman, and we never intended that she should redeem this property if we could help it.'" "He repeated that when they went into this matter they intended to clean her out."

Fairfield denies these expressions, it is true; but they are so consonant with what actually took place, that we may suppose that he did not recollect precisely what he did say. Brown says that he caused the conversation to be taken down in short hand as soon as he returned to his own office. It is true that Fairfield's declarations ought not to be used against Graffam, except when made by him in the course of his business as Graffam's attorney. It is in this point of view that they have been noticed.

The testimony of Conant, the complainant's agent, is signifi-

cant in this connection. He was in Melrose when the defendant was removing the personal property. He went to the house to see what was the matter. He knew the teamster, and the man who was loading the wagon. He says: "I asked the cause of all this trouble. I conversed mostly with a black-haired man, who appeared to be the keeper in charge; he told me it was about a mason's bill. I asked him the amount, and also asked him for time to telegraph to Mrs. Burgess, and I would see that the bill was paid within ten minutes. He said, *No, she had had time enough.* This was between eight and nine o'clock at night. I stayed there about an hour."

In any light in which Graffam's conduct may be viewed, it is clear that he did not pursue an open, straightforward course. As we view the proofs, he evidently conceived the design of getting the complainant's property for a mere nominal consideration, or else, of getting her into his power so as to compel her to comply with any exorbitant demands he might choose to make. He knew she was ignorant of the sale, and of the position in which the sale placed her. He stood by and saw her expending large sums of money on the property in total unconsciousness of his proceedings, and of the means of injuring her which he held in his hands. Instead of undeceiving her he gave her a mere perfunctory notice, that if she did not settle the claims which he held he would have to take it out of her property, and pursued just such a course as was calculated to lull instead of exciting any suspicions of the real danger in which she stood, all the time purposing to take possession of the property for his own use as soon as her back was turned, and keeping spies to watch her proceedings, and to find a favorable opportunity of clandestinely slipping into the premises in her absence. If this is not fraud, we should have great difficulty in defining what fraud is.

That the defendant sought to put all possible embarrassments in the way of the redemption of the property, is evinced by the device resorted to of getting an assignment of Newhall's claim. Newhall had purchased all the interest of the complainant remaining in the property after the sale to Graffam, which included the right of redemption. The testimony given on this

subject by Graffam's counsel, Fairfield, indicates the object of this move. "I formed," says he, "an opinion in the premises that Newhall had a right to redeem the Graffam title or claim, and as I was counsel for both, I stated to Newhall that he had the right if he desired it, and told him and Peter Graffam, also, that one had better buy the other out and hold both claims. Newhall was not disposed to do it and Graffam was, so I settled the matter in that way."

Then the pretended sale to Doble, at the time, and under the circumstances it was made, shows a design to place the property beyond the complainant's reach. It is very obvious, from the evidence, that this was a sham sale. Graffam evidently saw that a day of reckoning was coming, and the property must be placed out of his hands. A deed was drawn with the nominal consideration of $5000, first, to N. L. Graffam, one of Peter Graffam's counsel in the case. That was abandoned. The deed was changed by erasing N. L. Graffam's name and inserting Doble's under an arrangement in writing, which writing was called for and promised, but never produced, but we infer from Doble's own testimony that he was to be held harmless. This change was not effected until the 13th of July, 1880, three days after the bill was filed in this case; but the date of the deed is the 6th of July and the date of the acknowledgment (taken before the attorney, Fairfield,) is the 7th of July, which, of course, cannot be the true date, since it is testified that the acknowledgment was not taken until Doble gave his check, which is dated the 13th. Doble testifies that he was to pay $1600 for the property, the consideration in the deed being $5000, and the property worth $10,000. The transaction is marked all over with evidences of fraud and simulation.

Looking at the whole case, the traces of design on the part of Graffam to mislead the complainant, to lull her into security, and thus to prevent her from redeeming the property, are abundantly manifest, and such design must be assumed as an established fact in the case.

It is hardly necessary to cite authorities on a matter the solution of which depends on the application of such obvious principles of equity and justice. As already perceived, we

do not rest our conclusion alone upon the gross inadequacy of the consideration of the sale; but upon that, in connection with the unfair conduct of the defendant in taking advantage of the complainant's ignorance of the sale, and giving her no intelligible notice or intimation of it, or of his intended seizure of the property after the year of redemption had passed, but standing by and seeing her expend large sums of money upon it, even after the year had expired. This, we think, presents a case sufficiently strong to justify the action of the court below, at least to the extent to which it went in making the decree appealed from. A few legal propositions, with a reference to the decisions on which they rest, is all that we deem it necessary to state.

It was formerly the rule in England, in chancery sales, that until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price ten *per centum*. 2 Daniell's Ch. Pr., 1st Ed. 924; 2d Ed. by Perkins, 1465*, 1467*; Sugden on Vendors & Purchasers, 14th Eng. Ed. 114. But Lord Eldon expressed much dissatisfaction with this practice of opening biddings upon a mere offer of an advanced price, as tending to diminish confidence in such sales, to keep bidders from attending, and to diminish the amount realized. *White* v. *Wilson*, 14 Ves. 151; *Williams* v. *Attenborough*, Turner & Russell, 75; *White* v. *Damon*, 7 Ves. 30, 34. Lord Eldon's views were finally adopted in England in The Sale of Land by Auction Act, 1867, 30 and 31 Vict., c. 48, § 7, so that now the highest bidder at a sale by auction of land, under an order of the court, provided he has bid a sum equal to, or higher than, the reserved price (if any), will be declared and allowed the purchaser, unless the court or judge, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land, either opens the biddings, or orders the property to be resold. 1 Sugden on Vendors & Purchasers, 14th Ed. by Perkins, 114, note (a^1).

In this country Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal, that a sale will not be set aside for inadequacy of price, unless

the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed. *Livingston* v. *Byrne*, 11 Johns. 555, 566, [1814]; *Williamson* v. *Dale*, 3 Johns. Ch. 290, 292, [1818]; *Howell* v. *Baker*, 4 Johns. Ch. 118, [1819]; *Tiernan* v. *Wilson*, 6 Johns. Ch. 411, [1822]; *Duncan* v. *Dodd*, 2 Paige, 99, [1830]; *Collier* v. *Whipple*, 13 Wend. 224, 226, [1834]; *Tripp* v. *Cook*, 26 Wend. 143; *Lefevre* v. *Laraway*, 22 Barb. 167, 173; *Seaman* v. *Riggins*, 1 Green's Ch. (2 N. J. Eq.) 214; *Eberhardt* v. *Gilchrist*, 3 Stockt. (11 N. J. Eq.) 167; *Campbell* v. *Gardner*, 3 Stockt. (11 N. J. Eq.) 423; *Marlatt* v. *Warwick*, 3 C. E. Green, (18 N. J. Eq.) 108; *Klœpping* v. *Stellmacker*, 6 C. E. Green, (21 N. J. Eq.) 328; *Wetzler* v. *Schauman*, 9 C. E. Green, (24 N. J. Eq.) 60; *Carson's Sale*, 6 Watts. 140; *Surget* v. *Byers*, Hempst. 715; *Byers* v. *Surget*, 19 How. 303; *Andrews* v. *Scoton*, 2 Bland, 629; *Glenn* v. *Clapp*, 11 G. & J. 1; *House* v. *Walker*, 4 Maryland Ch. 62; *Young* v. *Teague*, 1 Bailey Eq. 13, 14; *White* v. *Floyd*, Speer's Eq. 351; *Hart* v. *Bleeght*, 3 T. B. Mon. 273; *Reed* v. *Carter*, 1 Blackford, 410; *Pierce* v. *Kneeland*, 7 Wisc. 224; *Montague* v. *Dawes*, 14 Allen, 369; *Drinan* v. *Nichols*, 115 Mass. 353.

From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud.

In *Howell* v. *Baker*, *ubi supra*, where the case was a sale by a sheriff, grossly inadequate as to price, and was made on a stormy day, and the attorney was the purchaser, and no one was present but him and the sheriff, Chancellor Kent held the

purchaser as a trustee for both parties, and allowed the debtor to redeem.

In *Klœpping* v. *Stellmacker*, where there was a sheriff's sale for fifty-two dollars, of property worth two thousand dollars, belonging to a party who was ignorant, stupid and perverse, and would not believe that his property would be sold for such a paltry amount, though told that it would be, Chancellor Zabriskie, after conceding that mere inadequacy of price at a sheriff's sale is not sufficient ground to set aside a conveyance, added: "But when such gross inadequacy is combined with fraud or mistake, or any other ground of relief in equity, it will incline the court strongly to afford relief. The sale in this case is a great oppression on the complainants. They are ignorant, stupid, perverse, and poor. They lose by it all their property, and are ill fitted to acquire more. They are such as this court should incline to protect, notwithstanding perverseness." The Chancellor allowed the complainant to redeem the property by paying the purchase price and costs.

Byers v. *Surget*, 19 How. 303, was a case of sheriff's sale at a very grossly inadequate price, and the purchaser was an attorney in the case. Mr. Justice Daniel, delivering the opinion of this court, after giving a history of the transaction, said: "Such is the history of a transaction which the appellant asks of this court to sanction; and it seems pertinent here to inquire, under what system of civil polity, under what code of law or ethics, a transaction like that disclosed by the record in this case, can be excused, or even palliated."

The two cases cited from the Massachusetts Reports, were sales by mortgagees; but the principles on which these cases rest are the same as in those of sale by the sheriff or other officer. In *Drinan* v. *Nichols*, the sale was made in apparent good faith, except that the mortgagee knew that the owner had paid the accruing interest to the former owner who had given the mortgage, and expected that he would pay it over to the mortgagee. But this not being done, the mortgagee made the sale, without giving any notice to the owner. The court, speaking through Judge Endicott, say: "The mortgagee knew that the plaintiff, as administrator of her husband's estate, intending to

protect the interests of his minor children, had actually paid the money through the accustomed channel, and expected it would be paid by Pope to the mortgagee. With such knowledge of the position and expectation of the plaintiffs, a proper execution of the power, and a due regard to the rights and interest of the mortgagor or those having his estate in the premises, required of the mortgagee, when after a reasonable time it became evident that Pope would not pay, that notice should be given to the plaintiff, and a bare compliance with the terms of the power was not sufficient." This case, in its principles, is very analogous to the one now under consideration.

Mr. Kerr, in his treatise on Fraud and Mistake, says: "Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for cancelling the transaction." Kerr on Fraud, Am. Ed. 186. Chancellor Desaussure, in the case of *Butler* v. *Haskell*, 4 Desaussure, 651, 697, on the same subject, says: "I consider the result of the great body of the cases to be, that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct."

It is true these observations, both of Mr. Kerr and Chancellor Desaussure, were made in reference to private sales between parties, and do not strictly apply to judicial sales. But they show that great inadequacy of price is a circumstance which a court of equity will always regard with suspicion, unless it appears by the circumstances of the case, or by evidence, that it is no fault of the buyer.

Some technical objections, however, have been raised. It is said that it was error in the court to allow the amendment to redeem. We see no error in this. The case as set out in the original bill was one either for annulling the sheriff's sale and decreeing an unconditional delivery of the property, or for a

redemption on payment of the amount due. The original prayer was for the former, and for such other and further relief as to the court should seem meet and the nature of the case might require. The prayer might have been in the alternative, either for an unconditional delivery of the property, or, in case the court should not deem that proper, then for leave to redeem. Had there been an offer to pay the debt the prayer for general relief would probably have been sufficient to enable the court to decree a redemption. But as the case made by the bill was full to the purpose of such a decree, except the formal offer, and as the proofs supported the bill to that extent at least, we think the court did perfectly right in allowing the amendment to be made. Lord Redesdale says: "If upon hearing the cause the plaintiff appears entitled to relief, . . . if the addition of parties alone is wanted, an order is usually made for the cause to stand over, with liberty to amend the bill by adding the proper parties; and in some cases where a matter has not been put in issue by bill with sufficient precision, the court has, upon hearing the cause, given the plaintiff liberty to amend the bill for the purpose of making the necessary alteration." Redesdale Eq. Pl. 326; and see *The Tremolo Patent*, 23 Wall. 518, 527. "So the court will sometimes at the hearing permit the prayer of the bill to be amended, so as to make it more consistent with the case made by the plaintiff than the one he has already introduced." 1 Daniell's Ch. Pr., 1st Ed. 474; Ib. 2d Ed. 480; and see *Neale* v. *Neales*, 9 Wall. 1; *Hardin* v. *Boyd*, 113 U. S. 756, 764. So a formal charge of fraud may be added when it is necessary and has been omitted. *Wamburzee* v. *Kennedy*, 4 Desaussure, 474, 480.

It is also objected that, as the bill was originally founded on a charge of fraud, and the fraud was not proved, the bill should have been dismissed. It is true the fraud and conspiracy may not have been proved to the extent and in precisely the aspect in which they were charged in the bill, so as to authorize the specific relief originally prayed for; but we think we have shown that very material fraud was proved, sufficient to justify the court in relieving the complainant against the lapse of time for redeeming her land.

Other objections of a technical character are also raised, but we do not deem it necessary to notice them. Our views of the merits of the case are such that, whilst the complainant has not seen fit to take an appeal, and, therefore, can only ask for an affirmance of the decree, yet that no mere formal objections ought to stand in the way of such affirmance. A decree cannot justly be rendered for the defendants.

The decree of the Circuit Court is *Affirmed.*

Mr. Justice Miller, with whom concurred Mr. Justice Woods, Mr. Justice Matthews, and Mr. Justice Gray, dissenting.

In a great many of the States of the Union a period is allowed of from twelve to fifteen months to redeem real estate from sale under execution, by payment of the amount for which it was sold, and interest on that amount. In nearly all these States this right of redemption attaches in sales made under chancery decrees as well as judgments at law.

In such cases, whether the statute, as in Massachusetts, provides that the conveyance shall be made by the sheriff or other officer immediately after the sale, or, as in many of the western States, only at the end of the time allowed for redemption, the title of the purchaser does not become absolute until that time has expired. In the case before us, it is not denied that the appellant received the sheriff's deed in accordance with the law of the State, and that the appellee failed to redeem within the time allowed.

It is of the utmost importance where this redemption law prevails, that the right thus granted should be strictly exercised according to the statute. For, in addition to the sanctity which the law concedes to judicial sales, founded on well-considered reasons of policy as old as the law itself, the favor of allowing the debtor one year more to save his land, after judgment and sale under execution have fixed his rights, only adds to his obligation to exercise the right thus granted in strict accordance with its terms.

In the case before us the judge who rendered the decree below stated that the conspiracy charged in the bill was not

proved, nor did he rely upon any act of fraud, and for that reason he refused to set aside the sale, but permitted, under a new prayer in the bill, the appellee to redeem on payment of the debt, interest and all costs, including fees of counsel. The counsel of appellee in the brief expressly declines to rely upon an actual fraud on the part of Graffam. In our opinion there is no evidence of such misconduct on his part as afforded any ground, in law or equity, to justify appellee in her failure to redeem from the sale. There is no reason why she did not pay the judgment rendered against her, of which she had full notice. Certainly no obstruction was interposed to her exercise of the right of redemption, and no promise made to induce her to forego it. Yet, after Graffam had acquired a complete legal title under judicial proceedings which were unimpeachable, the court treats the case as if the whole matter was still *in fieri*, and gives further time for redemption.

I do not deem it appropriate to enter into the discussion of the evidence in this case, but I dissent from the judgment and the opinion of the court as leading to evil results, in discrediting judicial sales, and embarrassing the due and just exercise of the right of redemption, by turning it into a question of judicial discretion.

Justices Woods, Matthews and Gray concur in this opinion.

AKERS, Executor *v.* AKERS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Submitted March 1, 1886.—Decided March 8, 1886.

A suit cannot be removed from a State court under the act of March 3, 1875, unless the requisite citizenship for removal existed when the suit was begun, as well as when the application for removal was made.
Gibson v. *Bruce*, 108 U. S. 561 affirmed and applied.

This cause was commenced in a State court of Tennessee in March, 1882. In the following October an order for its re-

moval into the Circuit Court of the United States, founded on a petition of defendant's, which averred, among other things, "that the controversy in said suit is between citizens of different States, and that the petitioner is a citizen of the State of Kentucky," was made. The Circuit Court on the 25th October, 1882, made the following order and judgment.

"The petition for the removal of this case from the State court to this court failing to aver that the parties were citizens of different States at the commencement of this suit, and it further appearing from the admission of said parties that both plaintiff and defendant were citizens of Tennessee at the time said suit was commenced, the court entertains the opinion that it is without jurisdiction, and doth thereupon order and adjudge that the cause be remanded to the Circuit Court of Davidson County, the tribunal from which it came; and it is further considered by the court that the plaintiff have and recover of the defendant his costs incurred in this court, for which execution is awarded; to which judgment of the court the defendant then and there excepted."

The defendant sued out this writ of error to review that judgment. On motion of the defendant in error the cause was advanced under Rule 32, and was then submitted.

Mr. S. Watson for defendant in error.

No appearance for plaintiff in error.

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

The order remanding this cause is affirmed on the authority of *Gibson* v. *Bruce*, 108 U. S. 561, it being admitted that both the plaintiff and the defendant were citizens of Tennessee at the time the suit was brought. *Affirmed.*

JOHNSON *v.* KEITH & Another.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Submitted March 2, 1886.—Decided March 8, 1886.

A judgment of reversal in a State court, accompanied by an order remanding the cause for a retrial, is not a final judgment for the purpose of a writ of error to this court.

Bostwick v. *Brinkerhoff*, 106 U. S. 4, affirmed.

This was a motion to dismiss a writ of error "because the record and mandate of the said Supreme Court of Missouri in this cause, brought up by such writ of error, shows on the face thereof that no final judgment or decree was rendered or made in this cause by said Supreme Court of Missouri; but on the contrary thereof, it appears from such record and mandate, that the judgment and decree of the inferior court, to wit: The said Circuit Court of Lafayette County, Missouri, was, by such Supreme Court of Missouri, reversed; and that this cause was by such Supreme Court of Missouri remanded to the said Circuit Court of Lafayette County, Missouri, for further proceedings to be had therein, in conformity with the opinion of said Supreme Court of Missouri in this cause delivered. Such writ of error was prematurely and improvidently sued out and issued."

Mr. F. M. Cockrell for the motion.

No one opposing.

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

This motion is granted. A judgment of reversal, accompanied by an order remanding the cause for a retrial, is not a final judgment for the purposes of a writ of error to this court. *Houston* v. *Moore*, 3 Wheat. 433; *Bostwick* v. *Brinkerhoff*, 106 U. S. 4, and cases there cited.

Motion granted.

HARWOOD & Another v. DIECKERHOFF & Another.

ORIGINAL MOTION IN A CAUSE PENDING IN THIS COURT.

Argued March 2, 1886.—Decided March 8, 1886.

Jerome v. *McCarter*, 21 Wall. 17, affirmed and applied to this case.
On the authority of that case the court declines to increase the amount of the bond given on appeal in this case, or to require additional securities.

This was a motion, founded upon accompanying affidavits, "to increase the amount of the bond to be given on appeal, and to require additional securities, or in default thereof, that the appeal taken by the above-named appellants to review the decree of the United States Circuit Court for the Fifth Circuit and Northern District of Florida, rendered at the December Term, 1884, that is to say, the 9th day of May, 1885, be dismissed, upon the ground that by reason of the death of N. B. Harwood, one of the appellants, since the date of said decree, the property therein decreed to be sold for the satisfaction of the sums found due to the complainants, has greatly depreciated and is constantly depreciating, and for the want of the care and attention which it had in the lifetime of the said N. B. Harwood, and would now have, but for his death, the security is altogether inadequate; and for such further or other relief or order as may be proper in the premises."

Mr. C. J. Babbitt and *Mr. W. E. Earle* for the motion. *Mr. John J. Walker* was with them on the brief.

Mr. Henry Jackson opposing. *Mr. L. I. Fleming* was with him on the brief.

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

This motion is denied on the authority of *Jerome* v. *McCarter*, 21 Wall. 17. "The circumstances of the case, or of the parties," have not been so changed by the death of N. B. Harwood, one of the appellants, as to make "the security, which,

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at the time it was taken, was 'good and sufficient,'" now insufficient. No personal decree is asked. The sole purpose of the suit is to subject the lands in question to the payment of debts of Harwood, the deceased appellant. The affidavits do not satisfy us that the property is depreciating in value by reason of any neglect of the surviving appellants in its care or management.

Motion denied.

TUA *v.* CARRIERE & Others.

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

Submitted January 4, 1886.—Decided March 1, 1886.

In Louisiana, on the death of one of several members of a firm, the survivors may surrender their own undivided interests in the assets of the firm for the benefit of the creditors of the firm, but cannot surrender the interest of the deceased partner for that purpose; but, when such surviving members make such a surrender, purporting to include both their own interests therein and the interest of the deceased partner, and it is accepted by the court and acted upon in the manner provided by the law of the State, the action of the court therein is a judicial act, which cannot be attacked collaterally by an attaching creditor of the firm, interested in setting aside the proceedings for the purpose of retaining the lien of his attachment.

The insolvent laws of Louisiana were in force before and when the uniform Bankrupt Act of 1867 was enacted by Congress, and revived when that act was repealed.

A State insolvent statute, passed at a time when an act of Congress establishing a uniform system of bankruptcy is in force, is inoperative, so far as in conflict with that act, while the act is in force; but on its repeal, the State statute becomes operative.

The plaintiff in error brought this suit on August 18, 1884, on certain bills of exchange drawn by the firm of A. Carriere & Sons, on which he alleged there was due him the sum of $12,437. His petition stated that A. Carriere & Sons was a commercial firm lately doing business in New Orleans, composed of Antoine Carriere, Emile L. Carriere, and Charles J. Carriere; that Antoine Carriere had departed this life on June

4, 1884, testate, and that Olivier Carriere and Emile L. Carriere had been appointed his executors. The petition alleged as a ground for the issue of a writ of attachment that the defendants had converted, or were about to convert, their property into money or evidence of debt, with intent to place it beyond the reach of their creditors, and prayed that the writ might issue against the property, goods, and effects of the firm of A. Carriere & Sons, and of Emile L. Carriere and Charles J. Carriere; that said firm be cited, and the individual members thereof, Emile L. and Charles J., and Antoine Carriere, through his testamentary executors, Olivier Carriere and Emile L. Carriere, and, after due proceedings, that judgment be rendered in favor of petitioner and against A. Carriere & Sons and the members of said firm *in solido* for the amount due on the bills of exchange, "with lien and privilege on the property attached."

In accordance with the prayer of the petition a writ of attachment was issued, and, as appears by the marshal's return, was levied on certain property and effects already in his custody on other writs of attachment. Afterwards, one James M. Seixas filed his intervention and opposition in the cause, in which he averred that on July 18, 1884, the defendants, A. Carriere & Sons, made a cession of all their property to their creditors in the Civil District Court of the Parish of Orleans, which was accepted by the court for their creditors; that the petitioner was appointed by the court, and on August 21, 1884, was elected by the creditors and qualified as syndic of said insolvent estate, and as such had title and right of possession to the goods seized by the marshal, and that the property was not subject to attachment, and prayed that the attachment might be dissolved. Olivier Carriere, as executor of Antoine Carriere, joined in the petition and intervention of Seixas, and prayed for the dissolution of the attachment.

Emile L. and Charles J. Carriere filed for themselves individually, and for the firm of A. Carriere & Sons, an answer, in which they averred that individually, and in behalf of A. Carriere & Sons, they had, on July 18, 1884, in the Civil District Court of the Parish of Orleans, surrendered all their assets to their creditors, and the surrender had been accepted by the

court, and their creditors, and they prayed that the attachment might be dissolved.

The plaintiff filed an answer to the intervention of Seixas, in which he denied that the latter was the syndic of Carriere & Sons, averred that the property attached was in the hands of the United States Court, and that Seixas never had any control over the same, and had no right to disturb the possession of the United States Court.

Upon the issues thus raised upon the original petition of the plaintiff and the intervention of Seixas, the case was tried by a jury, which returned a verdict for the plaintiff for $12,437.-82, and that the attachment be dissolved.

It appeared from a bill of exceptions taken upon the trial that evidence was given tending to show that the firm of A. Carriere & Sons was composed of Antoine Carriere, Emile Carriere, and Chas. J. Carriere; that Antoine Carriere departed this life on the 4th day of June, 1884, and Olivier Carriere was appointed his testamentary executor, and that Emile L. and Chas. J. Carriere, individually, and as surviving members of A. Carriere & Sons, took, on the 18th day of July, 1884, the benefit of the insolvent law of Louisiana, and filed schedules of their individual assets and liabilities, and of the assets and liabilities of the firm of A. Carriere & Sons; that at the meeting of the creditors J. M. Seixas was appointed and qualified as the syndic of Emile L. and Chas. J. Carriere, individually, and as surviving members of the firm of A. Carriere & Sons; that their creditors refused them a discharge either individually or as surviving members of said firm; that said syndic was appointed prior to the attachment in this case, and that the attachment was levied subsequent to the refusal to discharge the said Emile L. and Chas. J. Carriere; that the attachment was levied on property already in the hands of the marshal by virtue of attachments issued prior to the 18th of July, 1884, and that said prior attachments were dissolved by the court on the day of the trial. Thereupon the court charged the jury that "the cession shown in this case is made by E. L. Carriere and Chas. J. Carriere, individually and as surviving partners of A. Carriere & Sons, and by operation of law carries into the surrender all their individ-

ual property and all the property of the firm, and that the effect of the cession and proceedings thereunder, was to stay and practically dissolve all attachments then issued against the said surrendering partners, and all property surrendered in the State courts by direct operation of State laws, and in the national court by force of section 933 Revised Statutes." The plaintiff excepted to this charge. The court gave effect to the verdict of the jury by rendering judgment in favor of the plaintiff for $12,437.82, and dissolving his attachment. Thereupon the plaintiff sued out a writ of error to bring under review that part of the judgment of the Circuit Court which dissolved his attachment.

Mr. Charles Louque for plaintiff in error.

Mr. Thomas L. Bayne for Seixas, defendant in error.

Mr. Justice Woods delivered the opinion of the court. After stating the case as above reported, he continued:

It is not disputed that if the insolvent law of Louisiana was a valid law, and the surrender made by the surviving partners of the dissolved firm of A. Carriere & Sons was a valid surrender of the effects of the firm, the attachment of the plaintiff was rightfully dissolved. For, under the law of Louisiana the effect of a cession of property by an insolvent person is to dissolve all attachments which have not matured into judgments. Code of Practice, Art. 724; *Hannah* v. *His Creditors*, 12 Mart. 32; *Fisher* v. *Vose*, 3 Rob. (La.) 457; *Collins* v. *Duffy*, 7 La. Ann. 39. And by section 933 of the Revised Statutes of the United States, an attachment of property upon process instituted in any court of the United States is dissolved when any contingency occurs by which, according to the law of the State where the court is held, such attachment would be dissolved upon the process instituted in the courts of said State.

But the plaintiff insists that the partnership of Carriere & Sons having been dissolved on June 4, 1884, by the death of Antoine Carriere, the surviving members of the firm had no

power to surrender the assets of the firm for the benefit of its creditors, and the plaintiff's attachment of said assets was therefore good.

We agree that the attempt of the surviving partners to surrender the share of their deceased partner in the assets of the firm dissolved by his death was not authorized by law, unless by consent of the heirs, or for some other reason not disclosed by this record. For, under the jurisprudence of Louisiana, upon the death of a member of a partnership, the title to his interest in the partnership effects descends to his heir, and does not vest in the survivor. The law of Louisiana on this point is stated and illustrated by the following decisions of the Supreme Court of that State:

In the case of *Simmins* v. *Parker*, 4 Martin N. S. 200, 207, the court said: "We think the power of the surviving partner to alienate the property belonging to" the partnership "ceased with the dissolution; that the heirs of the deceased" partner "became joint owners of the common property, and that the utmost effect that can be given to a transfer" by the surviving partner "is to consider it as disposing of all the right which the vendor had in the thing sold."

In *Shipman* v. *Hickman*, 9 Rob. (La.) 149, it was held that after the death of a member of a partnership the partnership property was owned in common by the representatives of the deceased partner and the surviving partner, and that the interest of the representatives of the deceased could not be disposed of or alienated by the surviving partner.

So in *Notrebe* v. *Kenney*, 6 Rob. (La.) 113, it was said: "Our laws recognize no authority in a surviving partner. He cannot administer the partnership effects until regularly appointed, nor is he then surviving partner, but administrator."

In *Norris* v. *Ogden*, 11 Martin, 455, the court held that the heirs of a commercial partner have a right to participate with the survivor in the liquidation until a partition; if a partner sues for a partnership claim the others may be made parties to secure their rights.

"In commercial partnerships," say the court in *Flower* v.

O'Conner, 7 La. 194, "the survivor, to receive the deceased partner's share and hold it subject to partnership debts, must apply to the probate court, have the portion ascertained and valued, and give security."

In *Shipwith* v. *Lea*, 16 La. Ann. 247, it was held that at the death of a partner his interest in the firm is vested in his heirs-at-law, and the surviving partner can only acquire that interest by transfer or assignment from the heirs. See also *Pickerell* v. *Fisk*, 11 La. Ann. 277; and *McKowen* v. *McGuire*, 15 La. Ann. 637.

But while it must be conceded that the cession made by the surviving members of the interest of Antoine Carriere, the deceased partner, in the assets of the firm, was not authorized, unless for some reason appearing to the court, but not shown by this record, we are of opinion that the validity of the cession cannot be attacked in this collateral way. The cession of the surviving partners carried their own undivided interest in all the partnership effects, and it purported to carry the interest of the deceased partner. The surrender was accepted by the court, which, by the appointment of a syndic, undertook the administration of all the property of the late firm of A. Carriere & Sons. It is not disputed that the court had jurisdiction over the subject-matter and the parties interested. It had jurisdiction, and it was its duty to decide whether the cession of the effects of the partnership was valid and effectual, and what property it conveyed. The fact that the heirs of Antoine Carriere did not join in the cession does not render the orders of the Civil District Court void. The judgment of that court accepting the cession of the property and appointing a syndic could only be reversed in a direct proceeding. This is the well settled law of Louisiana. It has been held by the Supreme Court of that State that the order of a court accepting a cession of goods under the insolvent laws, and the staying of proceedings, is a judgment which demands the exercise of legal discrimination, and which, when granted, can be set aside only by appeal or action in nullity. *State ex rel. Boyd* v. *Green*, 34 La. Ann. 1027. So in *Cloutier* v. *Lemée*, 33 La. Ann. 305, the same court said, "The judgment of the Civil District Court

accepting the cession of the property and appointing a syndic cannot be collaterally attacked."

In *Nimick & Co.* v. *Ingram*, 17 La. Ann. 85, the facts were that Ingram had made in the Fifth District Court a surrender of his property for the benefit of his creditors, among whom were Nimick & Co. The court accepted the cession and stayed all proceedings against his person and property. After these events Nimick & Co. caused an execution to be issued on a judgment which they had recovered against Ingram in the Fourth District Court, and under it seized certain property which they charged was the property of Ingram, and in his possession. Thereupon Ingram took a rule upon Nimick & Co. in the Fifth District Court, where the insolvency proceedings were pending, requiring them to show cause why they should not respect the order of that court suspending proceedings against him, and why all further action upon the execution sued out by Nimick & Co. should not be stayed. The rule was upon trial made absolute, and Nimick & Co. appealed. In the Supreme Court they urged that by their diligence and vigilance they had discovered the property seized by them, which had never been surrendered by the insolvent debtor, and having thus made it available, had the right to appropriate it to the satisfaction of their claim. Upon the case thus stated the court said: "However irregular the proceedings in insolvency may have been, and however fraudulently the debtor may have acted, the plaintiffs could not on that account disregard the decree of the court which stayed all judicial proceedings against the insolvent and his property. They were parties to the proceedings, and were bound to respect them. . . . Any informality in the proceedings when questioned must be by direct action. No creditor will be permitted to disregard and treat as an absolute nullity a judgment accepting a surrender made by his debtor and granting a stay of proceedings. . . . The acceptance for the creditors by the court of the ceded estate vests in them all the rights and property of the insolvent, whether placed on the schedule or not, and the syndic may sue to recover them. But any creditor may show, provided it be contradictorily with the mass of the creditors or

their legal representatives, that any particular object or fund is not embraced in the surrendered estate, but is subject exclusively to his individual claim. And this is the remedy of the plaintiffs if they have any." See also *Haney* v. *Healey*, 14 La. Ann. 424.

This is in accord with the general rule that when property is in the possession of one court for administration it is not liable to be seized by process from another. *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Peoples' Bank* v. *Calhoun*, 102 U. S. 256; *Krippendorf* v. *Hyde*, 110 U. S. 276.

If there was any defect or informality in the surrender, the remedy of the plaintiff was, first, to apply to the court in which the surrender was made to set aside its order accepting the surrender and appointing a syndic. The plaintiff could not seize the property the administration of which the Civil District Court had accepted, as if no surrender thereof had been attempted. *Tyler* v. *Their Creditors*, 9 Rob. (La.) 372; *Harris* v. *Knox*, 10 La. 229.

The property surrendered to and accepted by the Civil District Court included the undivided shares therein of the surviving partners. The cession of their shares was valid. Of this there can be no question. This gave the syndic appointed by that court the right to the possession of the whole. It was impossible for that court to perform its duty in respect of the property surrendered if its possession was disturbed. But the plaintiff, assuming the cession to be void *in toto*, and giving it no effect even as to the shares of the surviving partners who made it, contends that he can attach the entire interest of all the partners, and apply all the proceeds of the property to the payment of his debt to the exclusion of other creditors. His attachment was made with this purpose. It could not be effectual except by actual seizure and detention of the property attached. *Nelson* v. *Simpson*, 9 La. Ann. 311. In this case the property was seized on the attachment after the Civil District Court had accepted the surrender of the entire assets of the dissolved partnership, and after the property was constructively in its possession. We think the writ was improvidently

issued and the levy invalid and ineffectual, and the attachment was properly dissolved, unless, as is next contended by the plaintiff in error, the insolvent law of Louisiana is of no force or effect.

This position is based on the assertion that the insolvent law of Louisiana was passed while the general bankrupt act of the United States was in force, and as the provisions of the two acts were inconsistent, the insolvent law was invalid and void.

The plaintiff in error concedes, as well he may, that, if the insolvent law of Louisiana had been enacted before the passage of the bankrupt act, it would have been valid, and that the effect of the bankrupt act would have been to suspend it only while the bankrupt act remained in force, and on its repeal the insolvent law would have revived. *Ward* v. *Proctor*, 7 Met. (Mass.) 318; *Lothrop* v. *Highland Foundry*, 128 Mass. 120; *Orr* v. *Lisso*, 33 La. Ann. 476. But he asserts that the insolvent law of Louisiana was passed while the bankrupt act of the United States was in force, and was, therefore, invalid and void, and so continued after the repeal of the bankrupt act. We do not agree with either the premises or the conclusion. The Supreme Court of Louisiana, in the case of *Orr* v. *Lisso*, 33 La. Ann. 476, which was decided in April, 1881, held "that the insolvent laws now in force in this State were in existence in 1867, when Congress adopted a uniform system of bankruptcy." And the court added: "The operation and effect of those laws were suspended until September 1st, 1878, when the general bankrupt law was repealed. This repeal vivified the State laws in the meantime dormant." A reference to the statutes of Louisiana shows that the insolvent law was first enacted in 1817 (see acts of the first session of the Third Legislature of Louisiana, begun November 18th, 1816, page 126), it was carried into the revision of 1855 (see Revised Statues of Louisiana of 1856, pp. 251–259), and included in the revision of 1870 (see Revised Statutes of 1870, page 353), and still remains upon the statute book (see Voorhies' Revised Laws of Louisiana, 1884, pp. 279–288). The act as it appears in the revision of 1855 is substantially the same as in Voorhies' Revised Laws of 1884. The circumstance alleged by the plaintiff that in the

revision of 1870 the insolvent law was formally reënacted is entirely immaterial. If those laws had then been enacted for the first time, they would, so far as inconsistent with the bankrupt act, have been inoperative while that act remained in force, but upon its repeal would have come into operation. The enactment of the insolvent law during the life of the bankrupt act would have been merely tantamount to a provision that the former should take effect on the repeal of the latter. It follows that since the repeal of the bankrupt act all the provisions of the insolvent law of Louisiana have been valid and operative.

Although, as appears from what we have said, the charge of the court did not accurately state the effect of the cession by the surviving partners of the assets of the dissolved firm of A. Carriere & Sons, yet it is clear that upon the law and the facts the verdict of the jury was right. The error of the court, therefore, works the plaintiff no injury, and does not require a reversal of the judgment dissolving the attachment. *Brobst* v. *Brock*, 10 Wall. 519; *Phillips Construction Co.* v. *Seymour*, 91 U. S. 646.

Judgment affirmed.

PATCH *v.* WHITE.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued November 12, 1885.—Reargued January 13, 14, 1886.—Decided March 1, 1886.

A latent ambiguity in a will, which may be removed by extrinsic evidence, may arise: (1) Either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description: or (2), when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence; or, if in existence, the person is not the one intended, or the thing does not belong to the testator.

When a careful study of the testator's language, applied to the circumstances by which he was surrounded, discloses an inadvertency or mistake in a description of persons or things in a will, which can be corrected without

Argument for Plaintiff in Error.

adding to the testator's language, and thus making a different will from that left by him, the correction should be made.

A made a will, in which, after saying "and touching [my] worldly estate," "I give, devise and dispose of the same in the following manner," he devised certain specific lots with the buildings thereon, respectively, to each of his near relations, and, amongst others, to his brother H a lot described as "lot numbered 6, in square 403, together with the improvements thereon erected." He then devised to his infant son as follows: "the balance of my real estate, believed to be and to consist in lots numbered six, eight and nine, &c.," describing a number of lots, but not describing lot No. 3, in square 406, hereafter mentioned: *Held*, (1) That the testator intended to dispose of all his real estate, and thought he had done so; (2) That in the devise to H he believed he was giving him one of his own lots; (3) That evidence might properly be received to show that the testator did not, and never did, own lot No. 6, in square 403, which had no improvements thereon; but did own lot No. 3, in square 406, which had a house thereon, occupied by his tenants; and that this raised a latent ambiguity; and that this evidence, taken in connection with the context of the will, was sufficient to show that there was an error in the description, and that the lot really devised was lot No. 3, in square 406.

Ejectment. The question at issue was the construction of a will, the principal parts of which are set forth in the opinion of the court. The case was first argued November 12, 1885. The judgment below was affirmed by a divided court, November 26, 1885. On the 14th December this judgment was set aside, and a reargument was ordered, which was made January 13, 14, 1886, by the same counsel.

Mr. John D. McPherson and *Mr. Calderon Carlisle* for plaintiff in error, cited *Bradley* v. *Packet Co.*, 13 Pet. 89; *Blake* v. *Doherty*, 5 Wheat. 359; *Atkinson* v. *Cummins*, 9 How. 479; *Reed* v. *Insurance Co.*, 95 U. S. 23; *Maryland* v. *Railroad Co.*, 22 Wall. 105; *Doe* v. *Hiscocks*, 5 M. & W. 363; *Finlay* v. *King*, 3 Pet. 346, 376; *Ingles* v. *Trustees*, 3 Pet. 99; *Smith* v. *Bell*, 6 Pet. 68; *Allen* v. *Allen*, 18 How. 385; *King* v. *Ackerman*, 2 Black, 403; *Clarke* v. *Boorman*, 18 Wall. 493; *Blake* v. *Hawkins*, 98 U. S. 315; *Barry* v. *Coombe*, 1 Pet. 639; *Allen* v. *Lyons*, 2 Wash. C. C. 475; *Rivers' Case*, 1 Atk. 410; *Purse* v. *Snaplin*, 1 Atk. 414; *Powell* v. *Biddle*, 2 Dall. 70; *Calvert* v. *Eden*, 2 Harr. & McH. 279, 349; *Doe* v. *Huthwaite*, 3 B. & Ald. 632; *Bradshaw* v. *Thompson*, 2 Y. & Coll. Ch.

295; *Doe* v. *Greening*, 3 M. & S. 171; *Newton* v. *Lucas*, 6 Sim. 54; *Miller* v. *Travers*, 8 Bing. 244; *Doe* v. *Roberts*, 5 B. & Ald. 407; *Merrick* v. *Merrick*, 37 Ohio St. 126; *Cleveland* v. *Spilman*, 25 Ind. 95; *Moreland* v. *Brady*, 8 Oregon, 303; *Selwood* v. *Mildmay*, 3 Ves. 306; *Door* v. *Geary*, 1 Ves. Sr. 255; *Pentecost* v. *Ley*, 2 Jac. & Walk. 207; *Clark* v. *Atkyns*, 90 N. C. 629; *Tucker* v. *Seaman's Aid Society*, 7 Met. (Mass.) 188; *Button* v. *American Tract Society*, 23 Vt. 336; *Trustees* v. *Peaselee*, 15 N. H. 317; *Dowsett* v. *Sweet*, Ambler, 175; *Parsons* v. *Parsons*, 1 Ves. Jr. 266; *Smith* v. *Coney*, 6 Ves. 42; *Garth* v. *Meyrick*, 1 Bro. Ch. 30; *Stockdale* v. *Bushby*, Cooper, 229; *Doe* v. *Danvers*, 7 East, 299; *Hampshire* v. *Pearce*, 2 Ves. Sr. 216; *Bradwin* v. *Harper*, Ambler, 374; *Mosely* v. *Massey*, 8 East, 149; *Ex parte Hornby*, 2 Bradford, 420.

Mr. Walter D. Davidge (*Mr. J. Holdsworth Gordon* was with him) for defendant in error, cited *Berry* v. *Berry*, 1 Harr. & Johns. 417; *Creswell* v. *Lawson*, 7 G. & J. 227; *Ridgley* v. *Bond*, 18 Maryland, 433; *Saylor* v. *Plaine*, 31 Maryland, 158; *Lingan* v. *Carroll*, 2 Harr. & McH. 328; *Allen* v. *Allen*, 18 How. 385; *Finlay* v. *King*, 3 Pet. 346; *Doe* v. *Buckner*, 6 T. R. 610; *Hayden* v. *Stoughton*, 5 Pick. 528; *Miller* v. *Travers*, 8 Bing. 244; *Doe* v. *Hiscocks*, 5 M. & W. 363; *Webber* v. *Stanley*, 16 C. B. N. S. 698; *Weatherhead* v. *Baskerville*, 11 How. 329; *Mackie* v. *Story*, 93 U. S. 589; *Baylis* v. *Attorney General*, 2 Atk. 239; *Ulrich* v. *Littlefield*, 2 Atk. 372; *Taylor* v. *Richardson*, 2 Drewry, 16; *Shore* v. *Wilson*, 9 Cl. & Fin. 355; *Kurtz* v. *Hibner*, 55 Ill. 514; *Bishop* v. *Morgan*, 80 Ill. 357; *Griscom* v. *Evans*, 11 Vroom. (40 N. J. L.) 402; *West* v. *Lawday*, 11 H. L. Cas. 375; *Drew* v. *Drew*, 28 N. H. (8 Foster) 489; *Beall* v. *Holmes*, 6 Harr. & Johns. 206; *Preston* v. *Evans*, 56 Maryland 476; *Hammond* v. *Hammond*, 8 G. & J. 426; *Dougherty* v. *Monett*, 5 G. & J. 459.

Mr. Justice Bradley delivered the opinion of the court.

Ejectment for two undivided thirds of a lot of land in Washington City, known on the plats and ground plan of the city as lot No. 3, square 406, fronting 50 feet on E Street north: plea, not guilty. The plaintiff, John Patch, now plaintiff in

error, claims the lot under Henry Walker, devisee of James Walker. The latter died seized of the lot in 1832, and by his last will, dated in September of that year, devised to Henry Walker as follows, to wit: "I bequeath and give to my dearly-beloved brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected, and appurtenances thereto belonging." The testator did not own lot number 6, in square 403, but did own lot number 3, in square 406, the lot in controversy; and the question in the cause is, whether the parol evidence offered and by the court provisionally received, was sufficient to control the description of the lot so as to make the will apply to lot number 3, in square 406. The judge at the trial held that it was not, and instructed the jury to find a verdict for the defendant. The court in General Term sustained this ruling and rendered judgment for the defendant; and that judgment is brought here by writ of error for review upon the bill of exceptions taken at the trial.

The testator, at the time of making his will, and at his death, had living a wife, Ann Sophia, an infant son, James, a mother, Dorcas Walker, three brothers, John, Lewis, and Henry (the latter being only eleven years old), and three sisters, Margaret Peck, Louisa Ballard, and Sarah McCallion, and no other near relations, and all of these are provided for in his will, if the change of description of the lot given to Henry is admissible; otherwise Henry is unprovided for, except in a residuary bequest of personal property in connection with others. The following are the material clauses of the will. After expressing the ordinary wishes and hopes with regard to the disposal of his body and a future life, the testator adds: "And touching worldly estate, wherewith it has pleased Almighty God to bless me in this life, I give, devise, and dispose of the same in the following manner and form." He then gives and bequeaths to his wife one-third of all his personal estate, forever, and the use of one-third of his real estate for life, remainder to his infant son, James. He then proceeds: "I bequeath and give to my dear and affectionate mother, Dorcas Walker, forever, all of lot numbered seven, in square one hundred and six, as

laid down on the plan of the City of Washington, together with all the improvements thereon erected and appurtenances thereto belonging.

"I bequeath and give to my dearly-beloved brother, John Walker, forever, all of lot numbered six, in square one hundred and six, with the two-story brick house, back building, and all appurtenances thereto belonging.

"I bequeath and give to my dearly-beloved brother, Lewis Walker, forever, lots twenty-three, twenty-four, and twenty-five, in square numbered one hundred and six, together with a two-story brick building, with a basement story back building, and all appurtenances thereto belonging and erected on one or more of said lots.

"I bequeath and give to my dearly-beloved brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging."

Then, after giving to his three sisters, and his infant son, respectively, other specific lots with houses thereon, he proceeds as follows:

"I also bequeath and give to my infant son, James Walker, forever, the balance of my real estate *believed to be and to consist in* lots numbered six, eight, and nine, with a house, part brick and part frame, erected on one of said lots, in square one hundred and sixteen; lots thirty-one, thirty-two, and thirty-three, in square numbered one hundred and forty, and a slaughter-house erected on one of said lots; lots numbered eight and eleven, in square numbered two hundred and fifty; and lot numbered twenty-eight, in square numbered one hundred and seven; and further, I bequeath and give to my infant son, James Walker, one thousand dollars, to be paid out of my personal estate, and applied at the discretion of his guardian hereinafter appointed, for the education of my son, James Walker." He then adds:

"The balance of my personal estate, whatever it may be, I desire shall be equally divided between my mother, Dorcas Walker, my sister, Sarah McCallion, and my brothers, John, Lewis and Henry Walker."

Opinion of the Court.

It is clear from the will itself—

1. That the testator intended to dispose of all his estate.

2. That he believed he had disposed of it all in the clauses prior to the residuary clause, except the specific lots thereby given to his son.

3. That when he gave to his brother, Henry, lot number 6, in square 403, he believed he was giving him one of his own lots. On general principles, he would not have given him a lot which he did not own; and he expressly says, "touching worldly estate, wherewith it has pleased Almighty God to bless *me* in this life, I give, devise, and dispose of *the same* in the *following* manner."

4. That he intended to give a lot with improvements thereon erected.

Now, the parol evidence discloses the fact, that there was an evident misdescription of the lot intended to be devised. It shows, first, as before stated, that the testator, at the time of making his will, and at the time of his death, did not, and never did, own lot 6, in square 403, but did own lot 3, in square 406; secondly, that the former lot had no improvements on it at all, and was located on Ninth Street, between I and K Streets, whilst the latter, which he did own was located on E Street, between Eighth and Ninth Streets, and had a dwelling house on it, and was occupied by the testator's tenants—a circumstance which precludes the idea that he could have overlooked it.

It seems to us that this evidence, taken in connection with the whole tenor of the will, amounts to demonstration as to which lot was in the testator's mind. It raises a latent ambiguity. The question is one of identification between two lots, to determine which was in the testator's mind, whether lot 3, square 406, which he owned, and which had improvements erected thereon, and thus corresponded with the implications of the will, and with part of the description of the lot, and rendered the devise effective; or lot 6, square 403, which he did not own, which had no improvements thereon, and which rendered the devise ineffective.

It is to be borne in mind that all the other property of the

testator, except this one house and lot, was disposed of to his other devisees, at least that was his belief as expressed in his will, and there is no evidence to the contrary; whilst this lot (though he believed he had disposed of it), was not disposed of at all, unless it was devised to his brother, Henry, by the clause in question. In view of all this, and placing ourselves in the situation of the testator at the time of making his will, can we entertain the slightest doubt that he made an error of description, so far as the numbers in question are concerned, when he wrote, or dictated, the clause under consideration? What he meant to devise was a lot that he owned; a lot with improvements on it; a lot that he did not specifically devise to any other of his devisees. Did such a lot exist? If so, what lot was it? We know that such a lot did exist, and only one such lot in the world, and that this lot was the lot in question in this cause, namely, lot number 3, in square 406. Then is it not most clear that the words of the will, "lot numbered six, in square four hundred and three," contained a false description. The testator, evidently by mistake, put "three" for "six," and "six" for "three," a sort of mis-speech to which the human mind is perversely addicted. It is done every day even by painstaking people. Dr. Johnson, in the preface to his Dictionary, well says: "Sudden fits of inadvertence will surprise vigilance, slight avocations will seduce attention, and casual eclipses of the mind will darken learning." Not to allow the correction of such evident slips of attention, when there is evidence by which to correct it, would be to abrogate the old maxim of the law: "*Falsa demonstratio non nocet.*"

It is undoubtedly the general rule, that the maxim just quoted is confined in its application to cases where there is sufficient in the will to identify the subject intended to be devised, independently of the false description, so that the devise would be effectual without it. But why should it not apply in every case where the extrinsic facts disclosed make it a matter of demonstrative certainty that an error has crept into the description, and what that error is? Of course, the contents of the will, read in the light of the surrounding circumstances, must lead up to and demand such correction to be made.

Opinion of the Court.

It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject: as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances, or declarations of the testator. 1 Jarman on Wills, 370; Hawkins on Wills, 9, 10. Where it consists of a misdescription, as before stated, if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will. 1 Jarman on Wills, 364, 365; 1 Roper on Legacies, 297, 4th ed.; 2 Williams on Executors, 988, 1032. Mr. Williams (afterwards Mr. Justice Williams) says: "Where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified. . . . 1. By the context of the will; 2. To a certain extent by parol evidence. . . . A court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person intended by the testator." pp. 988–989. Again he says, on page 1032: "Mistakes in the description of legacies, like those in the description of

legatees, may be rectified by reference to the terms of the gift, and evidence of extrinsic circumstances, taken together. The error of the testator, says Swinburne, in the proper name of the thing bequeathed, doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain: As, for instance, the testator bequeaths his horse Criple, when the name of the horse was Tulip; this mistake shall not make the legacy void; for the legatory may have the horse by the last denomination; for the testator's meaning was certain that he should have the horse; if, therefore, he hath the thing devised, it is not material if he hath it by the right or the wrong name." See also Roper on Legacies, 297.

The rule is very distinctly laid down by Sir James Wigram, who says: "A description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or at least sufficiently so to enable a court to identify the subject intended; as where a false description is superadded to one which by itself would have been correct. Thus, if a testator devise his black horse, having only a white one, or devise his freehold houses, having only leasehold houses, the white horse in the one case and the leasehold houses in the other would clearly pass. In these cases the substance of the subject intended is certain, and if there is but one such substance, the superadded description, though false, introduces no ambiguity, and, as by the supposition the rejected words are inapplicable to any subject, the court does not alter, vary, or add to the effect of the will by rejecting them." Wigram on Extrinsic Evidence, 53. Of course when the author speaks of the rejected words as being "inapplicable to any subject," he means inapplicable because the subject is not in existence, or does not belong to the testator.

The case of the *Roman Catholic Orphan Asylum* v. *Emmons*, 3 Bradford, 144, which arose before the Surrogate of New York, well illustrates the application of the rule. There a testatrix bequeathed *her* shares of the Mechanics' Bank stock to the Orphan Asylum. She had no bank stock except ten shares of the City Bank. Surrogate Bradford, in a learned opinion, held that the word "Mechanics" must be rejected as inappli-

cable to any property ever owned by the testatrix, and the rejection of this word left the bequest to operate upon any bank stock possessed by her, and so to pass the City Bank shares. See also a learned note of Chief Justice Redfield, 10 Am. Law Reg., N. S. 93, to the case of *Kurtz* v. *Hibner*, 55 Ill. 514, in which he strongly disapproves the decision in that case.

Chief Justice Marshall, in *Finlay* v. *King's Lessee*, 3 Pet. 346, 377, lays down the general rule that underlies all others. "The intent of the testator," says he, "is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although in giving effect to it some words should be rejected, or so restrained in their application, as materially to change the literal meaning of the particular sentence."

But it is not our intention to review or classify the decisions. They are legion. The intrinsic difficulty of stating the rule as applicable to all cases is such as to make it presumptuous in any one to attempt to chain it down and fix it in the form of a verbal definition. Sufficient appears from the authorities already quoted to show that, whilst no bill in equity lies to reform a will, because its author is dead, and his intent can only be known from the language he has used, when applied to the circumstances by which he was surrounded, yet a careful study of that language and of those circumstances will generally disclose any inadvertency or mistake in the description of persons or things, and the manner in which it should be corrected, without adding anything to the testator's language, and thereby making a different will from that left by him. We will only quote further, an observation of Chief Justice Thompson, of New York, in *Jackson* v. *Sill*, 11 Johns. 201, which is very pertinent to the present discussion. In that case the court rejected the extrinsic evidence offered to remove a supposed latent ambiguity in a will, for the very good reason that it appeared, on examination, that no ambiguity existed. But the Chief Justice justly said: "It is undoubtedly a correct rule in the construction of wills, to look at the whole will for the purpose of ascertaining the intention of the testator in any particular part, where such part is ambiguous. But where the

intention is clear and certain, and no repugnancy appears between the different parts of the will, no such aid is necessary or proper." Of course, in the case of a latent ambiguity such repugnancy can only appear by means of the evidence which discloses the ambiguity.

In view of the principles announced in these authorities, the case under consideration does not require any enlargement of the rule ordinarily laid down, namely, the rule which requires in the will itself sufficient to identify the subject of the gift, after striking out the false description. The will, on its face, taking it altogether, with the clear implications of the context, and without the misleading words, "six" and "three," devises to the testator's brother, Henry, in substance as follows: "I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot number—, in square four hundred and —, together with the improvements thereon erected and appurtenances thereto belonging—being a lot which belongs to me, and not specifically devised to any other person in this my will." In view of what has already been said there cannot be a doubt of the identity of the lot thus devised. It is identified by its ownership, by its having improvements on it, by its being in a square the number of which commenced with four hundred, and by its being the only lot belonging to the testator which he did not otherwise dispose of. By merely striking out the words "six" and "three" from the description of the will, as not applicable (unless interchanged) to any lot which the testator owned; or instead of striking them out, supposing them to have been blurred by accident so as to be illegible, the residue of the description, in view of the context, so exactly applies to the lot in question, that we have no hesitation in saying that it was lawfully devised to Henry Walker.

The judgment is reversed, and the cause remanded, with directions to award a new trial.

Mr. Justice Woods, with whom concurred Mr. Justice Matthews, Mr. Justice Gray and Mr. Justice Blatchford, dissenting.

Mr. Justice Matthews, Mr. Justice Gray, Mr. Justice Blatch-

ford and myself cannot concur in the judgment of the majority of the court.

The suit was an action of ejectment in which the will was offered in evidence to prove the plaintiff's title. The property in controversy was lot three, in square four hundred and six, in the city of Washington. The plaintiff claimed under a devise of lot six, in square four hundred and three. The devise was as follows: "I bequeath to my dearly beloved brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected and the appurtenances thereto belonging." The devise does not describe the property sued for. Extrinsic evidence to aid the devise was offered by the plaintiff, who insisted that it was admissible for the purpose of removing a latent ambiguity.

Latent ambiguities are of two kinds: first, where the description of the devisee or the property devised is clear upon the face of the will, but it turns out that there are more than one estate or more than one person to which the description applies; and, second, where the devisee or the property devised is imperfectly, or in some respects erroneously, described, so as to leave it doubtful what person or property is meant.

It is clear that if there is any ambiguity in the devise under consideration it belongs to the latter class. But there is no ambiguity. The devise describes the premises as lot six, in square four hundred and three. It is conceded that there is such a lot and square in the city of Washington, and but one; and it is not open to question what precise parcel of land this language of the devise points out. It clearly, and without uncertainty, designates a lot on 9th street, between I and K streets, well known on the map of the city of Washington, whose metes and bounds and area are definitely fixed and platted and recorded. The map referred to was approved by President Washington in 1792, and recorded in 1794. Thousands of copies of it have been engraved and printed. All conveyances of real estate in the city made since it was put on record refer to it; it is one of the muniments of title to all the public and private real estate in the city of Washington, and

it is probably better known than any document on record in the District of Columbia. The accuracy of the description of the lot devised is, therefore, matter of common knowledge, of which the court might even take judicial notice.

Nor is any ambiguity introduced into the description by the words "with the improvements thereon erected and the appurtenances thereto belonging," or by the testimony which was offered to prove that at the date of the will and of the death of the testator the lot described in the devise was unimproved. It is plain that the words "improvements thereon erected" were a conveyancer's phrase of the same nature as the words which immediately followed them, namely, "and the appurtenances thereto belonging," and the whole phrase is simply equivalent to the words "with the improvements and appurtenances." The words "with the improvements thereon erected" were not intended as a part of the description of the premises, which had already been fully and accurately described, but were used, perhaps, as a matter of habit, or perhaps out of abundant but unnecessary caution, to include in the grant improvements that might be put upon the premises between the date of the testator's will and the date when it took effect, namely, at his death. The phrase is one not commonly used to identify the premises, and was not so used in this devise. There is persuasive evidence of this in the will. For in eight other devises of realty the testator particularly describes the character of the improvements. Thus, in the devise to his brother, John Walker, the improvements are described as a "two-story brick house, back building;" in the devise to Lewis Walker as "a two-story brick building, with a basement story back building;" in the devise to Margaret Peck of four lots, as "a two-story frame house erected on lot 27"; in the devise to Louisa Ballard, as a "three-story brick house"; in the devise to Sarah McCallion, as a "frame house;" in the devise to James Walker of two lots, as "two two-story brick houses"; and in the residuary devise to James Walker of the testator's real estate as "a house part brick and part frame," and "a slaughter-house." There is no proof that any of the other real estate mentioned in the will was improved. There is, there-

fore, no doubt about the identity of the lot described in the devise.

But even if the words under discussion were used to carry the idea that the property mentioned in the devise was improved, and it turned out to be unimproved, these facts would not make the description ambiguous or uncertain. For it is a settled rule of construction, that if there be first a certain description of premises, and afterwards another description in general terms, the particular description controls the general. Thus, in *Goodtitle* v. *Southern*, 1 M. & S. 299, it was held that by a devise of "all my farm called Trogues-farm, now in the occupation of C.," the whole farm passed though it was not all in C.'s occupation. See also *Miller* v. *Travers*, 8 Bing. 244; *Goodright* v. *Pears*, 11 East, 58.

Another cognate rule, well settled in the law, is also applicable here, and that is that where there is a sufficient description of premises, a subsequent erroneous addition will not vitiate the description, and we may reject a false demonstration. *Doe* v. *Galloway*, 5 B. & Ad. 43; *Law* v. *Hempstead*, 10 Conn. 23; *Bass* v. *Mitchell*, 22 Texas, 285; *Peck* v. *Mallams*, 10 N. Y. 509, 532; *Abbott* v. *Abbott*, 53 Maine, 356, 360; *Doane* v. *Wilcutt*, 16 Gray, 368, 371; *Jones* v. *Robinson*, 78 N. C. 396; 3 Washburn on Real Property, 629.

Upon these established rules, as well as upon the general sense and practice of mankind, it is beyond controversy that a lot described in the words used in the devise in question would pass either by will or deed, though it should turn out that the lot was unimproved. The description is as particular and precise as if the metes and bounds, the area, and the street on which the lot was situated, and every other particular of size and situation, had been given. The identity of the lot is settled beyond question. Upon the authorities cited the description is not rendered ambiguous or uncertain by the use of the general words "with the improvements erected thereon," even though there be no improvements. It follows that the description of the premises in controversy, contained in the devise, was good and sufficient, and upon well settled rules of law, free from doubt or ambiguity.

It is, therefore, beyond controversy that if the testator had been the owner of lot numbered six, in square four hundred and three, it would have passed by the devise, and the sufficiency of the description could not have been challenged. The only ground, therefore, upon which the plaintiff can base his contention that there is a latent ambiguity in the devise, is his offer to prove that the testator did not own the lot described in the devise, but did own another which he did not dispose of by his will. This does not tend to show a latent ambiguity. It does not tend to impugn the accuracy of the description contained in the devise. It only tends to show a mistake on the part of the testator in drafting his will. This cannot be cured by extrinsic evidence. For, as Mr. Jarman says, "As the law requires wills, both of real and personal estate (with an inconsiderable exception), to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is a partial or total failure of the testator's intended disposition; for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator around with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources." 1 Jarman on Wills, 4th and 5th eds., 409.

If there is any proposition settled in the law of wills, it is, that extrinsic evidence is inadmissible to show the intention of the testator, unless it be necessary to explain a latent ambiguity; and a mere mistake is not a latent ambiguity. Where there is no latent ambiguity there no extrinsic evidence can be received. The following cases support this proposition:

In *Miller* v. *Travers*, 8 Bing. 244, Tindal, Chief Justice of the Common Pleas, and Lyndhurst, Chief Baron of the Exchequer, were called in to assist Brougham, Lord Chancellor. Their joint opinion was delivered by Tindal, Chief Justice. The case was this: The testator devised all his freehold and real estate in the county of Limerick and city of Limerick.

The testator had no real estate in the county of Limerick, but his real estate consisted of lands in the county of Clare, which were not mentioned in the will, and a small estate in the city of Limerick, inadequate to meet the charges in the will. The devisee offered to show by parol evidence that the estates in the county of Clare were inserted in the devise to him, in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that by mistake he erased the words "county of Clare," and that the testator, after keeping the will by him for some time, executed it without adverting to the alteration as to that county. The case was considered on the assumption that the extrinsic evidence, if admitted, would show that the county of Clare was omitted by mistake, and that the land in that county was intended to be included in the devise. But the evidence was held inadmissible to show that the testator intended to devise property which had been omitted by mistake.

So in *Box* v. *Barrett*, Law Rep. 3 Eq. 244, 249, Lord Romilly, Master of the Rolls, said: "because the testator has made a mistake you cannot afterwards remodel the will and make it that which you suppose he intended, and as he would have drawn it if he had known the incorrectness of his supposition."

In *Jackson* v. *Sill*, 11 Johns. 201, 212, which was an action of ejectment, the defendant claimed under the following devise to the testator's wife: "I also give to my said beloved wife the farm which I now occupy, together with the whole crops," &c. In a subsequent part of his will the testator mentioned said premises as his lands. It turned out that the premises in controversy were, at the time the will was made, and at the death of the testator, in the possession of one Salisbury under a lease for seven years. The plaintiff offered testimony to show that the testator intended to devise the premises as a part of the farm which he occupied himself and of which he died possessed. Chief Justice Thompson, afterwards a Justice of this court, in delivering judgment, said: "I think it unnecessary to notice particularly the evidence offered; for it is obvious that, if it was competent, especially that of Mr. Van Vechten, it would

have shown that the premises were intended by the testator to be devised to the defendant Sill. The will was drawn, however, by Mr. Van Vechten under a misapprehension of facts, and under a belief that the testator was in the actual possession of the premises. It is, therefore, a clear case of *mistake*, as I apprehend, and under this belief I have industriously searched for some principle that would bear me out in letting in the evidence offered; but I have searched in vain, and am satisfied the testimony cannot be admitted in a court of law, without violating the wise and salutary provisions of the statute of wills, and breaking down what have been considered the great landmarks of the law on this subject."

In *Tucker* v. *Seaman's Aid Society*, 7 Met. (Mass.) 188, the testator gave a legacy to the "Seaman's Aid Society in the City of Boston," which was the correct name of the society. The legacy was claimed, however, by another society called the Seaman's Friend Society. Chief Justice Shaw, in stating the case, said: "It is also, we think, well proved by the circumstances which preceded and attended the execution of the will, as shown by extrinsic evidence, that it was the intention of the testator to make the bequest in question to the 'Seaman's Friend Society,' and at the time of the execution of the will he believed he had done so;" "that the testator was led into this mistake by erroneous information honestly given to him by Mr. Baker who drew his will;" "that the testator acted on this erroneous information—erroneous as to his real purpose, as it now appears by the evidence—and made the bequest to the Seaman's Aid Society by their precise name and designation." The court, therefore, held that there was simply a mistake and no latent ambiguity, and that extrinsic evidence was inadmissible.

It is unnecessary to extend this opinion by other extracts from the adjudged cases. The quotations we have made are from masters of the law. The following additional authorities will be found to sustain the proposition we have stated: *Cheney's Case*, 5 Rep. 68; *Doe* v. *Oxenden*, 3 Taunt. 147; *Smith* v. *Maitland*, 1 Ves. Jr. 362; *Chambers* v. *Minchin*, 4 Ves. 675, and note; *Doe* v. *Westlake*, 4 B. & Ald. 57; *Newburgh* v. *New*

burgh, 5 Madd. 364; *Clementson* v. *Gandy*, 1 Keen, 309; *Brown* v. *Saltonstall*, 3 Met. (Mass.) 423, 426; *Mann* v. *Mann*, 1 Johns. Ch. 231; *Yates* v. *Cole*, 1 Jones Eq. (N. C.) 110; *Walston* v. *White*, 5 Maryland, 297; *Cesar* v. *Chew*, 7 G. & J. 127; *Fitzpatrick* v. *Fitzpatrick*, 36 Iowa, 674; *Kurtz* v. *Hibner*, 55 Ill. 514.

Our conclusion is, therefore, that, as the evidence offered and rejected was for the purpose of explaining a latent ambiguity when there was no ambiguity, either latent or patent, it was properly rejected.

The opinion of the court in this case allows, what seems to us to be an unambiguous devise, to be amended by striking out a sufficient description of the premises devised, and the blank thus made to be filled by ingenious conjectures based on extrinsic evidence. This is in the face of the statute of frauds in force in the District of Columbia, where the premises in controversy are situate. Fifty years after the unequivocal devise in question, as written and executed by the testator, had, as required by law, been placed upon the records of the District for the information of subsequent purchasers and incumbrancers, it is allowed to be erased, and, by argument and inference, a new one substituted in its place. This is not construing the will of the testator; it is making a will for him.

The decision of the court subjects the title of real estate to all the chances, the uncertainty, and the fraud attending the admission of parol testimony, in order to give effect to what the court thinks was the intention of the testator, but which he failed to express in the manner required by law.

BARNEY & Others *v.* WINONA & ST. PETER RAILROAD COMPANY.

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

Submitted January 7, 1886.—Decided March 1, 1886.

Inadvertent expressions in an opinion of the court, which are not material to the decision of the case, are not decisions of the court within the general rule that what is decided in a cause on appeal is not open to reconsideration in the same case on a second appeal on similar facts.

In the construction of land grant acts in aid of railroads, "granted lands" are those falling within the limits specially designated, the title to which attaches as of the date of the act of Congress, when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department; but "indemnity lands" are lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, the title to which accrues only from the time of their selection.

The provision in § 3 of the act of March 3, 1865, that any lands granted to Minnesota by the act of March 3, 1857, which might be located within the limits of the extension made by said act of 1865 to the original grant made by said act of 1857, should be deducted from the full quantity of lands granted by the act of 1865, applies to "granted lands" of the prior grant falling within the six-mile limit, and not to possible indemnity lands which might be subsequently acquired.

Winona & St. Peter Railroad Company v. *Barney*, 113 U. S. 618, explained.

This case was before the court at October Term, 1884, 113 U. S. 618. The questions which arose in the execution of the mandate, and which were brought up by the second appeal, are stated in the opinion of the court.

Mr. Gordon E. Cole for appellants.

Mr. Thomas Wilson for appellee.

Mr. Justice Field delivered the opinion of the court.

This case was before us at the October Term, 1884. By an act of Congress passed March 3, 1857, a grant of land was made to Minnesota, then a Territory, to aid in the construction of certain railroads, including one from Winona, a town

on the Mississippi River, to a point on the Big Sioux River, in the present Territory of Dakota. 11 Stat. 195. The grant was of every alternate section designated by odd numbers, for six sections in width on each side of the road, subject to certain exceptions, not important to be here mentioned, with a right to select indemnity lands within fifteen miles from the line of the road. In May following the legislature of the Territory authorized a company, previously incorporated, to construct and operate this road; and, to aid in its construction, granted to the company the interest and estate, present and prospective, of the Territory and future State, in the lands ceded by the act of Congress, together with the rights, privileges and immunities conferred by it.

In 1858 * the Territory became a State and was admitted into the Union; and under proceedings for the foreclosure of a mortgage executed by the company, it became, before March, 1862, reinvested with the estate in the lands and the rights and privileges it had granted. In March, 1862, its legislature passed an act transferring the lands, property, franchises and privileges, with which it had thus become reinvested, to the Winona and St. Peter Railroad Company, which soon afterwards commenced the construction of the road. By the act of Congress of March 3, 1865, the quantity of land granted by the act of 1857 was increased to ten sections per mile, with an enlargement of the limits within which indemnity lands might be selected from fifteen to twenty miles. 13 Stat. 526. The third section provided that any lands which had been granted to Minnesota for the purpose of aiding in the construction of any railroad which might be located within the limits of the extension, should be deducted from the "full quantity" granted by the act. The full quantity was the four additional sections, and we held that the reservation was merely a legislative declaration of that which the law would have pronounced independently of it, inasmuch as a prior grant of the

* In the opinion in 113 U. S. 621, the admission by a misprint is stated to have been in 1857. The constitution of the State was adopted in that year, but the admission was on May 11, 1858. 11 Stat. 285.

same property must necessarily be deducted from a subsequent one in which it is included.

In October, 1867, the company agreed with the plaintiffs, upon sufficient consideration, to convey to them as many acres of land, previously granted by Congress to Minnesota, as it should receive from the State by reason of the construction of its road already made, estimated to be 105 miles, but in fact only 102 miles and a fraction of a mile. This suit was brought to enforce the specific performance of this contract, and the only question between the parties was as to the quantity of land to be conveyed under it.

By the act of 1857, lands were also granted to Minnesota to aid in the construction of the road of the Minnesota (Minneapolis) and Cedar Valley Railroad Company, afterwards the Minnesota Central Railroad Company (Laws of Minnesota, Extra Session of 1857, 20, and Special Laws of 1863, 137), and that road intersected the road of the defendant between Rochester and Waseca; and lands of that company at the intersection were located within the limits of the extension of four sections made by the act of 1865.

The court below, however, held that, for the part of the defendant's road constructed after the act of 1865, the plaintiffs were entitled, under their contract, to ten full sections per mile, without any deduction for the lands which were located at the intersection of the road with the road of the Minnesota Central Railroad Company, and within the grant for the construction of the latter. It was accordingly adjudged that the plaintiffs were entitled, in addition to what had been voluntarily conveyed to them, to a conveyance of 197,111 acres and a fraction of an acre, and a decree to that effect was entered. The case being brought to this court, that decree, at the October Term, 1884, was reversed, and the cause sent back to the court below in order that the proper deduction might be made by reason of the interference of the two grants, and the elder grant be deducted from the extension made by the act of 1865, so far as it was located within that extension. 113 U. S. 618–629.

In speaking of the two grants we said of the first one, that of 1857, that it was one by description, that is, of land in place

and not one of quantity. It was of particular parcels of land designated by odd numbers for six sections on each side of the road; that is, of particular parcels of land lying within certain defined lateral limits to the road and described by numbers on the public surveys. The grant of the four additonal sections by the act of 1865 was also a grant of land in place. The intention of Congress was to enlarge the first grant from six to ten sections per mile; the additional four to be taken in like manner as the original six, and subject to the same limitations, and to others that had been or might be prescribed, with a right to select indemnity lands within twenty miles instead of fifteen. The act did not purport to change the character of the first grant, but to increase its quantity. We said, however, that the grant of these additional sections might be regarded as one of quantity—an inadvertence for which the writer of that opinion, who is also the writer of this one, is alone responsible. The statement was not at all material to the decision, which was that a deduction should have been made by reason of the intersection of the two grants, so far as the prior grant was located within the extension.

We recognize the rule that what was decided in a case pending before us on appeal, is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case, and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision. When the case went back, the court below seems to have been embarrassed by the erroneous description of the character of the grant of the four additional sections, and to have felt obliged to deduct from the amount originally decreed the number of acres which, prior to March 3, 1865, had passed to Minnesota within the designated limits of the grant to aid the construction of the road of the Minnesota Central Railroad Company, and also the number of acres which had been taken beyond them within the indemnity limits of fifteen miles. In this construction of the reservation made by the third section of the act of 1865, we think the court erred. The reservation from the four sections was of land previously granted, which

was located within them. The previous grant was of lands in place, for it was of alternate sections designated by odd numbers, for six sections in width on each side of the road, and that portion of it was reserved from the subsequent grant which fell within the four new sections, also land in place.

In the construction of land grant acts, in aid of railroads, there is a well-established distinction observed between "granted lands" and "indemnity lands." The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. It is these "granted lands" of the prior grant falling within the six-mile limit that, in our opinion, are reserved, and not the possible indemnity lands which might be subsequently acquired. These granted lands of the prior grant being in place could be readily deducted from the four sections, also in place, whenever the roads of the two companies intersected, and the lands fell within the four sections. The quantity thus granted is found by the special masters appointed by the court to be fifteen thousand acres and $\frac{45}{100}$ of an acre. This quantity only, in addition to the lands used for the track of the road of the Winona and St. Peter Railroad Company, and for depots and other purposes necessary and incident to its operation, should, therefore, be deducted from the number of acres, to a conveyance of which from the company the plaintiffs, by the decree of the court below at its December Term, 1880, were adjudged to be entitled.

The decree will, therefore, be reversed, and the cause be remanded with directions to enter a new decree comformable to this opinion.

COFFEY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY. PETITION FOR REHEARING.

Petition received March 1, 1886.—Decided March 15, 1886.

The pleadings in a suit *in rem* brought by the United States, in a Circuit Court of the United States in Kentucky, for the forfeiture of property after its seizure for the violation of the internal revenue laws, are not required by section 914 of the Revised Statutes, to be governed by the statute of Kentucky in regard to pleadings in civil actions; but are to be, as before the enactment of section 914, according to the course in Admiralty.

This was a petition for a rehearing of the cause reported 116 U. S. 427. The case is stated in the opinion of the court.

Mr. Samuel McKee for petitioner.

Mr. Justice Blatchford delivered the opinion of the court.

On the 18th of January last, a decision was made in this case, 116 U. S. 427, affirming the judgment below, rendered on an information *in rem*, filed for the forfeiture to the United States of certain personal property seized for a violation of the internal revenue laws. There was a trial by jury and a verdict for the United States. The claimant, in his answer, had set up in bar, that a criminal information had been filed against him, in the same court, alleging as offences the same matters averred in the information in the civil suit, and that he had pleaded guilty and been adjudged to pay a fine. There was no demurrer or reply to this answer. After verdict, the claimant moved in arrest of judgment, alleging as cause the judgment in the criminal proceeding, but the motion was overruled. There was no bill of exceptions, and no exception to the overruling of the motion.

On the hearing in this court, the claimant contended that, as there was no traverse of the answer, it must be taken to be true. But this court held that no reply or replication to the answer was necessary to raise an issue of fact on the matters averred in it; that the proceedings, so far as the pleadings were con-

cerned, were kindred to those in a suit in Admiralty *in rem;* that the general rules of pleading in regard to Admiralty suits *in rem* apply to suits *in rem* for a forfeiture, brought by the United States, after a seizure on land, as laid down in the cases of *The Sarah*, 8 Wheat. 391, *Union Ins. Co.* v. *United States*, 6 Wall. 759, 765, *Armstrong's Foundry*, 6 Wall. 766, 769, and *Morris' Cotton*, 8 Wall. 507, 511; that Rule 22 of the Rules in Admiralty prescribes regulations for the form of informations and libels of information on seizures for the breach of the laws of the United States on land or water; that by Rule 51 in Admiralty, new matter in an answer is considered as denied by the libellant; that the issue of fact as to the former conviction must be held to have been found against the claimant, by the general verdict; and that no question in regard to the defence set up could be raised.

An application is now made by the claimant for a rehearing, on the ground that, as to the pleadings, the case must be governed by section 914 of the Revised Statutes, which is a reenactment of § 5 of the act of June 1, 1872, ch. 255, 17 Stat. 197, and is in these words: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and Admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the Courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding." It is urged that this is a civil cause, but not an equity or an Admiralty cause, and that the provisions of sections 126 and 386 of the Civil Code of Practice of Kentucky, which took effect Jannary 1, 1877, apply to it. Those sections are as follows: "§ 126 [153]. Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed." "§ 386 [416]. Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him."

The practice as to the pleadings in suits *in rem* like the present having been well settled prior to the passage of the act of June 1st, 1872, the question is, whether it was changed by that

act. In *Union Ins. Co.* v. *United States*, 6 Wall. 759, 764, where land was seized and proceeded against as forfeited to the United States under a confiscation act, it was held, that, while either party had a right to demand a trial by jury, the proceedings were to be "in general conformity to the course in Admiralty." A like ruling was made, in a like case, in *Armstrong's Foundry*, 6 Wall. 766, 769; and in a case of the seizure of personal property on land, in *Morris' Cotton*, 8 Wall, 507, 511. Section 914 prescribes a conformity to the practice in the courts of the State only "as near as may be," and only "in like causes." It is a proper construction of this section to hold, that, while the provisions of the Code of Kentucky in regard to pleadings in civil suits *in personam* apply to like causes in the Federal courts in Kentucky, they do not apply to suits *in rem* by the United States for the forfeiture of property, after its seizure, for the violation of a revenue law, because there are no "like causes" known to the laws of Kentucky. Such suits *in rem* are peculiar in their practice, pleadings, and forms of procedure, and, so long as there is ample scope for the operation of section 914 of the Revised Statutes in regard to civil suits *in personam*, and no intention is manifest to change the established practice in such suits *in rem*, and any change in practice is limited to "like causes," we must continue to regard the former practice as applicable to the present suit.

The question of the scope of operation of § 914 has been considered by this court in *Nudd* v. *Burrows*, 91 U. S. 426; *Indianapolis Railroad Co.* v. *Horst*, 93 U. S. 291; *Newcomb* v. *Wood*, 97 U. S. 584; and *Ex parte Fisk*, 113 U. S. 713. In *Newcomb* v. *Wood*, it was held that the section did not abrogate the established rule in the courts of the United States, that to grant or refuse a new trial was a matter of discretion, which could not be reviewed on a writ of error; and that a State law entitling a party to a second trial in an action to recover the value of personal property, did not entitle him to a second trial in such an action in a Federal court. No decision has been made by this court in conflict with the views above indicated as applicable to this case; and

The application for a rehearing is denied.

Statement of Facts.

PHELPS & Others *v.* OAKS & Others.

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

Submitted March 1, 1886.—Decided March 15, 1886.

A Circuit Court of the United States having, by removal from a State court by reason of citizenship of the parties, properly acquired jurisdiction of an action against a tenant for the possession of land, is not ousted of it by admitting as codefendant, under the provisions of a State statute, his landlord, a citizen of the same State as the plaintiff.

Section 914 of the Revised Statutes, which requires the forms and modes of proceeding in civil causes other than equity and admiralty causes in Circuit and District courts to conform, as near as may be, to the forms and modes of proceeding existing at the time in like causes in the courts of record in the State within which the Circuit or District Courts are held, does not require the courts of the United States, by adopting the forms and modes of the State courts, to divest themselves of a jurisdiction once lawfully acquired under an act of Congress.

In ejectment against a tenant in possession of real estate whose landlord is a citizen of another State, the plaintiff has a real and substantial "controversy" with the defendant within the meaning of the act for removal of causes from State courts, which continues after his landlord is summoned in and becomes a party for the purpose of protecting his own interests.

The plaintiffs in error, who were plaintiffs below, brought their action in the Circuit Court of DeKalb County, Missouri, at the April Term, 1883, against George R. Oaks for the recovery of the possession of certain lands in that county, unlawfully withheld by him, as they alleged, and for damages therefor and for rents and profits.

The defendant, a citizen of Missouri, having been served with process, the plaintiffs, who were citizens of Pennsylvania, filed their petition for the removal of the cause to the Circuit Court of the United States for the Western Division of the Western District of Missouri, on the ground that the controversy in said suit was between citizens of different States, the matter and amount in dispute being in excess of the sum or value of $500. The prayer of the petition was granted, the accompanying bond being approved, and the cause was removed.

Afterwards, on June 16, 1884, the defendant Oaks filed his answer, in which he denied all the allegations of the plaintiffs' complaint, except as expressly admitted, and in addition set up that at the time of the commencement of the action he was in possession of the premises as the tenant, from year to year, of one Maria Zeidler, wife of John Zeidler, who was the owner thereof, and to whom he had paid the rents due on account thereof, and asked that the said Maria and John Zeidler be made parties defendant to the suit, according to the form of the statute of Missouri in such cases provided. Thereupon the Zeidlers also appeared and asked to be let in as defendants and for leave to plead, and it was so ordered by the court, with leave to file a motion to remand the cause to the State court in thirty days. Such a motion was accordingly made on the ground that Maria Zeidler and John Zeidler, her husband, were both citizens of Pennsylvania; that the defendant Oaks made no claim or demand to the premises in controversy, otherwise than as the tenant of Maria Zeidler, and that, consequently, the said suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court of the United States.

Pending this motion the plaintiffs moved the court to rescind the order making Maria and John Zeidler parties. This motion to rescind was denied, and the motion of the defendants to remand the cause was granted. To reverse these rulings was the object of this writ of error.

Mr. S. B. Ladd (*Mr. J. D. Strong*, *Mr. C. A. Mosman*, and *Mr. H. K. White* were with him) for plaintiffs in error.

Mr. Charles W. Hornor (*Mr. S. S. Brown*, *Mr. H. Ramey*, and *Mr. J. F. Harwood* were with him) for defendants in error.

Mr. Justice Matthews delivered the opinion of the court. After stating the case as above reported, he continued:

That the cause when removed from the State to the Circuit Court was rightly removed is not denied. Under the Removal Act of 1875, the plaintiffs were authorized to remove their ac-

tion, although brought by them in the first place in the State court, into the Circuit Court of the United States, they being citizens of Pennsylvania, and the defendant a citizen of Missouri and an inhabitant of the district.

The ground on which the suit was remanded was that it subsequently appeared that it did not really and substantially involve a controversy properly within the jurisdiction of the Circuit Court, according to the sense of the 5th section of the act of March 3, 1875. This conclusion, it is supposed, is justified by the fact that the defendant Oaks, being merely a tenant of Maria Zeidler, who claimed title to the premises in dispute, had no real interest in the controversy and was a merely nominal party, his landlord being the real party in interest, entitled to be let in to defend as a party to the record, and bound by law to maintain his tenant's possession; so that the real and substantial controversy involved in and to be determined by the action, was not between the plaintiffs and Oaks, but between them and the Zeidlers; and the latter being citizens of the same State with the plaintiffs, it became apparent that the cause was not properly within the jurisdiction of the Circuit Court.

The statutes of Missouri provide that "every tenant on whom a summons in an action to recover the tenements held by him shall be served shall forthwith give notice thereof to the person or the agent of the person of whom such tenant holds, under the penalty of forfeiting to such person the value of three years' rent of the premises occupied by him." 1 Rev. Stat. Missouri, 1879, 514, § 3071. And by § 2244, that "the person from or through whom the defendant claims title to the premises may, on motion, be made a co-defendant." 1 Rev. Stat. Missouri, 374. And it is claimed that, under the decisions of the Supreme Court of the State, this right of the owner or warrantor of the title to be let in as a party to defend, does not rest in the discretion of the court, but is absolute. *Sutton* v. *Casseleggi*, 77 Missouri, 397, 408. It is assumed that the statute is equally obligatory upon the courts of the United States.

But this is a mistake. It is true that by Rev. Stat. § 914, it is required that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and ad-

miralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding;" but "the conformity is required," as was said by this court in *Indianapolis & St. Louis Railroad Co.* v. *Horst*, 93 U. S. 291, 301, "to be 'as near as may be'—not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose: it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such State statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals." Certainly it was not intended that these statutes were to be adopted with the effect of defeating the jurisdiction of the courts of the United States once lawfully attached under an act of Congress. *Stewart* v. *Dunham*, 115 U. S. 61.

It is equally an error to assume that the plaintiffs had not a substantial and real controversy with the defendant Oaks, and that their controversy was solely with the Zeidlers. The object and purpose of the action was to recover possession of the real estate in the visible and actual occupation of Oaks, and not otherwise in the possession of his landlord, than by force of his tenancy. The Zeidlers were not citizens of Missouri, nor residents of the district, and could not have been sued by the plaintiffs. The latter were not bound to look beyond the person who, by his occupation of the disputed premises, was holding adversely to their claim; and if the Zeidlers were permitted to defend, it was for their own interest, and not because they were either necessary or indispensable parties to the proceeding in which the plaintiffs were the actors. The controversy, so far as the Zeidlers were interested in it, was of their own seeking, and as their rights could not be concluded by a judgment against the tenant, they were not in a position to insist that the plaintiffs should forego their legal right to proceed against the

most convenient defendant. The landlord could defend the possession of the tenant, as it was his right and duty to do on notice of the action, but he could do so as well in the name of the tenant as in his own. At any rate, the plaintiffs had a right to eject the defendant, who actually and unlawfully withheld from them possession of their lands; and it is not correct to say that the controversy in law is with the landlord in virtue of whose claim of title the wrongful possession is maintained. Much less can the plaintiff's right to prosecute his action in the courts of the United States, once vested, be defeated by imposing upon him an adversary against whom he cannot maintain the jurisdiction of these tribunals.

Undoubtedly it was the duty of the Circuit Court in this case to give effect to the statute of Missouri, as far as it could, but not at the expense of its jurisdiction. "It must be held," as was said in *Erstein* v. *Rothschild*, 22 Fed. Rep. 61, 64, "that the body of the local law thus adopted in the general, must be considered in the courts of the United States in the light of their own system of jurisprudence, as defined by their own constitution as tribunals, and of other acts of Congress on the same subject. It can hardly be supposed that it was the intent of this legislation to place the courts of the United States in each State, in reference to their own practice and procedure, upon the footing merely of subordinate State courts, required to look from time to time to the Supreme Court of the State for authoritative rules for their guidance in those details. To do so, would be, in many cases, to trench, in important particulars not easy to foresee, upon substantial rights, protected by the peculiar constitution of the Federal judiciary, and which might seriously affect, in cases easily supposed, the proper correlation and independence of the two systems of Federal and State judicial tribunals."

It was quite proper, therefore, for the Circuit Court to admit the landlord as a party, for the purpose of defending his tenant's possession, and through that, his own title; and to this end, he might not only be permitted to appear as a party to the record and codefendant, but to control the defence as *dominus litis*, raising and conducting such issues as his own rights and

interests might dictate. And this need not arrest or interfere with the jurisdiction of the court, already established by the plaintiffs against the tenant in possession. For such proceedings should be treated as incidental to the jurisdiction thus acquired, and auxiliary to it, as in like cases, in equity, one interested in the subject-matter, though a stranger to the litigation, may be allowed to intervene *pro interesse suo*. *Krippendorf* v. *Hyde*, 110 U. S. 276.

In this view, the Circuit Court was right in admitting the Zeidlers as codefendants, but there was error in remanding the cause to the State court. For this error,

The judgment complained of is reversed, and the cause is remanded to the Circuit Court with directions to proceed in the action according to law.

EX PARTE ROYALL, No. 1.

EX PARTE ROYALL, No. 2.

APPEALS FROM AND ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Argued January 7, 8, 1886.—Decided March 1, 1886.

Circuit Courts of the United States have jurisdiction on habeas corpus to discharge from custody a person who is restrained of his liberty in violation of the Constitution of the United States, but who, at the time, is held under State process for trial on an indictment charging him with an offence against the laws of the State.

When a person is in custody, under process from a State court of original jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted; but this discretion should be subordinated to any special circumstances requiring immediate action. After conviction of the accused in the State court, the Circuit Court has still a discretion whether he shall be put to his writ of error to the highest court of the State, or whether it will proceed by writ of habeas corpus summarily to determine whether he is restrained of his liberty in violation of the Constitution of the United States.

Statement of Facts.

On the 29th day of May, 1885, William L. Royall filed two petitions in the Circuit Court of the United States for the Eastern District of Virginia, each verified by oath, and addressed to the judges of that court.

In one of them he represented, in substance, that he was a citizen of the United States; that, in June, 1884, as a representative of a citizen of New York—who was the owner of certain bonds issued by Virginia under the act approved March 30, 1871, entitled "An act to provide for the funding and payment of the public debt"—he sold in the city of Richmond, to Richard W. Maury, for the sum of $10.50 in current money, a genuine past-due coupon, cut from one of said bonds in petitioner's presence, and which he received from the owner, with instructions to sell it in that city for the best market price; that said coupon bore upon its face the contract of Virginia that it should be received in payment of all taxes, debts, and demands due that Commonwealth; that he acted in said matter without compensation; and, consequently, the transaction was a sale of the coupon by its owner. The petition proceeded:

"That on the second day of June, 1884, the grand jury of the city of Richmond, Virginia, found an indictment against your petitioner for selling said coupon without a license. That the before mentioned coupon is the only one that your petitioner has sold. That your petitioner was thereupon arrested and committed to the custody of N. M. Lee, sergeant of the city of Richmond, to be tried on said indictment, and that he will be prosecuted and tried on said indictment for selling said coupon without a license, under the provisions of section 65 of the act of March 15th, 1884, relating to licenses generally, and the general provisions of the State law in respect to doing business without a license. That your petitioner had no license under the laws of Virginia to sell coupons. That the act of the General Assembly under which your petitioner was arrested, and is being prosecuted, requires any person who sells one or more of the said tax-receivable coupons issued by said State of Virginia to pay to said State, before said sale, a special license tax of $1000, and, in addition thereto, a tax of twenty per cent. on the face value of each coupon sold.

Statement of Facts.

"That said act does not require the seller of any other coupon, or the seller of anything else, to pay said tax, but it is directed exclusively against the sellers of such coupons. That your petitioner is being prosecuted under said act because he sold said coupon without having first paid to said State said special license tax, and without paying to her said special tax of twenty per cent. on the face value thereof. That said act of the General Assembly of Virginia is repugnant to section ten of article one of the Constitution of the United States, and is, therefore, null and void. That if the said State can refuse to pay the said coupons at maturity, and then tax the sale of them to tax-payers, she may thus indirectly repudiate them absolutely, and thus effectually destoy their value.

"That your petitioner has been on bail from the time he was arrested until now, but that his bail has now surrendered him, and he is at this time in the custody of the said N. M. Lee, sergeant of the city of Richmond, to be prosecuted and tried on said indictment. That he is held in violation of the Constitution of the United States, as he is advised."

In the other petition he represented, in substance, that, under the provisions of the beforementioned act of 1871, Virginia issued her bonds, with interest coupons attached, and bearing upon their face a contract to receive them in payment of all taxes, debts, and demands due to that commonwealth; that another act, approved January 14, 1882, provided that said coupons should not be received in payment of taxes until after judgment rendered in a suit thereon according to its provisions; that the validity of the latter act was sustained in *Antoni* v. *Greenhow*, 107 U. S. 769, upon the ground that it furnished tax-payers with a sufficient remedy to enforce said contract; that by the provisions of sections 90 and 91 of chapter 450 of the laws of Virgina for the year 1883–84, it was provided that attorneys-at-law who had been licensed to practice law less than five years should pay a license tax of fifteen dollars, and those licensed more than five years twenty-five dollars, and that such license should entitle the attorney paying it to practice law in all the courts of the State; that it was further provided by said 91st section that no attorney should bring any suit on

said coupons under said act of January 14, 1882, unless he paid, in addition to the above-mentioned license tax, a further special license tax of $250; that petitioner had been licensed to practice law more than five years, and that in the month of April, 1884, he paid twenty-five dollars, receiving a revenue license to practice law in all the courts of the State but that he had not paid the additional special license tax provided for in said 91st section; that, under employment of a client who had tendered coupons, issued by Virginia under the act of March 30, 1871, to the treasurer of Richmond city in payment of his taxes, and thereafter had paid his tax in money—the coupons having been received by that officer for identification and verification, and certified to the Hustings Court of the City of Richmond—he brought suit under the act of January 14, 1882, to recover the money back after proving the genuineness of the coupons; that the grand jury of the city of Richmond thereupon found an indictment against him for bringing the suit without having paid the special license tax; that he brought it after he had paid his license tax above mentioned, and while he had a license to practice law until April 1885; that he was thereupon arrested by order of the Hustings Court of Richmond, committed to the custody of N. M. Lee, sergeant of that city, and was about to be tried and punished under said indictment; that the act requiring him to pay a special license tax in addition to his general license tax was repugnant to section 10 of article 1 of the Constitution of the United States, and was, therefore, null and void; and that the act providing for punishing him for not paying the special license tax was likewise repugnant to the Constitution.

After stating, at some length, the grounds upon which he contended that the before mentioned acts were repugnant to the Constitution, the petitioner averred that he "is now in the custody of the said N. M. Lee, sergeant of the city of Richmond, under said indictment, and he is, therefore, restrained of his liberty in violation of the Constitution of the United States."

Each petition concluded with a prayer that the Circuit Court award a writ of habeas corpus directed to that officer,

commanding him to produce the body of the petitioner before that court, together with the cause of his detention, and that he have judgment discharging him from custody.

In each case the petition was dismissed upon the ground that the Circuit Court was without jurisdiction to discharge the prisoner from prosecution.

This case was argued with *Barry* v. *Edmunds*, *Chaffin* v. *Taylor*, *Royall* v. *Virginia* and *Sands* v. *Edmunds*, all reported in 116 U. S.; and with *Ex parte Royall*, *post*, 254.

Mr. William L. Royall in person, and *Mr. Daniel H. Chamberlain* for the petition.

Mr. R. A. Ayres and *Mr. Walter H. Staples* opposing.

Mr. Justice Harlan delivered the opinion of the court. After stating the case as above reported, he continued:

These cases come here under the act of March 3, 1885, ch. 353, 23 Stat. 437, which so amends § 764 of the Revised Statutes as to give this court jurisdiction, upon appeal, to review the final decision of the Circuit Courts of the United States in certain specified cases, including that of a writ of habeas corpus sued out in behalf of a person alleged to be restrained of his liberty in violation of the Constitution.

The first question to be considered is whether the Circuit Courts have jurisdiction on habeas corpus to discharge from custody one who is restrained of his liberty in violation of the National Constitution, but who, at the time, is held under State process for trial on an indictment charging him with an offence against the laws of the State.

The statutory provisions which control the determination of this question are found in the following sections of the Revised Statutes:

"Sec. 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus.

"Sec. 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

"SEC. 753. 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 omitted in pursuance of a law or treaty 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 citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any 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.

"SEC. 754. Application for the writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

"SEC. 755. The court, or justice, or judge to whom the application is made, shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."

"SEC. 761. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

It is further provided, that, pending the proceedings on habeas corpus in cases mentioned in §§ 763 and 764—which include an application for the writ by a person alleged to be restrained of his liberty in violation of the Constitution of the United States—and, "until final judgment therein, and after final judgment of discharge, any proceeding against the person

so imprisoned, or confined, or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard or determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void." § 766.

The grant to the Circuit Courts in § 751 of jurisdiction to issue writs of habeas corpus, is in language as broad as could well be employed. While it is attended by the general condition, necessarily implied, that the authority conferred must be exercised agreeably to the principles and usages of law, the only express limitation imposed is, that the privilege of the writ shall not be enjoyed by—or, rather, that the courts and the judicial officers named, shall not have power to award the writ to—any prisoner in jail, except in specified cases, one of them being where he is alleged to be held in custody in violation of the Constitution. The latter class of cases was first distinctly provided for by the act of February 5, 1867, ch. 28, 14 Stat. 385, which declares that the several courts of the United States, and the several justices and judges thereof within their respective jurisdictions, in addition to the authority then conferred by law, "shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." Whether, therefore, the appellant is a prisoner in jail, within the meaning of § 753, or is restrained of his liberty by an officer of the law executing the process of a court of Virginia, in either case, it being alleged under oath that he is held in custody in violation of the Constitution, the Circuit Court has, by the express words of the statute, jurisdiction on habeas corpus to inquire into the cause for which he is restrained of his liberty, and to dispose of him "as law and justice require."

It may be suggested that the State court is competent to decide whether the petitioner is or is not illegally restrained of his liberty; that the appropriate time for the determination of that question is at the trial of the indictment; and that his detention for the purpose simply of securing his attendance at the trial ought not to be deemed an improper exercise by that

court of its power to hear and decide the case. The first of these propositions is undoubtedly sound; for in *Robb* v. *Connolly*, 111 U. S. 624, 637, it was held, upon full consideration, that "a State court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity, arising under the Constitution and laws of the United States, or involving rights dependent upon such Constitution or laws;" and that "upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." But with respect to the other propositions, it is clear that, if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity. As was said in *Ex parte Siebold*, 100 U. S. 371, 376, "An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." So in *Ex parte Yarbrough*, 110 U. S. 651, 654, it was said that if the statute prescribing the offence for which Yarbrough and his associates were convicted was void, the court which tried them was without jurisdiction, and they were entitled to be discharged. It would seem—whether reference be had to the act of 1867 or to existing statutory provisions—that it was the purpose of Congress to invest the courts of the Union, and the justices and judges thereof, with power upon writ of habeas corpus, to restore to liberty any person, within their respective jurisdictions, who is held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States. The statute evidently contemplated that cases might arise when the power thus conferred should be exercised, during the progress of proceedings instituted against the petitioner in a State court, or by or under authority of a State, on account of the very matter presented for determination by the

writ of habeas corpus; for care is taken to provide that any such proceedings, pending the hearing of the case upon the writ and until final judgment and after the prisoner is discharged, shall be null and void. If such were not the clear implication of the statute, still, as it does not except from its operation cases in which the applicant for the writ is held in custody by the authority of a State, acting through its judiciary or by its officers, the court could not, against the positive language of Congress, declare any such exception, unless required to do so by the terms of the Constitution itself. But as the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of habeas corpus cannot be suspended unless when in cases of rebellion or invasion the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, "anything in the Constitution and laws of any State to the contrary notwithstanding." And that equal power does not belong to the courts and judges of the several States; that they cannot, under any authority conferred by the States, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the General Government acting under its laws, results from the supremacy of the Constitution and laws of the United States. *Ableman*

v. *Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Robb* v. *Connolly*, 111 U. S. 624.

We are, therefore, of opinion that the Circuit Court has jurisdiction upon writ of habeas corpus to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution.

It remains, however, to be considered, whether the refusal of that court to issue the writ and to take the accused from the custody of the State officer can be sustained upon any other ground than the one upon which it proceeded. If it can be, the judgment will not be reversed because an insufficient reason may have been assigned for the dismissal of the petitions.

Undoubtedly the writ should be forthwith awarded, "unless it appears from the petition itself that the party is not entitled thereto;" and the case summarily heard and determined "as law and justice require." Such are the express requirements of the statute. If, however, it is apparent upon the petition, that the writ if issued ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milligan*, 4 Wall. 2, 111. What law and justice may require, in a particular case, is often an embarrassing question to the court or to the judicial officer before whom the petitioner is brought. It is alleged in the petitions—neither one of which, however, is accompanied by a copy of the indictment in the State court, nor by any statement giving a reason why such a copy was not obtained—that the appellant is held in custody under process of a State court, in which he stands indicted for an alleged offence against the laws of Virginia. It is stated in one case that he gave bail, but was subsequently surrendered by his sureties. But it is not alleged and it does not appear, in either case, that he is unable to give security for his appearance in the State court, or that reasonable bail is denied him, or that his trial will be unnecessarily delayed. The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is competent for the State court to pass.

Under such circumstances, does the statute imperatively require the Circuit Court, by writ of habeas corpus, to wrest the petitioner from the custody of the State officers in advance of his trial in the State court? We are of opinion that while the Circuit Court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the national Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any 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; in such and like cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who

were held in custody under State authority. So, also, when they are in the custody of a State officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses. The present cases involve no such considerations. Nor do their circumstances, as detailed in the petitions, suggest any reason why the State court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The Circuit Court was not at liberty, under the circumstances disclosed, to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States. In *Taylor* v. *Carryl*, 20 How. 583, 595, it was said to be a recognized portion of the duty of this court—and, we will add, of all other courts, National and State—" to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may coöperate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations." And in *Covell* v. *Heyman*, 111 U. S. 176, 182, it was declared " that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity."

That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this court holds that where a person is in custody, under process from a State court of

original jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the State court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. The latter was substantially the course adopted in *Ex parte Bridges*, 2 Woods, 428. The prisoner was indicted and convicted in one of the courts of Georgia for perjury committed in an examination before a United States commissioner under what is known as the Enforcement Act of Congress. He was discharged upon habeas corpus, sued out before Mr. Justice Bradley, upon the ground that the State court had no jurisdiction of the case, the offence charged being one which, under the laws of the United States, was exclusively cognizable in the Federal courts. Adverting to the argument that where a defendant has been regularly indicted, tried, and convicted in a State court, his only remedy was to carry the judgment to the State court of last resort, and thence by writ of error to this court, he said: "This might be so if the proceeding in the State court was merely erroneous; but where it is void for want of jurisdiction, habeas corpus will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case. *Ex parte Lange*, 18 Wall. 163." It was further observed, in the same case, that while it might appear unseemly that a prisoner, after conviction in a State court, should be set at liberty by a single judge on habeas corpus, there was no escape from the act of 1867, which invested such judge with power to discharge when the prisoner was restrained of his liberty in violation of a law of the United States.

Statement of Facts.

As it does not appear that the Circuit Court might not, in its discretion and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of opinion that the judgment in each case must be affirmed, but without prejudice to the right of the petitioner to renew his applications to that court at some future time should the circumstances render it proper to do so.

Affirmed.

EX PARTE ROYALL.

ORIGINAL.

Argued December 1, 1884.—Decided March 1, 1886.

The petitioner prayed for a writ of habeas corpus on the ground that the State statute under which he was arrested and held in custody was repugnant to the Constitution of the United States: *Held*, That, without deciding whether the court has power under existing legislation, and on habeas corpus, to discharge a prisoner held in custody under process of a State court of original jurisdiction for trial on an indictment charging him with an offence against the laws of that State, such power ought not, for reasons given in *Ex parte Royall, ante* 241, to be exercised in advance of his trial.

This was an original petition for a writ of habeas corpus. The proceedings were founded upon some of the legislation of the State of Virginia respecting the receipt of coupons by the State in payment of taxes which is considered in *Antoni* v. *Greenhow*, 107 U. S. 769; the *Virginia Coupon Cases*, 114 U. S. 269; *Barry* v. *Edmunds*, 116 U. S. 550; *Royall* v. *Virginia*, 116 U. S. 572; *Sands* v. *Edmunds*, 116 U. S. 585; and *Ex parte Royall, ante*, 241. The case is stated in the opinion of the court.

Mr. William L. Royall in person and *Mr. Daniel H. Chamberlain* for the petitioner. *Mr. William B. Hornblower* was with them on the brief.

Syllabus.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an original application by W. L. Royall, to this court, for a writ of habeas corpus, directed to N. M. Lee, sergeant of the city of Richmond, Virginia, commanding him to produce the body of the petitioner before this court, together with the cause of his detention, that he may be discharged from the custody of said officer. The writ is asked upon the ground that the statute under which he was arrested and is held in custody is repugnant to the Constitution of the United States, and, consequently, that he is restrained of his liberty in violation of that instrument. The petition was filed here on the 1st day of December, 1884. It states the same facts as are set out in the petition in *Ex parte Royall No.* 1, and *Ex parte Royall No.* 2, *ante*, 241, just determined.

The application for the writ must be denied. It is sufficient to say that if this court has power, under existing legislation, and upon habeas corpus, to discharge the petitioner, who is in custody, under the process of a State court of original jurisdiction, for trial on an indictment charging him with an offence against the laws of that State—upon which it is not necessary to express an opinion—such power ought not, for the reasons given in the other cases just decided, to be exercised in advance of his trial.

Denied.

APPLEGATE & Others *v.* LEXINGTON & CARTER COUNTY MINING COMPANY & Others.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Argued March 4, 1886.—Decided March 15, 1886.

When an ancient deed forms part of the original papers in a suit in a court of record to determine the title to land to which the deed relates, the record of the case is admissible against persons who are not parties or privies to the suit in order to prove the antiquity of the deed and to account for its custody.

Statement of Facts.

An ancient, uncontradicted, and apparently genuine certificate of a recorder that a deed was recorded in a specified year long gone by, indorsed upon the original deed, is competent and sufficient evidence that the deed was put on record in the year named. *Stebbins* v. *Duncan*, 108 U. S. 32, affirmed.

When it appears that a deed is at least thirty years old, and that it is found in proper custody, and possession under it is shown, or other equivalent corroborative proof of authenticity, the deed may be admitted in evidence.

The act of the Legislature of Kentucky, of December 19, 1795, "to establish District Courts in this Commonwealth," conferred upon such a court jurisdiction over suits to foreclose mortgages upon real estate situated within its territorial jurisdiction.

When a court of general jurisdiction, empowered by statute to acquire by constructive notice jurisdiction over rights of non-resident defendants in property within its jurisdiction, takes jurisdiction of a cause involving such rights, after ordering service of notice upon an absent defendant in the manner required by the statute and after the lapse of the requisite time for service, and adjudges the case, it will be presumed that every step necessary to obtain jurisdiction has been taken, unless the statute requires evidence of it to appear in the record.

This suit was in the nature of an action of ejectment to recover possession of a tract of land formerly in Mason County, but now in Greenup, Carter, and Boyd Counties, in Kentucky. The plaintiffs in error were the plaintiffs in the Circuit Court. They alleged in their petition that they were the lineal heirs of Carey L. Clark, who died seized of a tract of eight thousand three hundred and thirty-four acres, part of a tract of eighteen thousand acres, granted by patent from the Commonwealth of Virginia, dated April 21, 1792, to Charles Fleming, from whom their ancestor, Carey L. Clark, derived title by a regular chain of conveyances; that the plaintiffs were the owners, and entitled to the possession of the land sued for; and that the defendants had unlawfully entered upon and unlawfully withheld possession of the same.

The defendants, by their answers, denied these allegations, and averred that they were seized of the premises by paramount title. The answers were traversed by the plaintiffs' reply.

There was a jury trial. The plaintiffs, to sustain the issue on their part, offered in evidence the following documents as links in their chain of title:

Statement of Facts.

1. A copy, duly certified from the land office of the State of Kentucky, of the patent from the State of Virginia to Charles Fleming, for the tract of land of which the land in controversy was originally a part.

2. A copy of the will of Charles Fleming, devising a moiety of said tract of land to William Fleming, John Bernard, Jr., and Richard Bernard, as trustees.

3. A copy of a deed from Samuel Sackett and wife to Joseph Conkling and others, dated August 29, 1795, for the particular land in controversy in this case, together with certain other tracts that had been patented by the State of Virginia to Charles Fleming.

4. A copy of a mortgage from Joseph Conkling and others, the grantees above named, to Samuel Sackett, the grantor above named, conveying the same lands as above, and dated August 29, 1795.

5. A copy of a deed from William Fleming and the Bernards, trustees as above under the will of Charles Fleming, to John Bryan, conveying to Bryan the lands devised to them by the will of Fleming, and dated December 31, 1796.

6. The original of the deed last named.

7. A copy of a deed from John Bryan and wife to Samuel Sackett, dated January 28, 1797, conveying the same land conveyed to Bryan by deed last above named.

8. The original of the deed last above named.

9. The original of a deed from Charles Fleming, dated August 8, 1794, to John and William Bryan, conveying to them 13,300 acres of the land that had been patented to said Charles Fleming and being part of the 18,000 acre tract, of which tract the land in controversy is also a part.

10. A certified copy from the Mason County Circuit Court of the record in the case of *Carey L. Clark* v. *Joseph Conkling and others*, in which Clark, as the assignee of the above mentioned mortgage of Joseph Conkling and others to Samuel Sackett, brought suit to foreclose the same.

It was shown that a short time before the trial in the Circuit Court, deeds 6, 8, and 9 were discovered in the office of the clerk of the Circuit Court of Greenup County, Kentucky,

among the original papers in a suit brought there in 1816 to quiet title to part of the land conveyed by the deed of William Fleming and the Bernards to John Bryan. The deeds were produced by the clerk in obedience to a subpœna *duces tecum*.

The court admitted in evidence the first four of the documents above mentioned. All the others were rejected, namely, the original and the copy of the deed from William Fleming and the Bernards to John Bryan, the original and the copy of the deed from Bryan to Sackett, the original of the deed from Charles Fleming to John and William Bryan, and the copy of the record from the Mason County Circuit Court in the case of *Clark* v. *Conkling and others*.

The court having excluded these documents, the plaintiffs were unable to trace title to themselves for the premises in controversy; thereupon the jury, under the instruction of the court, returned a verdict for the defendants, upon which the court rendered judgment, and the plaintiffs sued out this writ of error.

Mr. David W. Armstrong for plaintiffs in error. *Mr. W. W. Helm* was with him on his brief. *Mr. N. T. Crutchfield*, also for plaintiffs in error, submitted on his brief.

Mr. Edward F. Dulin and *Mr. John F. Hager*, for defendants in error, submitted on their brief.

I. A copy of a deed is admissible as evidence only when acknowledgment or proof thereof is legally sufficient to entitle it to record. *Edwards* v. *Hannah*, 5 J. J. Marsh. 117; *Winlock* v. *Hardy*, 4 Littell, 272; *Taylor* v. *Bush*, 5 T. B. Mon. 84; *Harris* v. *Price*, 14 B. Mon. 414; *Carpenter* v. *Dexter*, 8 Wall. 513; *Carter* v. *Champion*, 8 Conn. 549; *DeWitt* v. *Moulton*, 17 Maine, 418; *Tilman* v. *Cowand*, 12 Sm. & Marsh. 262; *Kerns* v. *Swope*, 2 Watts, 75.

II. Mere antiquity of a deed is not sufficient to entitle it to be read as evidence; nor can the record of it, against one not a party, be received as corroborating proof of its execution. *Davis* v. *Wood*, 1 Wheat. 6; *Tappan* v. *Beardsley*, 10 Wall. 427; *Owings* v. *Hull*, 9 Pet. 607; *Fenwick* v. *Macy*, 2 B.

Mon. 469; *Beckwith* v. *Marryman*, 2 Dana, 371; *Samuels* v. *Hall*, 9 B. Mon. 374; *Sargeant* v. *State Bank of Indiana*, 12 How. 371; *Lewis* v. *Robards*, 3 T. B. Mon. 406; *Crowder* v. *Hopkins*, 10 Paige, 183; *Staring* v. *Bowen*, 6 Barb. 109; *Jackson* v. *Blanshan*, 3 Johns. 292; *Willson* v. *Betts*, 4 Denio, 201; *Clark* v. *Owens*, 18 N. Y. 434; *Ridgley* v. *Johnson*, 11 Barb. 527.

III. The Washington District Court had no power to hear and determine the cause. This is the test of jurisdiction, *Grignon's Lessee* v. *Astor*, 2 How. 338; to be determined by statute, not by common law or usage. *Dunn* v. *McMillen*, 1 Bibb, 409.

The act in question is that of 1796, Vol. I. Morehead & Brown's Statutes, 91, 94, and is directory of the method of proceeding in courts of equity against absent debtors or other absent defendants. It is evident that Clark's suit was brought and attempted to be maintained under the fourth section of this act. As we read and understand the first section, it authorized proceedings against absent defendants only in cases where debts were due them or their effects were in the hands of some one resident of Kentucky, and was restricted in this application to choses in action and other personal property. The second and third sections refer alone to the methods of procedure in cases authorized by the first. The fourth section, in like manner, was restricted in its application to personalty, and is to be construed as regulating proceedings on attachments against absconding debtors. Persuasive evidence in favor of such construction is found in the history of legislative enactments following the act of 1796. The act of 1800 (p. 94) authorized a resident joint tenant to sue for an adjustment of any claim to land held in joint tenancy. The act of 1802 was to permit a suit in chancery to obtain a division of lands against absent and unknown heirs. The act of 1815 (p. 97) enlarged the application of the act of 1802, but not until 1827 (see act, p. 98) was there any law of Kentucky by which the real estate of absent defendants could be subjected to sale for their debts. See *Hare* v. *Bryant*, 7 J. J. Marsh. 375.

IV. The record is void because the facts essential to the ex-

ercise of the jurisdiction do not appear therein. Section 2, act of 1796, I., M. & B. Stat. Ky. 92, prescribes that the court shall appoint some day in the next succeeding term for the absent defendant, or defendants, to enter his or their appearance and give security for performing the decree; a copy of which is directed to be forthwith published in the Kentucky Gazette or Herald, and continued for two months successively, and further, shall also be published on some Sunday, immediately after divine service, in such meeting-house as the court shall direct; and another copy shall be posted at the front-door of the court-house. The failure to appear and give security, authorized the court to take such proof as the complainant should offer; and if thereupon satisfied, to order the bill taken as confessed, and decree further, etc. In terms the orders conform to the statutory requirement aforesaid. The record produced contains no evidence of the fact of publication, not so much as reciting formally the existence of jurisdictional facts. The entire proceeding, it appears, was wholly *ex parte*. As in *Galpin* v. *Page*, 18 Wall. 350, presumption of service ordinarily arising from the existence of a judgment cannot be raised in favor of this record. Also see *Hart* v. *Grigsby*, 14 Bush, 542; *Green* v. *Breckenridge*, 4 T. B. Mon. 541; *Blight* v. *Banks*, 6 T. B. Mon. 192; *Brownfield* v. *Dyer*, 7 Bush, 505; *Long* v. *Montgomery*, 6 Bush, 394; *Grigsby* v. *Barr*, 14 Bush, 333.

Mr. Justice Woods delivered the opinion of th e court. After stating the case as above reported, he continued:

We shall first consider the exclusion of the original deed from Fleming and the Bernards to John Bryan, and the original deed from John Bryan to Samuel Sackett. We are of opinion that they should have been admitted in evidence. They have been certified to and inspected by this court. Their appearance affords strong evidence of their genuineness and antiquity, and they are free from any badge that would excite suspicion of fraud or forgery. In support of their genuineness it was shown that a short time before the trial in the Circuit Court they were discovered by one of the plaintiffs' attorneys

in the office of the clerk of the Circuit Court of Greenup County, Kentucky, among the original papers of a suit in that court brought by one *James Hughes* v. *The Heirs of Thomas Shore*, on July 15, 1816, to quiet his title to sixteen thousand acres of land in Greenup County, part of the lands conveyed by the deed of William Fleming and the Bernards to John Bryan. The deeds and the original papers in that suit were produced by a clerk of the Greenup Circuit Court in obedience to a subpœna *duces tecum*. The record of this case was admissible against persons not parties or privies, to prove the collateral fact of the antiquity of the original deeds offered in evidence and to account for their custody. *Barr* v. *Gratz*, 4 Wheat. 213, 220.

The bill of Hughes averred that he derived title under the patent to Charles Fleming, and by virtue of the devise in his will to William Fleming and the Bernards, and the deeds of William Fleming and the Bernards to John Bryan, and of John Bryan to Samuel Sackett. The complainant Hughes offered by his bill "to produce said patent and deeds showing the deduction of title in proper time, or whenever the court should require it." The two deeds mentioned in the bill of complaint filed by Hughes correspond with and appear to be the two original deeds, namely, the deed from William Fleming and the Bernards to John Bryan, and the deed from John Bryan to Samuel Sackett, offered in evidence by the plaintiffs in this case, which were found among the other papers in the case of *Hughes* v. *The Heirs of Shore*. These deeds were necessary exhibits and evidence in the case to entitle Hughes to the relief prayed for. They were produced from the files of the highest court of the county where the lands were situate, from the custody of an officer charged by law with their care and safe-keeping, where they had been placed for a necessary and proper use, and from which they could not be withdrawn without the order and consent of the court. Their custody was, therefore, accounted for, and was shown to be proper and beyond suspicion.

It further appeared that upon the trial of the case of *Hughes* v. *Shore's Heirs*, on July 8, 1825, the patent to Charles Fleming from the Commonwealth of Virginia for 16,191 acres of

land, the will of Charles Fleming and the said deed of William Fleming and the Bernards, trustees, to John Bryan, were offered in evidence. The latter was rejected "because," as the bill of exception states, "the certificate and seal of the mayor of Philadelphia" was "not sufficient to authorize it to be read, and because the same could not be read as a recorded deed, not having been recorded within the time prescribed by law." And "because by rejecting this deed complainants' claim of title was broken and they could not further progress with their evidence, the court rendered a decree dismissing their bill." It is, therefore, made clear by the evidence offered that at least as early as the year 1825 the deed of William Fleming and the Bernards to John Bryan was on file in the Circuit Court of Greenup County, and it may be safely inferred that the other documents mentioned by Hughes as his muniments of title were also on file in the same court at the same time, and that all the deeds remained in the custody of the court down to the time when they were produced by the clerk under the subpœna *duces tecum* issued in this case, a period of fifty-five years.

Another circumstance relied on to show the genuineness of the original deeds was that each bore indorsed thereon a certificate apparently ancient and genuine, one with the signature of the recording officer and the other without signature, to the effect that the deeds had been recorded in the year 1816. In the case of *Stebbins* v. *Duncan*, 108 U. S. 32, 50, it was held that a certified copy of a memorandum made at the foot of the record of a deed "recorded June 23d, 1818," and without signature, was competent and conclusive evidence that the deed had been recorded at the date mentioned. In view, therefore, of the habit of recorders of deeds, which is universal and matter of common knowledge, to indorse upon the deeds themselves the fact and date of their registration, the certificates appearing on the deeds in question were competent and sufficient evidence of the fact that the deeds had been put upon record during the year mentioned in the certificates.

We think this evidence, supported by an inspection of the deeds, was sufficient to justify their admission as ancient deeds without direct proof of their execution. The rule is that an

ancient deed may be admitted in evidence, without direct proof of its execution, if it appears to be of the age of at least thirty years, when it is found in proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity, freeing it from all just grounds of suspicion. Thus, in *Barr* v. *Gratz*, 4 Wheat., above cited, a deed from Craig to Michael Gratz, dated July 16, 1784, was offered in evidence, but was not proved by the subscribing witnesses, nor their absence accounted for. Its admission was alleged as error; but this court said that, as the deed was more than thirty years old, and was proved to have been in the possession of the lessors of the plaintiff, and actually asserted by them as the ground of their title in a prior chancery suit, it was in the language of the books sufficiently accounted for, and on this ground, as well as because it was a part of the evidence in support of the decree in that suit, it was admissible without the regular proof of its execution.

So in *Caruthers* v. *Eldredge*, 12 Gratt. 670, it was contended by the plaintiff in error that in no case could a paper be admitted in evidence as an ancient deed, without proof of its execution, until it was first shown that thirty years' quiet and continued possession of the land had been held under the deed. But the court held, in substance, that an ancient deed may be introduced in evidence without proof of its execution, though possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine.

In *Harlan* v. *Howard*, 79 Ky. 373, the Court of Appeals states the rule in relation to the proof of ancient deeds thus: "The genuineness of such instruments may be shown by other facts as well as that of possession. And when proof of possession cannot be had, it is within the very essence of the rule to admit the instrument, where no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled to it." See also Vin. Ab., Evidence A. b. 5; Ancient Deeds, 7; Com. Dig. Evidence, B. 2; 1 Greenleaf on Evidence, § 144, and note 1; Starkie on Evidence, 524;

Phillipps on Evidence, Cowen & Hill's Notes, Part II., note 197, page 368, *et seq.*, 3d ed.; note 430, page 400, 5th ed.; *Doe* v. *Passingham*, 2 Car. & P. 440; *Rancliffe* v. *Parkyns*, 6 Dow, 149, 202; *Winn* v. *Patterson*, 9 Pet. 663; *Jackson* v. *Laroway*, 3 Johns. Cas. 283; *Hewlett* v. *Cock*, 7 Wend. 371.

In the case last cited, Judge Nelson, afterwards a justice of this court, said, that there was some confusion in the cases in England and New York as to the preliminary proof necessary to authorize an ancient deed to be read in evidence; that possession accompanying the deed was always sufficient without other proof, but it was not indispensable. He approved the decision in *Jackson* v. *Laroway*, *ubi supra*, which he said had been recognized as law in *Jackson* v. *Luquere*, 5 Cowen, 221, and had undoubtedly in its favor the weight of English authority. These authorities sustain the rule as we have stated it.

The deeds in question, when offered in evidence, purported to be over eighty years old, and their appearance tended to prove their antiquity and their genuineness. The testimony offered in support of them proved their existence as far back as the year 1816, and that in that year they had been placed upon the public record of deeds, where, if properly acknowledged, they would have been entitled to registration. In the same year in which they were recorded they were mentioned and referred to in the bill filed by *Hughes* v. *Shore's Heirs* as muniments of his title, and he offered to produce them when required. There is no reason to doubt that they remained in the rightful custody of the clerk in whose office they had become file papers, until, after a lapse of at least fifty-five years, they were found and produced upon the trial of the present case by the officer to whose custody they belonged.

But the proof of the genuineness of both deeds was greatly strengthened by evidence which applied directly to one only of the two, namely, the original deed from John Bryan to Samuel Sackett, dated January 28, 1797.

This consisted of the record of a partition made October 18, 1810, on the application of James Hughes, by commissioners under authority of a general act of the Legislature of Kentucky, approved December 19, 1796. Hughes claimed the un-

divided half of the 18,000 acres conveyed to Charles Fleming by the Governor of Virginia, by patent dated April 21, 1792, and alleged as muniments of his title the said patent and the deed of John Bryan to Samuel Sackett. On the strength of the title shown by Hughes the commissioners divided the 18,000 acres and set off and conveyed to him the one-half thereof in severalty, and in their deed of conveyance referred to the patent to Charles Fleming, and the deed of Bryan to Sackett, as links in the title of Hughes. The partition thus made is shown to have been recognized by successive conveyances of parts of the land set off to Hughes and by possession held thereunder. The testimony, therefore, shows that as early as the year 1810 the deed of Bryan to Sackett was in existence, that it was recognized as a genuine deed by public officers whose duty it was to scrutinize it, and was made by them the basis of their official action, and that possession has been held of a portion of the land described therein by persons who trace title through it to the patent to Charles Fleming. These two deeds under consideration are shown by the record to have a common history, and to have been relied on as links in the same chain of title. Testimony, therefore, which is directly applicable to one only, tends to support the other. The facts, therefore, which we have just stated in reference to the deed from Bryan to Sackett, tend to show also the genuineness of the deed from Fleming and the Bernards to Bryan. We are, therefore, of opinion that the genuineness of both deeds was proven, and that the court erred in excluding them from the jury.

The offer in evidence of the original deed from Charles Fleming to John and William Bryan, dated August 8, 1794, stands upon substantially the same ground as the two deeds already considered. The bill of exceptions states that the plaintiffs offered in support of the competency of this deed the same evidence as was offered in support of the two last mentioned deeds; that it was found at the same time and place and produced from the same custody. In further support thereof the plaintiffs produced the clerk of the Mason County Court, having with him deed book B, containing deeds re-

corded in the clerk's office of that court, beginning February 22, 1794, and the two or three years next ensuing, and offered to show that there was recorded in that book a deed identical in terms with the aforesaid original deed. They also offered and read in evidence a copy of the deed duly certified from the clerk's office of the Mason County Circuit Court, with a copy of the certificate thereto appended showing that the original deed was recorded in the year 1794. It follows, from what we have said in relation to the admissibility of the other original deeds, that this one also should have been received in evidence, and that the Circuit Court erred in excluding it.

It remains to consider the exclusion by the Circuit Court of the transcript of the record in the case of *Clark* v. *Conkling*. This was a suit brought by Clark in the District Court, held at Washington in Mason County, Kentucky, on June 13, 1798, as the assignee of the mortgage from Conkling to Sackett, to foreclose the same, and the record was offered only to show the orders and decrees of the court in respect to the mortgaged premises situated within its jurisdiction, and not to prove any personal decree against the defendants. It appears from the record in this case that a subpœna having been issued and returned with the indorsement that the defendants were not inhabitants of the Commonwealth, the court made the following order, at its November Term, 1798:

"The defendants, not having entered their appearance agreeably to an act of assembly and rules of this court, and it appearing to the satisfaction of the court that they are not inhabitants of this Commonwealth, on the motion of the complainant, by his attorney, it is ordered that the defendants appear here on the third day of our next term and answer the complainants' bill; and that a copy of this order be inserted in the Kentucky Gazette or Herald for two months, successively; another posted at the door of the court-house of Mason County; and that this order be published some Sunday at the door of the Baptist meeting-house in Washington."

In June, 1799, the bill was taken as confessed, and an interlocutory decree made requiring the defendants to pay the money due on the mortgage. The money not having been paid a de-

cree of sale was made at the February term, 1800. The commissioners to make the sale reported on July 19, 1802, that after public notice they had sold the lands at public sale to Carey L. Clark, the complainant. Afterwards a final decree was made foreclosing the defendants of their equity of redemption in the premises.

The defendants objected to the introduction of the record, and the objection was sustained, and the defendants now insist that the exclusion of the record was right, first, because the court did not have authority of law to hear and determine the subject-matter of the suit, nor of suits of the class to which it belonged; and, second, because the record exhibits no proof of the publication or posting of the notice to the defendants as required by the laws of Kentucky.

We think the first objection is answered by reference to the statute laws of Kentucky, in force at the time. Section 8 of the act of the General Assembly of Kentucky, approved December 19, 1795, "to establish District Courts in this Commonwealth," provided as follows: "The jurisdiction of the said District Courts, respectively, shall be over all persons, and in all causes, matters, and things at common law or in chancery, arising within their districts," excepting actions of assault and battery or suits for slander and subjects of controversy of less than fifty pounds in value. 1 Littell's Laws of Kentucky, 298.

Section 4 of the act approved December 19, 1796, directing the method of proceeding in courts of equity against absent debtors and other absent defendants, provides for constructive service by publication, "in all cases, whatever, when a suit is or shall be depending in any court of chancery, concerning any matter or thing whatever, against any absent defendant or defendants." 1 Stat. (Laws M. & B.), 93. These provisions of the statute law are ample to confer jurisdiction on the court where the property in controversy is within its territorial jurisdiction, and are so clear as to require no discussion of the question. For, as was said in *Grignon's Lessee* v. *Astor*, 2 How. 338, "the power to hear and determine a cause is jurisdiction. If the law confers the power to render a judgment or decree, then the court has jurisdiction."

Opinion of the Court.

But it is objected to the record that it does not show publication and posting of notice to the defendants, as required by the order of the court and by law.

The law is found in section 2 of the act of December 19, 1796, *ubi supra*, and is as follows: "The court shall also appoint some day in the succeeding term for the absent defendant or defendants to enter his, her, or their appearance to the suit, and give security for performing the decree, a copy of which order shall be forthwith published in the Kentucky Gazette or Herald, and continued for two months successively, and shall also be published on some Sunday, immediately after divine service, in such church or meeting-house as the court shall direct, and another copy shall be posted at the front door of the said court-house."

The plaintiffs in the present case offered evidence outside the record to prove the fact that the order was published in the Kentucky Gazette, as required by the statute, by calling the assistant librarian of the public library at Lexington, "having with him," as the bill of exceptions states, "printed newspapers which appeared to be of great age, and which purported to be the original files of the newspaper called the Kentucky Gazette, published weekly; and plaintiffs showed, in nine successive issues of said newspaper, weekly publications, beginning with December 12, 1798, and ending with February 7, 1799, of" the order of the court above mentioned.

But no proof was offered to show the publication of the order at the church or meeting-house, or the posting of it at the front door of the court-house. After the lapse of more than eighty years proof not of record of these facts was clearly impossible. The fact, therefore, that after the lapse of so long a time the plaintiffs were able to show that the order of the court had been obeyed, by its publication in a newspaper, was persuasive evidence that the other requirements of the order had also been performed.

But the record contained no proof of the publication and posting of the notice as required by the statute, and it is insisted by the defendants in this case, that the record itself must show the publication and posting of the notice as required by

law, otherwise the jurisdiction of the court does not appear, and its decree is absolutely void.

While it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on non-residents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless indeed the statute expressly or by implication requires it. The court which made the decree in the case of *Clark* v. *Conkling* was a court of general jurisdiction. Therefore every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction. *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173; *Voorhees* v. *Bank of the United States*, 10 Pet. 449; *Grignon* v. *Astor*, 2 How. 319; *Harvey* v. *Tyler*, 2 Wall. 328. It is to be presumed that the court before making its decree took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed. That this presumption is authorized will appear by the following cases: In *Harvey* v. *Tyler*, *ubi supra*, the court, speaking by Mr. Justice Miller, said: "The jurisdiction which is now exercised by the common law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. . . . In all cases where the new powers, thus conferred, are to be brought into action in the usual form of common law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made, as in cases falling more strictly within the usual powers of the court." p. 342.

In *Hall* v. *Law*, 102 U. S. 461, the validity of a partition of lands, made by a Circuit Court of the State of Indiana, was attacked. This court, speaking by Mr. Justice Field, said: "All that" the statute "designates as necessary to authorize the court to act is, that there should be an application for the partition by one or more joint proprietors, after giving notice of the intended application in a public newspaper for at least four weeks. When application is made, the court must consider whether it is by a proper party, whether it is sufficient in

form and substance, and whether the requisite notice has been given, as prescribed. Its order made thereon is an adjudication in these matters." pp. 463–464.

The case of *Voorhees* v. *Bank of the United States*, 10 Pet. 449, was an action of ejectment, and the case turned on the validity of a sale of the premises in controversy under a judgment of the Court of Common Pleas of Hamilton County, Ohio, in a case of foreign attachment. The sale was attacked on the following among other grounds: (1.) Because the statute authorizing the proceeding by foreign attachment required that an affidavit should be made and filed with the clerk before the writ issued, and no such affidavit was found in the record. (2.) Because the statute directed three months' notice to be given, by publication in a newspaper, of the issuing of the attachment, before judgment should be entered, and also required fifteen days' notice of sale to be given, neither of which appeared by the record to have been done. (3.) Because the statute required that the defendant should be put in default at each of the three terms preceding the judgment, and the default entered of record, but no entry was made of the default at the last of the three terms.

But the court overruled the objections and sustained the validity of the judgment and the sale. It said: "But the provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear on the record. The thirteenth section [of the attachment law], which gives to the conveyances of the auditors the same effect as a deed from the defendant in the attachment, contains no other limitation than that it shall be 'in virtue of the authority herein granted.' This leaves the question open to the application of those general principles of law by which the validity of sales made under judicial process must be tested; in the ascertainment of which we do not think it necessary to examine the record in the attachment, for evidence that the acts alleged to have been omitted appear therein to have been done." p. 471.

The result of the authorities and what we decide is, that where a court of general jurisdiction is authorized in a proceed-

ing, either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid. The case of *Galpin* v. *Page*, 18 Wall. 350, cited by counsel for defendant, is not in conflict with this proposition. The judgment set up on one side and attacked on the other in that case was rendered on service by publication. The law permitted service to be made by publication only where certain facts were made to appear to the satisfaction of the court, and the court by a precedent order, which must necessarily appear of record, authorized service to be made by publication. But the record showed no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual. See also *Pennoyer* v. *Neff*, 95 U. S. 714, 727, 734.

It results from the views we have expressed, that

The judgment of the Circuit Court of Kentucky must be reversed and the cause remanded, with directions to grant a new trial.

BOARDMAN *v.* TOFFEY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Argued March 11, 1886.—Decided March 15, 1886.

If the trial below is by the court without a jury, and the findings of facts are general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions.

The case is stated in the opinion of the court.

Syllabus.

Mr. James B. Vredenburgh for plaintiff in error submitted on his brief.

Mr. Preston Stevenson for defendant in error.

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

This judgment is affirmed. The trial was by the court without a jury and there is no special finding of facts. The only questions presented by the bill of exceptions which we can consider are those which relate to the refusal of the court to allow certain interrogatories to be put to witnesses on the stand, and in these we find no error. The general finding prevents all inquiry by us into the special facts and conclusions of law on which that finding rests. *Norris* v. *Jackson*, 9 Wall. 125; *Cooper* v. *Omohundro*, 19 Wall. 65, 69; *Martinton* v. *Fairbanks*, 112 U. S. 670, 673.

Affirmed.

JEFFERSON, Trustee, *v.* DRIVER, Administrator, & Another.

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

Submitted March 1, 1886.—Decided March 15, 1886.

A removal of a cause from a State court on the ground of local prejudice can only be had where all the parties to the suit on one side are citizens of different States from those on the other.

The provision as to the removal of a separable controversy under the second subdivision of Rev. Stat. § 639 has no application to removals under the third subdivision; and the similar provision in the act of March 3, 1875, applies only to removals under that act.

A purchaser *pendente lite* of real estate who becomes party to the suit is subject to the disabilities of the parties at the time he comes in, in respect of removing the cause from a State court to a Circuit Court of the United States.

The case is stated in the opinion of the court.

Opinion of the Court.

Mr. J. J. Horner, *Mr. J. C. Tappan*, *Mr. D. E. Myers*, and *Mr. W. M. Sneed* for appellants.

Mr. E. F. Adams for appellees.

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

This is an appeal under § 5 of the act of March 3, 1875, 18 Stat. 470, ch. 137, from an order of the Circuit Court remanding a suit which had been removed from a State court. The case was here on a former appeal, and it was then decided that a former removal, to which J. T. Jefferson was a party, had been improperly accepted by the Circuit Court, and the cause was remanded to the State court by the order of this court. *Edrington* v. *Jefferson*, 111 U. S. 770. Reference is made to the report of that appeal for the facts of the case as they appear in the record down to that time.

That appeal, which was taken from a final decree upon the merits, did not operate as a supersedeas, and before the suit got back to the State court a sale of the property involved in the litigation was made, in accordance with the decree appealed from, under which J. W. Jefferson, a citizen of Tennessee, not then a party to the suit, became a purchaser and went into possession.

After the case got back to the State court Mrs. Edrington resigned her office as executrix of the will of James H. Edrington, and John B. Driver, a citizen of Arkansas, was appointed administrator with the will annexed. On the 16th of January, 1885, the administrator, who had been substituted as complainant for Mrs. Edrington as executrix, filed a petition against J. W. Jefferson, the purchaser of the property pending the former appeal, for an account of the rents and profits while he was in possession, and the next day Jefferson presented his petition for a removal of the suit to the Circuit Court of the United States, on the ground that, as to him, the suit was a new one just begun, in which there was a controversy "wholly between citizens of different States, and which can be fully determined as between them without the presence or intervention

of the parties thereto, to wit, a controversy between your petitioner, defendant J. W. Jefferson, who is a citizen and resident of the State of Tennessee, and the complainant in the original and amended bill, John B. Driver, . . . who is a citizen of Mississippi County, Arkansas." He also petitioned for a removal, under § 639, subdivision 3, of the Revised Statutes, on the ground of local prejudice. On the 15th of January, 1885, J. T. Jefferson, who was a party to the first petition for removal, presented his petition for another removal on the ground of local prejudice.

When the suit was entered in the Circuit Court of the United States under these removals it was remanded to the State court, and thereupon this appeal was taken.

So far as the removals on the ground of local prejudice are concerned, it is only necessary to say that such removals can only be had where all the parties to the suit on one side are citizens of different States from those on the other. *Myers* v. *Swann*, 107 U. S. 546. The language of the statute is, "when a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant." The provision as to the removal of a separable controversy, under the second subdivision of Rev. Stat. § 639, has no application to removals under the third subdivision, and the similar provision in the act of 1875 applies only to removals under that act. *Bible Society* v. *Grove*, 101 U. S. 610. As in this case many of the defendants are citizens of the same State with Driver, the complainant, it follows that the suit was properly remanded under this branch of the applications for removal.

As to the application of J. W. Jefferson for a removal under the act of 1875, the rule in *Cable* v. *Ellis*, 110 U. S. 389, applies. He was brought into the suit as a purchaser *pendente lite*, and the relief asked against him is only an incident to the original controversy. The proceeding is merely ancillary to the suit pending when he bought the property in dispute, and under which he got possession. It is, in short, only a part of the machinery in the administration of the cause. By purchas-

ing *pendente lite* he connected himself with the suit, subject to the disabilities of the other parties in respect to a removal at the time he came in.

The order remanding the suit is

Affirmed.

SLOANE & Others *v.* ANDERSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

Submitted March 1, 1886.—Decided March 15, 1886.

The filing of separate answers by several defendants, sued jointly in a State court, on an alleged joint cause of action in tort, in which each avers that he acted separately on his own account and not jointly, in the acts complained of, does not divide the suit into separate controversies so as to make it removable into the Circuit Court of the United States.

Pirie v. *Tvedt*, 115 U. S. 41, affirmed and applied.

This writ of error was sued out to review the action of the Circuit Court in remanding the cause to the State court, from whence it had been removed. The case is stated in the opinion of the court.

Mr. J. M. Flower and *Mr. C. W. Bunn* for plaintiffs in error.

Mr. M. P. Wing and *Mr. J. Hubley Ashton* for defendant in error.

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

This is a writ of error brought under the act of March 3, 1875, 18 Stat. 470, ch. 137, to reverse an order of the Circuit Court remanding a suit which had been removed from a State court. The suit was brought by Anderson, the defendant in error, a citizen of Wisconsin, against John Sloane, William D. Sloane, Henry F. Sloane, Thomas C. Sloane, Walter W. Law, Alexander Wright, and Charles L. Watson, partners under the name of W. & J. Sloane, all citizens of New York; John V.

Farwell, Charles B. Farwell, William D. Farwell, and John L. Harmon, partners under the name of J. V. Farwell & Co., citizens of Illinois; Curtis H. Remy, an attorney-at-law, and a citizen of Illinois; and Angus Cameron, Joseph W. Losey, and Charles W. Bunn, partners doing a general law business under the name of Cameron, Losey & Bunn, citizens of Wisconsin. The complaint states that in September, 1881, Anderson was a merchant in good credit, doing business at La Crosse, Wisconsin, and worth at least $15,000 over his debts; that on the 28th of September he was indebted to W. and J. Sloane in the sum of $3,378.28, of which only $363.03 was then due, and to J. V. Farwell & Co. in the sum of $1,757.08, of which only $439.27 was due; that on that day the defendants Cameron, Losey & Bunn and Curtis H. Remy, by the order and direction of W. & J. Sloane, caused a judgment to be entered against him as by confession in the Circuit Court of La Crosse County for his entire debt to that firm, and by the order and direction of J. V. Farwell & Co. another judgment for his entire debt to that firm, and that each of these judgments was irregular and void, the court being without jurisdiction in the premises. The complaint then proceeds as follows:

"That on the 28th day of September, 1881, the said defendants, Cameron, Losey & Bunn, by order and direction of the said Curtis H. Remy, and by order and direction of the said defendants, W. & J. Sloane and John V. Farwell & Co., wrongfully and unlawfully issued executions out of said Circuit Court on said several judgments for the full amount of damages and costs aforesaid to the sheriff of La Crosse County, which said executions, though regular in form so as to protect said sheriff, were unauthorized and void.

"That Mark M. Buttles, the then sheriff of La Crosse County, on the said 28th day of September, 1881, under and by virtue of the said executions, which were both delivered to him at the same time, and under and by virtue of the orders and directions of the said defendants, Cameron, Losey & Bunn, and of the defendants, Curtis H. Remy and W. & J. Sloane and John V. Farwell & Co., and in the absence of this plaintiff from the city of La Crosse, he having left this city

at the express request of the said defendant Curtis H. Remy, who was acting in behalf of said defendants, W. & J. Sloane and John V. Farwell & Co., the said sheriff, without the plaintiff's consent, levied upon, seized, and took possession of the entire stock of goods, fixtures, and furniture and store of this plaintiff, occupied by him under lease, . . . and seized and took the keys of said store, and turned out and caused to be removed and kept out from said store the clerks and customers of this plaintiff, and shut up said store and stopped all trades and sales therein for and during the space and time of twenty-five days, to his damage in the sum of five thousand dollars, the said stock of goods and fixtures and furniture being then and there worth the sum of thirty thousand dollars."

Separate answers were filed by Cameron, Losey & Bunn, W. & J. Sloane, and J. V. Farwell & Co. Each of these answers was substantially a copy of the others and the same defences were set up in all. Among other things it was alleged that in making the levies the firms of W. & J. Sloane and J. V. Farwell & Co. acted separately, each on its own account, and not jointly, "and that there was consequently a misjoïnder of parties defendant." It was, therefore, pleaded in abatement of the action that there was a "misjoinder of parties defendant, inasmuch as the defendants, W. & J. Sloane, and the defendants, J. V. Farwell & Co., are not jointly concerned in this matter or jointly liable to the plaintiff herein." Each of the firms, however, admitted that Cameron, Losey & Bunn acted under its authority and by its direction in what they did on its account.

After filing these answers, W. & J. Sloane and J. V. Farwell & Co. united in a petition for the removal of the suit to the Circuit Court of the United States upon the following ground:

"That there exists in said suit a controversy which is wholly between citizens of different States, to wit, between the said plaintiff, a citizen of Wisconsin, and your petitioners, citizens of the States of New York and Illinois aforesaid, and which can be fully determined as between them; that the controversy in this action, and which is stated in the pleadings on

file therein, is a separable one, and can be fully tried and determined between the said plaintiff and your petitioners without the presence of their said codefendants above named, or any or either of them."

The suit was docketed in the Circuit Court of the United States on the 1st of June, 1885, and that court remanded it to the State court on the 3d of June. To reverse the order to that effect this writ of error was brought.

We are unable to distinguish this case in principle from that of *Pirie* v. *Tvedt*, 115 U. S. 41, in which it was held, on full consideration, that a suit for malicious prosecution, brought by a citizen of Minnesota against citizens of Minnesota and citizens of Illinois, was not removable by the citizens of Illinois, under the second clause of § 2 of the act of 1875, on the ground that, as the action was in tort, it was severable for the purposes of removal. It is true in that case the complaint alleged that "the said defendants, confederating together, and with a malicious and unlawful design had and entertained by them, and each of them, to injure, oppress, and harass these plaintiffs, and to break them up in business, wrongfully, maliciously, unlawfully, and without any reason or provocation or probable cause," brought the action against the plaintiffs; but this was in its legal effect, so far as the present inquiry is concerned, nothing more than an allegation that the defendants acted jointly in the commission of the wrong which had been done. The point decided was that a joint action in tort was not severable for the purposes of removal any more than a joint action on contract. We had decided at the same term, in *Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S. 52, and in *Putnam* v. *Ingraham*, 114 U. S. 57, that suits on contracts were not separable for the purposes of removal because separate defences had been interposed by the several defendants, and under the State practice judgments in joint actions might be given for or against one or more defendants. Applying this principle to the case then in hand we said (p. 43): "There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert. The cause of action is several as

well as joint, and the plaintiffs might have sued each defendant separately, or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only, does not divide a joint action in tort into separate parts any more than it does a joint action on contract." In the present case there is, according to the complaint, but a single cause of action, and that is the wrongful seizure of the property of the plaintiff by the united efforts of all the defendants acting in common.

The claim that W. & J. Sloane and J. V. Farwell & Co. were acting each for themselves, and not in common, has no effect on the question of removal. All the defendants concede that Cameron, Losey & Bunn were acting as well for Sloane as for Farwell, and if there were in fact two trespasses instead of one, they were connected with both. Whether this, therefore, be considered as a suit for the Sloane trespass, or for the Farwell trespass, Cameron, Losey & Bunn are necessary parties to the relief which the plaintiff asks, and that is a judgment for damages against all who were guilty of the wrong of which he complains. They were parties to both the alleged trespasses, and a judgment is asked against them as well as the others. Sloane and Farwell cannot, either separately or jointly, remove the suit as it has been begun, without taking them along. They are citizens of the same State with the plaintiff. Consequently, if it be conceded that there are two separate causes of action, so far as Sloane and Farwell are concerned, the suit is still not removable, because each cause of action includes the Wisconsin defendants, and as to them there cannot be a removal.

The order remanding the suit is

Affirmed.

FIDELITY INSURANCE COMPANY *v.* HUNTINGTON.

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

Submitted March 1, 1886.—Decided March 15, 1886.

A creditor's bill, to subject incumbered property to the payment of his judgment, by sale and distribution of the proceeds among lien-holders according to priority, creates no separate controversy, as to the separate lien-holders parties respondent, within the meaning of the removal acts, although their respective defences may be separate.

The case is stated in the opinion of the court.

Mr. Samuel Dickson, *Mr. E. W. Kittredge*, *Mr. John C. Bullett*, and *Mr. Richard C. Dale*, for appellants.

Mr. R. A. Harrison, *Mr. William M. Ramsey*, and *Mr. Lawrence Maxwell, Jr.*, for appellee.

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

This is an appeal under section 5 of the act of March 3, 1875, 18 Stat. 470, ch. 137, from an order of the Circuit Court remanding a suit which had been removed from a State court.

The case is this: Collis P. Huntington, a citizen of New York, recovered a judgment in the Court of Common Pleas of Scioto County, Ohio, on the 29th of May, 1885, against the Scioto Valley Railroad Company, an Ohio corporation, for $639,305.67. Executions were afterwards issued upon this judgment, and levied upon the railroad, rolling-stock, and other personal property of the company. This property was covered by several mortgages, or deeds of trust, one to the Fidelity Insurance Trust and Safe Deposit Company, a Pennsylvania corporation; another to Samuel Thomas, a citizen of New York; another to the Central Trust Company of New York, a New York corporation; another to Henry K. McKarg, a citizen of New York; another to the Metropolitan Trust

Company of the City of New York, a New York corporation; and others to various citizens of Ohio. Such being the condition of the property, Huntington began a suit in the Court of Common Pleas of Scioto County, the object of which was to marshal the liens and obtain a sale of the property, free of incumbrance, to pay his judgment, after satisfying all prior claims, and, in the meantime, to have a receiver appointed. To this suit all the several lien-holders were made parties, and the Fidelity Insurance Trust and Safe Deposit Company answered, setting up its mortgage as a first lien, and asking that the property be sold and the proceeds applied to the satisfaction of that mortgage debt. This being done, the same company presented a petition for the removal of the suit to the Circuit Court of the United States, on the ground that there was in the suit a controversy which was wholly between citizens of different States, and which could be fully determined as between them, to wit, a controversy between the petitioner, a citizen of Pennsylvania, and Huntington, the plaintiff, and all the defendants, except the petitioner, citizens of States other than Pennsylvania. When the suit was entered in the Circuit Court it was remanded, and to reverse that order this appeal was taken.

The suit as brought by Huntington is a creditor's bill to subject incumbered property to the payment of his judgment by a sale and distribution of the proceeds among lien-holders according to their respective priorities. There is but a single cause of action, and that is the equitable execution of a judgment against the property of the judgment debtor. This cause of action is not divisible. Each of the defendants may have a separate defence to the action, but we have held many times that separate defences do not create separate controversies within the meaning of the removal act. *Louisville and Nashville Railroad Co.* v. *Ide*, 114 U. S. 52; *Putnam* v. *Ingraham*, 114 U. S. 57; *Pirie* v. *Tvedt*, 115 U. S. 41; *Starin* v. *New York*, 115 U. S. 248; *Sloane* v. *Anderson*, ante 275. The judgment sought against the Fidelity Company is incident to the main purpose of the suit, and the fact that this incident relates alone to this company does not separate this part of the con-

troversy from the rest of the action. What Huntington wants is not partial relief settling his rights in the property as against the Fidelity Company alone, but a complete decree, which will give him a sale of the entire property free of all incumbrances, and a division of the proceeds as the adjusted equities of each and all the parties shall require. The answer of this company shows the questions that will arise under this branch of the one controversy, but it does not create another controversy. The remedy which Huntington seeks requires the presence of all the defendants, and the settlement not of one only, but of all the branches of the case.

The order remanding the case is

Affirmed.

KLEINSCHMIDT & Others *v.* McANDREWS & Another.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Argued March 8, 1886.—Decided March 22, 1886.

An exception to a decision of the court on a motion for a nonsuit, ordering the same on the ground that the plaintiff had made no case for the jury, is an exception within the meaning of § 279 of the Montana Code of Civil Procedure.

The record recited the substance and effect of plaintiffs' evidence, a motion for nonsuit by defendant on the ground that there was no case in law for the jury, that the motion was granted and judgment ordered to be entered in favor of defendant, and that the plaintiffs then and there excepted to this ruling of the court: *Held*, That the exceptions applied to the whole facts in the record to which the ruling of law excepted to applied.

A bill of sale of personal property was made at nine o'clock in the evening. The property was twenty-three miles distant. Possession was delivered at four o'clock in the morning of the next day, and the vendee remained in possession until the property was seized in the afternoon of that day, on attachment at the suit of a creditor of the vendor: *Held*, That this was an immediate delivery of possession, with continued change of possession, under a statute of Montana, making sales of personal property, "unless accompanied by immediate delivery and followed by actual and continued change of possession," "conclusive evidence of fraud as against creditors."

Statement of Facts.

The plaintiffs in error, who were plaintiffs below, brought an action of replevin in the District Court for the Third Judicial District in the Territory of Montana, for the recovery of personal property which had been taken under a writ of attachment by the defendant McAndrews, as sheriff, at the instance of the other defendant, Bristol, a creditor of one Ingersoll, whose goods he claimed them to have been at the time of the levy. The plaintiffs claimed title by virtue of a bill of sale from Ingersoll, made before the seizure under the attachment.

The transcript of the record showed that the cause came on for trial on March 22, 1880, before a jury. The plaintiffs put in evidence a bill of sale, dated Helena, March 29, 1879 conveying to them the goods in controversy, consisting of a stock of merchandise, other personal property, and choses in action, in the store of Ingersoll in the town of Vestel, Deer Lodge County, with authority to sell and dispose of the same, and apply the proceeds *pro rata* to the payment of the indebtedness due from Ingersoll to the plaintiffs respectively. The record then contained certain stipulations between the parties in respect to the conduct of the cause, and a recital of the testimony adduced by the plaintiffs. It then proceeded as follows:

"The whole evidence on the part of the plaintiffs showed that the bill of sale referred to was executed by Ingersoll and delivered to plaintiffs in the office of Sanders & Cullen, in Helena City, in Lewis and Clark County, M. T., about 9 o'clock P.M. on the 29th day of March, A.D. 1879; that the goods, &c., were in possession of Stevenson, his clerk, at Vestel, in the county of Deer Lodge, about twenty-three miles distant; that after the writing mentioned was delivered to plaintiffs, as aforesaid, it was expressly agreed that plaintiffs should go out to Vestel and get possession of said property, and that said Stevenson should turn said property over to them; that said plaintiffs went at once and sent an agent with said 'bill of sale' to Vestel; and the evidence was sufficient to go to the jury, and tended to show that he took possession of said property about four o'clock on the morning of the 30th of

March, being the following morning after the execution and delivery of said writing; that he took with him said writing, exhibited it to said Stevenson, then in possession as clerk of said Ingersoll, and that he made no objection, but delivered him (said agent) the property aforesaid, being the property in controversy, and that the said Stevenson, the said clerk of Ingersoll, after said agent of plaintiffs so had possession, remained with and assisted said agent until the levy of the attachment by the sheriff on the 31st of said March; that the plaintiffs and defendant Bristol during this time were creditors of the said Ingersoll, for the purposes of this trial, was mutually agreed and conceded as a fact on the trial, and so entered accordingly as an admission."

It was thereupon stated that the plaintiffs then rested their case and the defendants made a motion for a nonsuit on the ground, among others, that there was "no sufficient case made out so as to authorize the submission of the same to the jury," and more particularly that—

"The evidence shows that there was no immediate change of possession accompanying the 'bill of sale,' or assignment of said property, and that in the meantime, between the execution thereof and the taking of such possession, if any was taken, defendant Bristol was a creditor of said Ingersoll, and his attachment duly levied on the thirty-first day of March, A.D. 1879."

The record then proceeded as follows:

"Which said motion was, after argument, duly submitted to the court, who thereupon granted the said motion and directed judgment to be entered in favor of the defendants and against the plaintiffs. To which ruling of the court the plaintiffs then and there duly excepted; and thereupon judgment was entered in the case as follows, to wit:

"*Judgment of Nonsuit.*

(Name of Court. Title of Cause.)

"This action came regularly on for trial. The said parties appeared by their respective counsel. A jury of twelve persons was duly empanelled and sworn to try said action. Wit-

nesses on the part of plaintiffs were duly sworn and examined. After the said plaintiffs had closed their case said cause was heard upon defendants' motion for a nonsuit and duly submitted to the court for consideration and decision, and after consideration thereon the court sustains said motion and orders judgment for the defendants accordingly. Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that the said defendants do have and recover of and from said plaintiffs all the property in the complaint, affidavit, and pleadings in this action described, or, in case possession of said property cannot be had, the value thereof in accordance with a certain stipulation filed herein April 11, 1879, and introduced in evidence herein, and that they recover their costs in this cause expended, taxed at the sum of $63.50.

"Judgment entered March 22d, A. D. 1880.

"To the entry of which said judgment the plaintiffs then and there excepted, and ask the court to sign this bill of exceptions, and that the same be made part of the record, which is done accordingly this 22d day of March, A. D. 1880.

"(Signed) D. S. WADE, *Judge.*"

From this judgment there was an appeal by the plaintiffs to the Supreme Court of the Territory, where it was affirmed. To reverse the judgment of that court this writ of error was prosecuted.

Mr. M. F. Morris for plaintiffs in error.

Mr. Joseph K. Toole for defendants in error. *Mr. Edwin W. Toole* was with him on the brief.

Mr. JUSTICE MATTHEWS delivered the opinion of the court. After stating the case as above reported, he continued:

The Supreme Court of Montana, in affirming the judgment of the District Court, proceeded on the ground that the errors assigned could not be considered for want of a sufficient bill of exceptions. It was held by that court that, in the nature of the case, an exception, within the meaning of § 279 of the Mon-

tana Code of Civil Procedure, could not be taken to the ruling of the court sustaining the motion for a nonsuit and directing judgment to be entered in favor of the defendants, because that section of the Code defines an exception as being "an objection taken at the trial to a decision upon a matter of law at any time from the calling of the action for trial to the rendering of the verdict or decision," whereas the exception here relied on "could not have been taken until after the rendition of the decision of the court." But no exception to a ruling of the court can be taken until after it is made; and it is plain, therefore, that what is meant by the section of the Code referred to is, that the exception must be to some decision or ruling of the court, occurring before final judgment is rendered, and not that the exception must be taken before the decision excepted to has been made. But in this case, the granting of the motion for a nonsuit, which is the ruling or decision excepted to, did take place before the final judgment was in fact made and entered.

It was also held by the Supreme Court of Montana Territory that the bill of exceptions in the record is limited to the exception taken to the entry of the final judgment, and does not embrace any of the matters stated in the record as occurring previously, nor include the testimony nor agreed statement of facts on which the motion for a nonsuit was based. But an inspection of the record shows this to be a mistake. The whole transcript from the beginning professes to be a bill of exceptions, and is so styled in the caption, and the verification by the signature of the judge cannot be restrained to the last sentence of the connected history of the case which precedes. Taken together, as it plainly should be, the ground of the exception is distinctly stated, and everything necessary to entitle it to consideration satisfactorily appears. The office of a bill of exceptions is evidently the same under the Montana Code as at common law, and whatever brings upon the record, properly verified by the attestation of the judge, the matters of fact occurring at the trial, on which the point of law arises, which enters into the ruling and decision of the court excepted to, answers sufficiently the description of a proper bill of exceptions.

Opinion of the Court.

It is further objected here, however, in argument, that the exception in the present case must be disregarded, because the appeal from the District Court to the Supreme Court was not taken in time under the provisions of § 408, Montana Statutes, 1879, which is as follows: "An exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment." In the present case, the judgment was rendered March 22 and the appeal taken on July 13, 1880, more than sixty days after the rendition of the judgment. But the exception taken and to be considered is not within the description of the class mentioned in this section of the statute. Here there was no verdict or decision upon the facts in favor of either party, which it is alleged was erroneous because not supported by the evidence. The ruling excepted to was, that upon the evidence submitted by the plaintiffs it was matter of law that they could not recover. The verdict or decision referred to in the above quoted section of the statute relates exclusively to findings alleged to be erroneous for want of sufficient support in the evidence. Here the matter of the exception is purely matter of law.

But on the motion for a nonsuit the court was also in error. It should not have been granted. The ground on which the District Court proceeded was, that the sale of the stock of goods by Ingersoll to the plaintiffs was void under § 15 of a statute of Montana relating to conveyances and contracts, Laws of Montana, 1872, 394, which is as follows:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery and be followed by an actual and continued change of possession of the thing sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the person making such assignments or subsequent purchasers in good faith."

Upon the facts recited in the bill of exceptions, that the bill of sale was executed and delivered at Helena on Saturday night,

March 29, 1879, at nine o'clock; that the stock of goods was at Vestel, twenty-three miles distant; that the plaintiffs took possession of them the next morning, Sunday, at four o'clock, and remained in possession until the goods were seized under the levy of the attachment made by the defendants the next morning; it appears that there was not a single hour in which business could be, or was usually, transacted that intervened between the execution and delivery of the bill of sale and the transfer of the possession of the property. This was certainly an immediate delivery of possession under the statute, and that possession continued until interrupted by the seizure by the defendants. Upon the facts in evidence, the title of the plaintiffs to the goods in controversy was sufficiently established in law, and if nothing else appeared it would have been the duty of the court so to have instructed the jury.

The judgment of the Supreme Court of Montana Territory is reversed, and the cause is remanded, with instructions to take further proceedings therein in conformity with law.

THE CHEROKEE TRUST FUNDS.

EASTERN BAND OF CHEROKEE INDIANS *v.* UNITED STATES AND CHEROKEE NATION, COMMONLY CALLED CHEROKEE NATION WEST.

APPEAL FROM THE COURT OF CLAIMS.

Argued January 4, 5, 6, 1886.—Decided March 1, 1886.

By treaties with the Cherokees the United States have recognized them as a distinct political community, so far independent as to justify and require negotiations with them in that character.

The Cherokees in North Carolina dissolved their connection with the Cherokee Nation when they refused to accompany the body of it on its removal, and have had no separate political organization since; though fostered and encouraged, they have not been recognized by the United States as a nation,

Statement of Facts.

in whole or in part, and, as now organized, are not the successor of any organization recognized by any treaty or law of the United States.

The claim of the Cherokees of North Carolina to a share of the commuted annuity fund of $214,000, and of the fund created by sales of lands west of the Mississippi ceded to the Cherokee Nation, has no substantial foundation; those funds and that property being dedicated by the Constitution of the Cherokees, and intended by their treaties with the United States for the benefit of the united nation, and not in any respect for those who had separated from it and become aliens to their nation.

This action was commenced by appellants in the Court of Claims under the jurisdiction conferred upon that court by the following provision in the act of March 3, 1883, ch. 141, 22 Stat. 582, 585: "That the Eastern Band of Cherokee Indians is hereby authorized to institute a suit in the Court of Claims against the United States to determine the rights of the said band in and to the moneys, stock, and bonds held by the United States in trust for the Cherokee Indians, arising out of the sales of lands lying west of the Mississippi River, and also in a certain other fund, commonly called the permanent annuity fund, to which suit the Cherokee Nation, commonly called the Cherokee Nation West, shall be made a party defendant. The said Eastern Band shall within three months after the passage of this act file a petition in said court, verified by the principal chief of said band, setting forth the facts upon which said claim is based. The said Cherokee Nation West shall within six months after the passage of this act file its answer to said petition, and said cause shall proceed to final determination pursuant to the practice in said court, and such rules or orders as the said court may make in that behalf.

"The Secretary of the Interior shall transmit to said court for the consideration of said court copies duly certified of all records, reports, papers, and other documents on file in the Department of the Interior which he may deem necessary to said cause, or which may be requested by either of the parties hereinbefore referred to, and the said parties, respectively, may take and submit to said court such additional competent testimony as they may desire. And jurisdiction is hereby conferred upon said court to hear and determine what, if any, interest, legal or equitable, the said Eastern Band has in said

moneys, stocks, bonds, so held in trust as aforesaid by the United States, and shall enter a decree specifically defining the rights and interests of the said Eastern Band therein, and in any moneys hereafter to be derived from sources similar to those out of which the existing fund arose.

"When the interest, if any, of the said Eastern Band has been ascertained as aforesaid, the Secretary of the Treasury shall, out of the portion of said fund adjudged to said parties, respectively, pay all the proper costs and expenses of said respective parties of the proceedings herein provided for, each party, except the United States, to be liable for its own costs and expenses, and the remainder shall be placed to credit of the said Eastern Band and of the Cherokee Nation, in accordance with their respective rights as ascertained by the said judgment and decree of said court.

"In the said proceeding the Attorney General, or such of his assistants as he may designate, shall appear on behalf of the United States. Either of the parties to said cause may appeal from any judgment rendered by said Court of Claims to the Supreme Court of the United States, and the said courts shall give such cause precedence."

The facts which make the case are stated in the opinion of the court.

Judgment was rendered against the claim of the Eastern Band to share in the funds named in the act, 20 C. Cl. 449, and this appeal was taken.

Mr. Assistant Attorney-General Maury on behalf of the United States stated to the court that they were merely trustee, with no interest in the result of the controversy.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* for appellants (*Mr. Samuel J. Crawford* and *Mr. J. H. Gillpatrick* were also on the brief, and *Mr. W. T. Curtis* was with them), contended as follows:

1. The claimants are a civil person and a legal entity recognized and known to and organized under the laws of the United States.

2. By the 10th and other articles of the treaty of 1846 they are treated and made to be, although residing east, a part of the Cherokee Nation of Indians.

3. By this same treaty of 1846, the treaty of 1835 has fixed upon it the binding and treaty signification that it secured to the claimant Indians, along with the rest of the Cherokee Nation, a common interest in all the property of the Cherokee Nation, wherever situate and whatever its character.

4. The 10th Article of the treaty of 1846 expressly preserves to the claimant Indians, in their residence at the east, this common interest in all the common property of the Nation, as defined by said treaty of 1835, although still residing east.

5. Articles 1 and 4 of the treaty of 1846, in securing to the whole Cherokee people, including the claimant Indians, an equal interest in the lands of the Nation, further establish the equal interest of the claimant Indians in the common lands of the Nation and the common funds of the Nation.

6. The act of Congress providing for the payment of the proceeds of the sales of the common lands east, made by the treaty of 1835, upon the principles of the opinion of the Attorney General, fixes upon the claimant Indians the character of being a part of the Cherokee Nation, and entitled to their *pro rata* share, under their present organization, of the proceeds of the sale of the common lands.

7. The executive branch of the government has also, under the authority of these laws, recognized them as a part of the Cherokee Nation, and entitled to their *pro rata* share of the proceeds of the sales of the common lands sold under the treaty of 1835.

8. There is no legal or equitable principle which distinguishes between the right of the claimant Indians to receive what was by them received under Article 9 of the treaty of 1846, and their right to recover the moneys claimed in the present case.

9. This recognition by the political branch of the government of their rights as a part of the Cherokee Nation in the common lands and money of the nation, is binding on the courts.

10. Congress has plenary power to regulate the administra-

tion of these public trust funds of Indian tribes, and power to recognize and legalize the division of the tribe in two parts, that residing east and that residing west, and power to provide for an equitable division of the national fund, whether lands, or the proceeds of the sale of lands, or annuities.

11. Congress has, since 1846, expressly provided for the distribution of the proceeds of the sale of part of this land, by affirming the principles of the opinion of the Attorney-General, and by other similar acts of Congress, and has thus bound the judiciary to recognize the status of claimant Indians, and their rights under that status to their proportionate share of the other common lands of the nation and common funds of the nation.

12. It being competent for Congress thus to provide for a geographical separation of the tribe into two parts, and proportionate division of their property, and Congress having done so, it cannot be said that the claimant Indians are in equity not entitled to enjoy their proportion of the national property in and under their separate organization, so legalized by the political branch of the government, and in order to do so that they must abandon the organization so legalized by Congress and the Executive.

13. The treaty of 1866, in its 31st Article, in effect carefully preserves these rights of the claimant Indians, because it preserves such rights unless expressly repealed by that treaty, which rights are not so expressly repealed.

14. The act creating the present jurisdiction is mandatory in requiring the court to render a decree in favor of the claimant Indians for whatever equitable as well as legal right they may have in the proceeds of the sale of land or other trust funds, and the equitable right of the claimant Indians to their proportionate share of both classes of funds is established by the above considerations.

15. The "neutral lands," 800,000 acres, were bought and paid for out of the $5,000,000, in which confessedly the eastern Indians had a proportionate interest, and having been so paid for, and having since been sold, the eastern Indians are in equity entitled to their proportionate share of the purchase

money. And the same principle applies to all other moneys covered by the petition, because such moneys arose from the sale of lands in which claimants had an equal interest proportioned to their numbers with the other Cherokees.

Mr. S. S. Burdett and *Mr. William A. Phillips* for appellees.

Mr. Justice Field delivered the opinion of the court.

This case comes before us on appeal from the Court of Claims. It was brought to determine the right of the petitioners, called the Eastern Band of the Cherokee Indians, to a proportionate part of two funds held by the United States in trust for the Cherokee Nation. One of the funds was created by the treaty with the Nation made December 29, 1835, at New Echota, in Georgia, commuting certain annuities into the sum of $214,000. The other arose from sales of certain lands of the Nation lying west of the Mississippi River.

The suit by the petitioners was authorized by an act of Congress, and it is brought against the United States and the Cherokee Nation. 22 Stat. 582, ch. 141. The United States, however, have no interest in the controversy, as they hold the funds merely as trustee. They stand neutral, therefore, in the litigation, although as a matter of form they have filed an answer traversing the allegations of the petition.

The general ground upon which the petitioners proceed and seek a recovery is, that the Cherokee Indians, both those residing east and those residing west of the Mississippi, formerly constituted one people and composed the Cherokee Nation; that by various treaty stipulations with the United States they became divided into two branches, known as the Eastern Cherokees and the Western Cherokees; and that the petitioners constitute a portion of the former, and as such are entitled to a proportionate share of the funds which the United States hold in trust for the Nation.

This claim is resisted upon the ground that the two branches, into which it is admitted the Nation was once divided, subsequently became reunited, and have ever since constituted one nation, known as the Cherokee Nation, and that as such it pos-

sesses all the rights and property previously claimed by both, and that the petitioners have not, since the treaty of New Echota, constituted any portion of the Nation.

To determine the merits of the respective claims and pretensions of the parties, it will be necessary to give some account of the different treaties between the Cherokees and the United States, and to refer to the several laws passed by Congress to carry the treaties into effect, and accomplish the removal of the Indians from their former home east of the Mississippi to their present country west of that river.

When that portion of North America which is now embraced within the limits of the United States east of the Mississippi was discovered, it was occupied by different tribes or bands of Indians. These people were destitute of the primary arts of civilization, and with a few exceptions had no permanent buildings, occupying only huts and tents. Their lands were cultivated in small patches and generally by women. The men were chiefly engaged in hunting and fishing. From the chase came their principal food, and the skins of animals were their principal clothing. The different tribes roamed over large tracts and claimed a right to the country as their territory and hunting grounds. Of these tribes, the Cherokee Indians constituted one of the largest and most powerful. They claimed the principal part of the country now composing the States of North and South Carolina, Georgia, Alabama, and Tennessee. Their title was treated by the governments established by England, and the governments succeeding them, as merely usufructuary, affording protection against individual encroachment, but always subject to the control and disposition of those governments, at least so far as to prevent, without their consent, its acquisition by others. Such superior right rested upon the claim asserted by England of prior discovery of the country, and was respected by other European nations. There was no nation, therefore, to oppose this assertion of superior right to control the disposition of the lands, and to acquire the title of the Indians, except the Indians themselves; and by treaties with them from time to time their title and interest were ceded to the United States.

Opinion of the Court.

On the 28th of November, 1785, the United States made their first treaty with the Cherokees. 7 Stat. 18. It was concluded at Hopewell, on the Keowee, between commissioners representing the United States on the one part and the "head men and warriors of all the Cherokees on the other." By it the Indians, for themselves and their respective tribes and towns, acknowledged that all the Cherokees were under the protection of the United States and of no other sovereign. The treaty promised peace to them and the favor and protection of the United States, on condition of the restoration to liberty of certain prisoners whom they had captured, and of the return of certain property which they had seized. It also prescribed the boundary between them and citizens of the United States of lands allotted to them for their hunting grounds. These lands embraced large tracts within the States mentioned. The ninth article provided that, for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States should "have the sole and exclusive right of regulating the trade with the Indians and managing all their affairs in such manner as they think proper." By this treaty the Cherokees were recognized as one people, composing one tribe or nation, but subject, however, to the jurisdiction and authority of the Government of the United States, which could regulate their trade and manage all their affairs.

On the 2d of July, 1791, another treaty was made with the Cherokees, in which they were described as the "Cherokee Nation." 7 Stat. 39. Its representatives were designated as the "Chiefs and warriors of the Cherokee Nation of Indians," and the first article declared that "there shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the whole Cherokee Nation of Indians." And the chiefs and warriors, "for themselves and all parts of the Cherokee Nation," acknowledged themselves and the Cherokee Nation to be under the protection of the United States and of no other sovereign. The treaty also renewed the agreement, on the part of the Cherokees, that the United States should have the sole and ex-

clusive right of regulating their trade; and readjusted the boundary between citizens of the United States and the "Cherokee Nation," by which the hunting grounds were reduced in quantity; and in consideration of this reduction the United States agreed to deliver certain valuable goods to the chiefs and warriors for the use of the Nation, and to pay to the Nation annually the sum of $1000. A further article increased the amount to $1500.

The boundary of the hunting grounds was from time to time changed by subsequent treaties, and by each succeeding one their extent was reduced; in consideration of which a larger quantity of goods was promised to the Nation; and the annuity was increased until, in the year 1805, it amounted to $10,000. 7 Stat. 43, 62, 93. This annuity was regularly paid to the Cherokee Nation, as represented by the Indians occupying territory east of the Mississippi River, until the treaty of July 8, 1817. 7 Stat. 156. That treaty originated from a division in opinion among the Cherokees as to their mode of life, which existed when the first treaty with the United States was made, in 1785, and which had from that time increased. There were numerous settlements or towns within the territory allotted to the Indians. Those who occupied the upper towns, which were mostly in the State of North Carolina, desired to engage in the pursuits of agriculture and civilized life, whilst those who occupied the lower towns, in the valley of the Mississippi, desired to continue "the hunter life," and, owing to the scarcity of game where they lived, to remove across the Mississippi River to vacant lands of the United States. As early as 1808 a deputation from the upper and lower towns, authorized by the Cherokee Nation, came to Washington to declare to the President their desires and inform him of the impracticability of uniting the whole Nation in the pursuits of civilized life, and to request the establishment of a division line between the two classes of towns. The treaty of 1817, which was made with "the chiefs, head men, and warriors of the Cherokee Nation east of the Mississippi River, and the chiefs, head men, and warriors of the Cherokees on the Arkansas River," recites the action of this deputation

and the reply of the President to the parties, made on the 9th of January, 1809, which was, in substance, that the United States were the friends of both parties, and, as far as could be reasonably asked, were willing to satisfy the wishes of both; that those who remained might be assured of their patronage, aid, and good neighborhood; that those who wished to remove would be permitted to send an exploring party to reconnoitre the country on the west of the Arkansas and White Rivers and higher up; that when this party should have found a tract of country suiting the emigrants and not claimed by other Indians, the United States would arrange with them to exchange it for a just proportion of the country they should leave, and to a part of which, according to their numbers, they had a right; and that every aid towards their removal, and what would be necessary for them there, would then be freely extended to them.

The treaty recites that, relying upon these promises of the President, the Cherokees explored the country on the west side of the Mississippi, and made choice of the country on the Arkansas and White Rivers, and settled upon lands of the United States to which no other tribe of Indians had any just claim, and that they had duly notified the President thereof, and of their desire for a full and complete ratification of his promise. To that end, as notified by him, they had sent their agents with full powers to execute a treaty, relinquishing to the United States their right, title and interest to all lands belonging to them as part of the Cherokee Nation, "which they had left and which they were about to leave, proportioned to their numbers, including with those now on the Arkansas those who were about to remove thither." The treaty then proceeds to recite that, to carry into effect in good faith the promises of the President, and to promote a continuation of friendship with their brothers on the Arkansas River, and for that purpose to make an equal distribution of the annuities secured by the United States to the whole Cherokee Nation, its articles were agreed upon. These were, in substance, that the chiefs, head men, and warriors of the whole Cherokee Nation ceded to the United States certain lands lying east of

the Mississippi, and the United States, in exchange for them, bound themselves to give to that branch of the Cherokee Nation on the Arkansas as much land on that river and the White River as they had received or might thereafter receive from the Cherokee Nation east of the Mississippi, "acre for acre, as the just proportion due that part of the Nation on the Arkansas, agreeably to their numbers." The United States also agreed to give to each poor warrior who might remove to the western side of the Mississippi a rifle gun with ammunition and other articles, to pay for all improvements of real value to their lands, and to give of the lands surrendered to the United States, to every head of an Indian family residing on the east side of the Mississippi, who might wish to become a citizen of the United States, 640 acres. It was also agreed that the annuity due to the whole Nation for the year 1818 should be divided between the two branches of the Nation, according to their respective numbers, to be ascertained by a census to be taken. Previous treaties between the United States and the Cherokee Nation were to continue in force with both of its branches, each to be entitled to all the immunities and privileges which the "old Nation" enjoyed under them.

On the 27th of February, 1819, another treaty was made with the Cherokee Nation, 7 Stat. 195, represented by its chiefs and head men. By it a further cession of lands was made to the United States, and it was agreed that the annuity to the Nation should be paid as follows: two-thirds to the Cherokees east of the Mississippi, and one-third to the Cherokees west of that river. This apportionment was based upon an estimate, that those who had emigrated and those who were enrolled for emigration constituted one-third of the Nation, instead of upon a census to be taken as mentioned in the treaty of 1817. The annuity thus divided was regularly paid as stipulated until commuted by the treaty of December, 1835, of which we shall presently speak.

On the 6th of May, 1828, a treaty was made with the chiefs and head men of the Cherokee Nation of Indians west of the Mississippi. 7 Stat. 311. This was the first time the Cherokees west of the river were recognized as so far a distinct and sepa-

rate political body from the Cherokees east of the river as to call for separate treaty negotiations with them. The treaty recited, as among the causes of its being made, that it was the anxious desire of the government to secure to the Cherokee Nation of Indians, as well those then living within the limits of Arkansas as those of their friends and brothers residing in States east of the Mississippi, who might wish to join their brothers west, a permanent home which should, under the guarantee of the United States, remain forever theirs, and that the present location of the Cherokees in Arkansas was unfavorable to their repose, and tended to their degradation and misery. By it the United States agreed to put the Cherokees in possession of, and to guarantee to them for ever, seven millions of acres of land which were specifically described, and which are situated in what is now known as the Indian Territory, and also to give and guarantee to the Cherokee Nation a perpetual outlet west of these lands, and a free and unmolested use of the country so far as their sovereignty and right of soil extended. They also agreed to pay for all improvements on the land abandoned, and, in order to encourage the emigration of their brothers remaining in the States, to give to each head of a Cherokee family then residing within any of the States east of the Mississippi, who might desire to remove west, on enrolling himself for emigration, a good rifle and certain other articles, to make just compensation for their property abandoned, to bear the cost of their emigration, and to procure provisions for their comfort, accommodation, and support by the way, and for twelve months after their arrival at the agency. On the other hand, the chiefs and head men of the Cherokee Nation west re-ceded to the United States the lands to which they were entitled on the Arkansas under the treaties of July 8, 1817, and of February 27, 1819, and agreed to remove from the same within fourteen months.

From this time until the treaty of New Echota, concluded December 29, 1835, 7 Stat. 478, the Cherokees were divided into two branches, so far constituting distinct political bodies that the United States had separate negotiations with each; and on the 14th February, 1833, by a treaty with the chiefs

and head men of the Cherokee Nation west of the Mississippi, the United States renewed their guarantee of the seven millions of acres, and of the perpetual outlet to the nation west of those lands, and of the free and unmolested use of the country west. 7 Stat. 413.

In the meantime—from the treaty of 1828 until the treaty of New Echota—the Cherokees remaining east of the Mississippi were subjected to harassing and vexatious legislation from the States within which they resided. The United States had, as early as 1802, agreed with Georgia, in consideration of her cession of western lands, to extinguish the Indian title to lands within the State. North Carolina claimed that the United States were under a similar obligation to extinguish the Indian title to lands within her limits, in consideration of a like cession of western lands, although there was no positive agreement to that effect. And with the extinguishment of their title, it was expected that the Indians themselves would be removed to territory beyond the bounds of those States. At the time the treaty of 1828 was made, a great deal of impatience had been exhibited by the people of those States at the little progress made in the extinguishment of the Indian title, and at the continued presence of the Indians. Severe and oppressive laws were passed by Georgia in order to compel them to leave; and, though less severity was practised in North Carolina towards the Indians in that State, an equally pronounced desire for their departure was expressed. Angry and violent disputes between them and the white people in both States, but more particularly in Georgia, were of frequent occurrence. See case of *Cherokee Nation* v. *State of Georgia*, as reported in a separate volume by Richard Peters in 1831; also a document called "The Public Domain," prepared by the Public Land Commission, and published as Ex. Doc. 47 of H. of R., 46th Cong., 3d Session; and Doc. No. 71 of H. of R., 23d Cong., 1st Session.

The treaty of New Echota was made to put an end to those troubles and to secure the reunion of the divided nation. It recites as motives to its negotiation, among other things, that the Cherokees were anxious to make some arrangement with the Government of the United States, whereby the difficulties

they had experienced from residence within the settled parts of the country under the jurisdiction and laws of the State governments, might be terminated and adjusted, and they be reunited into one body, and be secured a permanent home for themselves and their posterity in the country selected by their forefathers, without the territorial limits of the State sovereignties, and where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be most consonant with their views, habits, and conditions, and as might tend to their individual comfort and their own advancement in civilization. By its stipulations the Cherokees ceded to the United States all the lands owned, claimed, or possessed by them east of the Mississippi River, and all claims for spoliations of every kind, for the sum of $5,000,000, and agreed to remove to "their new home" west of the Mississippi within two years from its ratification.

The treaty also recited the cession to the Cherokee Nation by previous treaties of the 7,000,000 acres, and the guarantee of a perpetual outlet west of these lands, and a free and unmolested use of all the country, so far as the sovereignty of the United States and their right to the soil extended; and also that it was apprehended by the Cherokees that in this cession there was not a sufficient quantity of land for the accommodation of the whole nation, and, therefore, the United States agreed, in consideration of $500,000, to convey by patent to the Indians and their descendants an additional tract of 800,000 acres, and that the land previously ceded, including the outlet, should be embraced in the same patent. (Art. 2.) They also agreed to remove the Indians to their new home, and to subsist them one year after their arrival there, except that such persons and families, as in the opinion of "the emigrating agent" were capable of subsisting and removing themselves, should be permitted to do so, and should be allowed for all claims for the same $20 for each member of their families; and, in lieu of their one year's rations, should be paid the sum of $33.33, if they preferred it. (Art. 8.)

It was also agreed that, after deducting the amount which should be actually expended for the payment for improvements,

claims for spoliations, removal, subsistence, and debts and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer class of Cherokees, and the several sums to be invested for the general national funds provided for in the several articles of the treaty, the balance, whatever the same might be, should be equally divided between all the people belonging to the Cherokee Nation east according to the census completed, and such Cherokees as had removed west after June, 1833; and that those individuals and families that were averse to removal and were desirous to become citizens of the State wherein they resided, and such as were qualified to take care of themselves and their property, should be entitled to receive their due proportion of all the personal benefits arising under the treaty for their claims, improvements, and their *per capita*, as soon as an appropriation was made to carry out the treaty. (Arts. 12 and 15.)

By the eleventh article, "the Cherokees, believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition," agreed to commute their permanent annuity of $10,000 for the sum of $214,000, the same to be invested by the President of the United States as part of the general fund of the nation.

In the following year Congress made the requisite appropriation for the commutation, and, according to the tenth article of the treaty, the money was invested "for the benefit of the whole Cherokee Nation," which had removed, or should subsequently remove, to the lands assigned to it west of the Mississippi. This is one of the funds of which the petitioners claim a part, in proportion to their numbers as compared with the citizens of the Cherokee Nation living west of the Mississippi on the territory ceded. The provisions of the treaty as to the investment, custody and distribution of the income of this fund, and all other funds belonging to the nation, remained in force until the treaty of July 19, 1866. The interest was paid over annually to the agents of the Cherokee Nation authorized to receive the same, and was subject to application by its council to such purposes as they deemed best for the general interests of their people. The treaty of 1866, Article 23, 14 Stat. 799, 805,

provided that all funds then due the nation, or that might thereafter accrue from the sale of its lands by the United States, as provided for, should be invested in United States registered stocks at their current value, and the interest on all said funds should be paid semi-annually on the order of the Cherokee Nation, and be applied to the following purposes, to wit: thirty-five per cent. for the support of the common schools of the nation and educational purposes, fifteen per cent. for the orphan fund, and fifty per cent. for general purposes, including reasonable salaries of district officers.

Immediately after the ratification of the treaty of 1835 measures were taken by the government to secure its execution, and commissioners were appointed to adjust claims for improvements and to facilitate the emigration of the Indians. But emigration proceeded slowly. Great reluctance to go was manifested by large numbers, and at last it became necessary to make a display of force to compel their removal. Major-General Scott was sent to the country with troops, and instructed to remove all the Indians except such as were entitled to remain and become citizens under the twelfth article of the treaty. The number that remained was between eleven and twelve hundred. They were without organization or a collective name. They ceased to be part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the State in which they resided. The name of the Eastern Cherokees accompanied those who emigrated, to distinguish them from those who had preceded them and who were called old settlers.

After the reunion of the Cherokee people on their lands west of the Mississippi, resulting from the execution of the treaty, and on the 12th of July, 1839, the following act of union between the Eastern and Western Cherokees was adopted:

"*Act of Union between the Eastern and Western Cherokees.*

"Whereas our fathers have existed as a separate and distinct nation, in the possession and exercise of the essential and appropriate attributes of sovereignty, from a period extending

into antiquity, beyond the records and memory of man; and whereas, these attributes, with the rights and franchises which they involve, remain still in full force and virtue, as do also the national and social relation of the Cherokee people to each other and to the body politic, excepting in those particulars which have grown out of the provisions of the treaties of 1817 and 1819 between the United States and the Cherokee Nation, under which a portion of our people removed to this country and became a separate community (but the force of circumstances have recently compelled the body of the Eastern Cherokees to remove to this country, thus bringing together again the two branches of the ancient Cherokee family), it has become essential to the general welfare that a union should be formed and a system of government matured adapted to their present condition, and providing equally for the protection of each individual in the enjoyment of all his rights:

"Therefore we, the people composing the Eastern and Western Cherokee Nation, in national convention assembled, by virtue of our original unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic, under the style and title of the Cherokee Nation.

"In view of the union now formed, and for the purpose of making satisfactory adjustment of all unsettled business which may have arisen before the consummation of this union, we agree that such business shall be settled according to the provisions of the respective laws under which it originated, and the courts of the Cherokee Nation shall be governed in their decisions accordingly. Also, that the delegation authorized by the Eastern Cherokees to make arrangements with Major-General Scott for their removal to this country shall continue in charge of that business, with their present powers, until it shall be finally closed; and, also, that all rights and titles to public Cherokee lands on the east or west of the River Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation as constituted by this union.

"Given under our hands, at Illinois camp grounds, this twelfth day of July, 1838.

"By order of the national convention.

"GEORGE LOWRY,

"*President of the Eastern Cherokees.*

his

"GEORGE x GUESS,

mark.

"*President of the Western Cherokees.*"

On the 6th of September following they adopted a constitution of government, in which they recited that the Eastern and Western Cherokees had become reunited in one body politic, under the style and title of the Cherokee Nation. The second clause of its first article is as follows:

"The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of, them: *Provided*, that the citizens of the nation, possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements in any manner whatever to the United States, individual States, or to individual citizens thereof; and that whenever any citizen shall remove with his effects out of the limit of this nation and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: *Provided*, *nevertheless*, that the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation, on memorializing the national council for such readmission."

But notwithstanding this declared reunion of the divided Cherokees, there was much bitter feeling between the old settlers and the new-comers, leading to violent contests, and causing, in many instances, great loss of property and life. The new-comers, being the more numerous, claimed to control the government of the country, and endeavored to compel the old

settlers to submit to their rule. The old settlers had an organization of their own and complained that the new-comers occupied their lands and overthrew their organization. And among the new-comers, also, there was bitterness between those who had favored the treaty of removal from the east side of the Mississippi and those who had opposed it. The former sided with the old settlers, but the latter outnumbered both. Violent measures were resorted to on both sides to carry out their purposes, and there was little security for person or property. The situation became intolerable, and in 1845 the contending factions—the old settlers, the treaty party, and the anti-treaty party—sent delegates to Washington to lay their grievances before the officials of the United States Government, in the hope that some relief might be afforded to them. The old settlers and the treaty party desired a division of the people into two nations and a division of the Territory. Demands also were made by each party against the United States under the stipulations of the treaty of New Echota. These circumstances led to the treaty of August 6, 1846. 9 Stat. 871. It was negotiated on the part of the Cherokees by delegates appointed by the regularly constituted authorities of the Cherokee Nation, and by delegates appointed by and representing that portion of the Cherokee tribe known as the treaty party, and by delegates appointed by and representing that portion of the tribe known and recognized as Western Cherokees or the old settlers. It recited that serious difficulties had for a considerable time existed between the different parties of the people constituting and recognized as the Cherokee Nation of Indians, which it was desirable should be speedily settled, so that peace and harmony might be restored among them; and that certain claims existed on the part of the Cherokee Nation and portions of the Cherokee people against the United States; and that, with a view to the final and amicable settlement of these difficulties and claims, the parties had agreed to the treaty.

It declared that all difficulties and differences existing between the several parties of the Cherokee Nation were settled and adjusted, and that they should, as far as possible, be for-

gotten and forever buried in oblivion; that all party distinctions should cease, except so far as they might be necessary to carry the treaty into effect; that a general amnesty should be proclaimed; and that all offences and crimes committed by a citizen or citizens of the Cherokee Nation against the nation or an individual were pardoned. It was agreed also that all parties were to unite to enforce laws against future offenders, and that laws should be passed for equal protection and for security of life, liberty and property. Thus the personal dissensions were to a great extent healed.

The treaty also declared that the lands occupied by the Cherokee Nation should be secured to the whole Cherokee people for their common use and benefit, and that a patent should be issued for the same, including the eight hundred thousand acres purchased, together with an outlet west, thus recognizing that all the lands ceded by the United States for the benefit of the Cherokees west of the Mississippi belonged to the entire Nation, and not to any of the factions into which the Nation was divided. The treaty also made provision for the adjustment and payment of the claims of different parties. The 9th Article is as follows:

"The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the *per capita* division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence and commutation therefor, debts and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six million six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over *per capita* in equal amounts to all those individuals, heads of families, or their legal representatives, entitled

to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto."

By the treaty of July 19, 1866, 14 Stat. 799, provision was made for the settlement of friendly Indians on certain unoccupied lands of the Cherokees west of the Mississippi, and for the sale of their interest, and also for the sale of other lands belonging to them in the State of Kansas, and the investment of the proceeds in registered stocks of the United States for the benefit of the Cherokee Nation. Under it, and pursuant to other laws, sales were made of the lands mentioned, and also of other lands west of the Mississippi ceded to the Cherokees under the different treaties, to which we have referred, and the proceeds have been duly invested, as required by article twenty-third of the treaty. The investment constitutes one of the funds of which the petitioners seek a proportionate part.

Their claim, however, rests upon no solid foundation. The lands from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest, as a tenant in common, that he could claim a *pro rata* proportion of the proceeds of sales made of any part of them. He had a right to use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States. Our government, by its treaties with the Cherokees, recognized them as a distinct political community, and so far independent as to justify and require negotiations with them in that character. Their treaties of cession must, therefore, be held not only to convey the common property of the Nation, but to divest the interest therein of each of its members. Such was substantially the language, and such the decision of the Attorney General of the United States in a communication made to the President in 1845, with reference to the treaty of New Echota. "The Executive of the United States," he said, "must, there-

fore, regard the treaty of New Echota as binding on the whole Cherokee tribe; and the Indians, whether in Georgia, Alabama, Tennessee, or North Carolina, are bound by its provisions. As a necessary consequence, they are entitled to its advantages. The North Carolina Indians, in asking the benefit of the removal and subsistence commutation, necessarily admit the binding influence of the treaty on them and their rights. They cannot take its benefits without submitting to its burdens. The Executive must regard the treaty as the supreme law, and as a law construe its provisions." Attorney-General Mason, 4 Opins. Attys. Gen. 435, 437.

Whatever rights, therefore, the Cherokees in North Carolina, who refused to join their countrymen in the removal to the lands ceded to them west of the Mississippi, can claim in the funds arising from sales of portions of such lands, or in the fund created by a commutation of the annuities granted upon cessions of the lands of the Cherokee Nation, must depend entirely upon the treaties out of which those funds originated. They have as yet received nothing from either of them, and they can claim nothing by virtue of the fact that the lands of the Nation, which its authorities ceded to the United States, were held for the common benefit of all the Cherokees. All public property of a nation is supposed to be held for the common benefit of its people; their individual interest is not separable from that of the Nation.

The Cherokees in North Carolina dissolved their connection with their Nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever union they have had among themselves has been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate Nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that State and bound by its laws. As well observed by the Court

of Claims, in its exhaustive opinion, they have been in some matters fostered and encouraged by the United States, but never recognized as a Nation in whole or in part. 20 C. Cl. 449–483.

Nor is the band, organized as it now is, the successor of any organization recognized by any treaty or law of the United States. Individual Indians who refused to remove west, and preferred to remain and become citizens of the States in which they resided, were promised certain moneys, but there is no evidence that the petitioners have succeeded to any of their rights. The original claimants have probably all died, for fifty years have elapsed since the treaty of 1835 was made, and no transfer from them or their legal representatives is shown. But assuming that the petitioners properly represent all rightful demands of the Cherokees living in North Carolina when the treaty was made, what were those demands? As designated by articles twelve and fifteen of the treaty, these Cherokees were to receive "their due portion of all the personal benefits accruing under the treaty, for their claims, improvements, and *per capita*." The term "claims" had reference to demands for spoliations of their property which existed prior to the treaty. The improvements were those made on the property ceded. By *per capita* was meant the proportionate amount, given to each Cherokee east not choosing to emigrate, of the money received on the cession of the lands east of the Mississippi, after deducting certain expenditures mentioned in article fifteen. Whatever may have remained for the *per capita* distribution, of the $5,000,000 received for the lands after the deductions mentioned, it is plain that it constituted no portion of the moneys that formed the fund of which the petitioners seek by this suit a proportionate part. By the treaty of 1846 certain sums were allowed in addition to the $5,000,000 specified in the treaty of 1835, and from the whole amount certain items, other than those three designated, were to be deducted, and the balance was to be paid over *per capita* in equal amounts to all the individuals, heads of families, or their legal representatives entitled to receive it under that treaty. But this change in no respect affects the case.

When the treaty of 1846 was under negotiation, one William H. Thomas appeared in Washington as the representative of Cherokees in North Carolina and urged a recognition of their demands for the *per capita* money and the removal and subsistence money under articles eight and twelve of the treaty of 1835. He had obtained a statement from one of the commissioners who negotiated that treaty on the part of the United States, from several respectable persons who were privy to the negotiations, and from some of the Cherokees who signed the treaty, as to the meaning which should be given to certain terms used in it, and we are referred to these documents as though they should have some influence upon the construction of those terms. But it is too plain for controversy that they cannot be used to control the language of the treaty or guide in its construction.

The *per capita* money and removal and subsistence money had not been paid when the treaty of 1846 was made, but the Court of Claims finds that since then they have been paid. The claim now presented by the Cherokees of North Carolina to a share of the commuted annuity fund of $214,000, and of the fund created by sales of lands west of the Mississippi ceded to the Cherokee Nation, resting, as it does, upon the designation in the treaties of the lands originally possessed by the Cherokees and ceded to the United States, or subsequently acquired by them from the United States, as "the common property of the nation," or as held for the "common use and benefit" of the Cherokee people, has no substantial foundation. If Indians in that State, or in any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation. Those funds and that property were dedicated by the constitution of the Cherokees, and were intended by the treaties with the United States, for the benefit of the united Nation,

and not in any respect for those who had separated from it and become aliens to their Nation. We see no just ground on which the claim of the petitioners can rest to share in either of the funds held by the United States in trust for the Cherokee Nation; and the decree of the Court of Claims must, therefore, be *Affirmed.*

PHŒNIX INSURANCE COMPANY *v.* ERIE AND WESTERN TRANSPORTATION COMPANY.

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

Argued January 19, 20, 1886.—Decided March 1, 1886.

The right, by way of subrogation, of an insurer, upon paying for a total loss of the goods insured, to recover over against third persons, is only that right which the assured has.

A common carrier may lawfully obtain insurance on the goods carried against loss by the usual perils, though occasioned by the negligence of his own servants.

In a bill of lading, which provides that the carrier shall not be liable for loss or damage of the goods by fire, collision, or dangers of navigation, a further provision that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods, is valid, as between the carrier and the shipper; and therefore, in the absence of any misrepresentation or intentional concealment by the shipper in obtaining insurance upon the goods, or of any express stipulation on the subject in the policy, limits the right, by way of subrogation, of the insurer, upon paying to the shipper the amount of a loss by stranding, occasioned by the negligence of the carrier's servants, to recover over against the carrier.

This was a libel in admiralty against a common carrier by an insurance company which had insured the owners upon the goods carried, and had paid them the amount of the insurance, and claimed to be subrogated to their rights against the carrier. The defence relied on was that, by a provision of the contract of carriage, the carrier was to have the benefit of any insurance upon the goods. The District Court held that this provision was valid, and therefore no right of subrogation

accrued to the libellant, and entered a decree accordingly. The libellant appealed to the Circuit Court, which found the following facts:

The respondent was a Pennsylvania corporation, authorized to carry on the business of lake transportation, was engaged in business as a common carrier, and owned a line of propellers running between Erie and other ports on the Lakes, called the Anchor Line, one of which propellers was the Merchant.

On July 24, 1874, the firms of A. M. Wright & Co., owners of 16,325.34 bushels of corn, worth $8000; Elmendorf & Co., owners of 800 bushels of corn, worth $600; and Gilbert Wolcott & Co., owners of 370 bushels of corn and 689 bushels of oats, together worth $800, caused to be shipped on board the propeller Merchant, then lying at Chicago, and bound for Erie, the grain aforesaid, consigned to themselves at other places beyond; and severally made oral agreements with the respondent, by which, in consideration of certain stipulated freight, the respondent agreed to transport the several parcels of grain from Chicago by way of the Lakes to Erie, and thence to forward them to their ultimate destinations; and it was tacitly understood that bills of lading for the shipments would be subsequently issued to the shippers, but nothing whatever was said respecting the terms and conditions thereof.

After the goods had been received on board and the propeller had departed on her voyage, the respondent delivered to the shippers respectively bills of lading, each of which described the goods as shipped on the propeller Merchant, and addressed to the owners by name at their ultimate destination; fixed the rate of freight from Chicago to that destination; and contained an agreement that the goods should be "transported by the Anchor Line, and the steamboats, railroad companies and forwarding lines with which it connects, until the said goods shall have reached the point named in the bill of lading, on the following terms and conditions," among which were these:

"The said Anchor Line, and the steamboats, railroad companies and forwarding lines with which it connects, and which receive said property, shall not be liable" "for loss or damage

by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals. And where grain is shipped in bulk, the said Anchor Line is hereby authorized to deliver the same to the Elevator Company at Erie, as the agent of the owner or consignee, for transshipment (but without further charge to such owner and consignee) into the cars of the connecting railroad companies or forwarding lines; and when so transshipped in bulk, the said Anchor Line and the said connecting railroad company or carrier shall be and is, in consideration of so receiving the same for carriage, hereby exempted and released from all liability for loss, either in quantity or weight, and shall be entitled to all other exemptions and conditions herein contained."

"It is further agreed that the Anchor Line, and the steamboats, railroads and forwarding lines with which it connects, shall not be held accountable for any damage or deficiency in packages, after the same shall have been receipted for in good order by consignees or their agents, at or by the next carrier beyond the point to which this bill of lading contracts."

"It is further stipulated and agreed that in case of any loss, detriment or damage, done to or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage; and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

"And it is further agreed that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading."

These bills of lading were received by the shippers without protest or objection, and were signed by Elmendorf & Co. and by Wolcott & Co., but not by A. M. Wright & Co.

The bills of lading were received by the shippers without specially reading the terms and conditions, their attention was

not directed to them, nor was anything said respecting them; and no reduction of freight from the rate stipulated in the oral agreement was made in consequence of those terms and conditions, or other consideration paid therefor; but the shippers had often before shipped goods by this line under similar contracts, and thereby knew, or had every opportunity of knowing, the contents of these bills of lading.

The propeller completed the lading of the goods during the evening of July 24, 1874, and about midnight departed on her voyage. About ten o'clock the next morning, in a dense fog, she was stranded on the western shore of Lake Michigan, about ten miles south of Milwaukee, through the negligence of those managing her, and immediately filled with water, and all the grain became wet and damaged; 1200 bushels of it were thrown overboard to get off the vessel; and 5188 bushels were brought into Milwaukee in a perishable condition, and were there sold for the sum of $1037.60, which was retained by the respondent.

On said 24th of July, the libellant, a New York corporation, authorized to transact a general lake and insurance business, insured the shippers, at their request and expense, against loss or damage to these shipments from perils of the seas and other perils; and issued to them certificates of insurance, for $8000, $520 and $700, respectively, in this form:

"No. 627. The Phœnix Insurance Company, New York. $8000. Chicago, July 24, 1874. This certifies that A. M. Wright & Co. [are] insured, under and subject to the conditions of open policy No. 2263 of the Phœnix Insurance Company, in the sum of eight thousand dollars, on corn on board the propeller Merchant, at and from Chicago to Erie. Loss payable to assured, order hereon, and return of this certificate.

"Chas. E. Chase, Agent."

The policy of insurance, referred to in these certificates, insured "Charles E. Chase, on account of whom it may concern," "lost or not lost, at and from ports and places to ports and places, on cargo, premiums to be settled monthly, upon all kinds

of lawful goods and merchandise laden or to be laden on board" any vessel or vessels; and was otherwise in the usual form of an open policy of insurance for $1,000,000 against marine risks, including perils of the seas, "barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises or any part thereof;" and contained these provisions: "The company are to be entitled to premium at their usual rates on all shipments reported or not. It is warranted by the assured to report every shipment on the day of receiving advices thereof, or as soon thereafter as may be practicable, when the rate of premium shall be fixed by the president or the vice-president of the company." "No shipment to be considered as insured until approved and endorsed on this policy by C. E. Chase, agent."

The shipments were duly approved and endorsed on the policy. On August 19, 1874, the shippers abandoned the goods to the libellant as a total loss, by written instruments, substantially alike, the material part of the one executed by A. M. Wright & Co. being as follows:

"Chicago, August 19, 1874. For and in consideration of the sum of eight thousand dollars, the receipt whereof is hereby acknowledged, we do by these presents assign, transfer, cede and abandon to the Phœnix Insurance Company all our right, title and interest in and to the property hereinafter specified, and to all that can or may in any way be made, saved or realized from the damage or loss, reported to have occurred, by reason of which a claim of payment has been made by us, with full power to take and use all lawful ways and means (at the risk and expense of the Phœnix Ins. Co.) to make, save and realize the said property, to wit, 16,325.34 bushels of corn, as per bill of lading and invoice, shipped on board the propeller Merchant, bound from Chicago for Erie, and covered by insurance with the Phœnix Ins. Co., by open policy No. 2263, certificate No. 627, under date of July 24, 1874."

In consequence thereof, the libellant paid to the shippers the amount of the insurance as and for a constructive total loss.

Argument for Appellant.

A general average adjustment was made on September 2, 1884, and readjusted on February 1, 1875, awarding to the libellant the sum of $2466.12 on account of these shipments.

The Circuit Court made and stated the following conclusions of law: 1. That the bills of lading were the contracts by which the rights of the parties were to be governed. 2. That under them the respondent became liable to the shippers for the value of the shipments, by reason of the negligent loss of the same, and that the shippers had rights of action therefor. 3. That by the abandonments, the libellant did not succeed to those rights of action of the shippers, by reason of the stipulation contained in the bills of lading, that "the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods." 4. That the libellant was entitled to recover the sum of $2466.12, awarded to it in the general average adjustment readjusted as aforesaid, with interest thereon.

The Circuit Court entered a decree for the libellant for this sum only, and the libellant appealed to this court.

Mr. George D. Van Dyke for appellant (*Mr. George A. Black* also filed a brief for same), cited, in the divisions of his argument under the following general heads, cases as follows: As to the legal effect of the abandonments, *Chesapeake Insurance Co.* v. *Stark*, 6 Cranch, 268; *Columbian Insurance Co.* v. *Ashby*, 4 Pet. 139; *Patapsco Insurance Co.* v. *Southgate*, 5 Pet. 604; *Comegys* v. *Vasse*, 1 Pet. 193; *Union Insurance Co.* v. *Burrell*, Anthon N. P. 128; *Mellon* v. *Bucks*, 5 Martin La. N. S. 371; *Rogers* v. *Hosack*, 18 Wend. 319; *Mutual Insurance Co.* v. *Cargo of the George*, Olcott Adm. 89; *The Monticello*, 17 How. 152; *The Manistee*, 5 Bissell, 381; *S. C.*, 7 Bissell, 35; *Bradlie* v. *Maryland Insurance Co.*, 12 Pet. 378; *Columbian Insurance Co.* v. *Catlett*, 12 Wheat. 383; *Union Insurance Co.* v. *Scott*, 1 Johns. 106; *Smith* v. *Manufacturing Co.*, 7 Met. (Mass.) 448, 453; *Sun Mutual Insurance Co.* v. *Hall*, 104 Mass. 507; *Stewart* v. *Greenock Insurance Co.*, 2 H. L. Cas. 159; *Garrison* v. *Memphis Insurance Co.*, 19 How. 312; *Hall & Long* v. *Railroad Cos.*, 13 Wall. 367;

Mobile & Montgomery Railway v. *Jurey*, 111 U. S. 584; *The Atlas*, 93 U. S. 302; *The Potomac*, 105 U. S. 630; *Ins. Co.* v. *Stinson*, 103 U. S. 25: That the carrier had notice of assured's right of abandonment and the legal effect thereof, from the derivation of its title, *Sheppard* v. *Taylor*, 5 Pet. 675: That the assured could not impair the rights of the insurer under the abandonments by dealing with one charged with notice thereof, *Welch* v. *Mandeville*, 1 Wheat. 233; *Andrews* v. *Beecker*, 1 Johns. Cas. 411 and note to 2d ed.; *Hart* v. *Western Railroad Co.*, 13 Met. (Mass.) 99; *Monmouth Ins. Co.* v. *Hutchinson*, 6 C. E. Green (21 N. J. Eq.), 107; *Connecticut Insurance Co.* v. *Erie Railway Co.*, 73 N. Y. 399; *Steele* v. *Franklin Insurance Co.*, 17 Penn. St. 290; *Atlantic Insurance Co.* v. *Storrow*, 1 Edw. Ch. 621; *Foster* v. *Van Reed*, 70 N. Y. 19; *Carpenter* v. *Providence Insurance Co.*, 16 Pet. 495; *Bank of South Carolina* v. *Bicknell*, 1 Cliff. 85: That a common carrier cannot contract for the benefit of the shipper's insurance to protect him against his own negligence, *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174; *Caldwell* v. *Express Co.*, 21 Wall. 266; *Railroad Co.* v. *Pratt*, 22 Wall. 123; *Railway Co.* v. *Stevens*, 95 U. S. 655; *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331; *The Hadji*, 20 Fed. Rep. 875; *S. C.*, 16 Fed. Rep. 861; *The Titania*, 19 Fed. Rep. 101; *Peek* v. *N. S. R. Co.*, 10 H. L. C. 473; *Cincinnati Railway Co.* v. *Spratt*, 2 Duval, 4; *Candee* v. *Western Union Tel. Co.*, 34 Wisc. 471; *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527; *Hooper* v. *Robinson*, 98 U. S. 528; *The Sidney*, 23 Fed. Rep. 88; *Waters* v. *Monarch Assurance Co.*, 5 El. & Bl. 870; *London & Northwestern Railway Co.* v. *Glyn*, 1 El. & Bl. 652; *North British Insurance Co.* v. *London & Globe Insurance Co.*, 5 Ch. D. 569; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560; *Joyce* v. *Kennard*, L. R. 7 Q. B. 78; *Mutual Insurance Co.* v. *Sherwood*, 14 How. 351, 367–8; *Mathews* v. *Howard Insurance Co.*, 1 Kern. 1; *McQuirk* v. *The Penelope*, 2 Pet. Adm. 276; *Phœnix Insurance Co.* v. *Cochran*, 51 Penn. St. 143; *Citizens Insurance Co.* v. *Marsh*, 4 Penn. St. 386; *Walker* v. *Maitland*, 5 B. & Ald. 171; *Crowley* v. *Cohen*, 5 B. & Ad. 478; *Van Natta* v. *Security Insurance Co.*, 2 Sandf. Super. Ct. 490;

Savage v. *Corn Exchange Insurance Co.*, 36 N. Y. 655: As to whether the assured had defeated the abandonments by the stipulation in the bill of lading respecting the benefit of insurance, *The Adriatic*, 107 U. S. 512; *The Benefactor*, 102 U. S. 214; *Sun Mutual* v. *Ocean Insurance Co.*, 107 U. S. 485; *Barnes* v. *Williams*, 11 Wheat. 415; *Hodges* v. *Easton*, 106 U. S. 408; *Bostwick* v. *Baltimore & Ohio Railroad*, 45 N. Y. 712; *Baker* v. *Michigan Southern Railroad*, 42 Ill. 73; *Strohn* v. *Detroit & Milwaukee Railway Co.*, 21 Wisc. 554; *Detroit & Milwaukee Railroad Co.* v. *Adams*, 15 Mich. 458; *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344; *York Co.* v. *Central Railroad*, 3 Wall. 111; *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318; *Insurance Co.* v. *Railroad Co.*, 104 U. S. 146; *Western Transportation Co.* v. *Newhall*, 24 Ill. 466; *Illinois Central Railroad Co.* v. *Smyser*, 38 Ill. 354; *Erie & Western Transportation Co.* v. *Dater*, 91 Ill. 195; *Merchants' Dispatch* v. *Theilbar*, 86 Ill. 71; *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304; *The Delaware*, 14 Wall. 579; *Scudder* v. *Union Bank*, 91 U. S. 406; *Pope* v. *Nickerson*, 3 Story, 484; *Maynard* v. *Syracuse & Binghamton Railroad*, 71 N. Y. 180; *Holsapple* v. *Rome & Watertown Railroad*, 86 N. Y. 275; *Christmas* v. *Russell*, 14 Wall. 69; *Dillon* v. *Barnard*, 21 Wall. 430; *Removal Cases*, 100 U. S. 457; *Minturn* v. *Manufacturing Insurance Co.*, 10 Gray, 501; *Stearns* v. *Quincy Insurance Co.*, 124 Mass. 61; *Swain* v. *Seamens*, 9 Wall. 254; *Flanigan* v. *Turner*, 1 Black, 491; *King* v. *Fowler*, 16 Mass. 397; *Charles* v. *Altin*, 15 C. B. 46; *Alston* v. *Herring*, 11 Ex. 822; *Willard* v. *Dorr*, 3 Mason, 161.

Mr. George B. Hibbard for appellee.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

It being found as matter of fact that the lading of the goods on board the propeller was not completed until the evening of the 24th of July, that she departed on her voyage about midnight, and that the bills of lading were not delivered by

the carrier to the shippers until after her departure, it is clear that the bills of lading were not actually delivered until the 25th. But it being also found that oral agreements for the carriage were made on the 24th, with the understanding that bills of lading would be subsequently issued; and that the shippers, having often before shipped goods by this line under similar bills of lading, knew or had every opportunity of knowing their terms and conditions; it is also clear that the bills of lading were but a putting in form of the oral agreements made on the 24th, and took effect as if they had been delivered and accepted on that day.

The certificates of the agent of the insurance company, without which the policy of insurance did not attach to these goods, were also made on that day, and described the goods as on board the propeller. The contract of carriage and the contract of insurance must therefore be treated as substantially contemporaneous, and both made before the loss of the goods. There is nothing to show any misrepresentation or intentional concealment by the assured in obtaining the insurance, or that the insurer had or had not knowledge or notice of the usual form of the bills of lading.

The policy of insurance contains no express stipulation for the assignment to the insurer of the assured's right of action against third persons. In the bills of lading, it is expressly stipulated that the carriers, whose railroad or vessels form part of the line of transportation, shall not be liable for loss or damage by fire, collision, or dangers of navigation; and that each carrier shall be liable only for a loss of the goods while in its custody, "and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

The question is, whether under these circumstances the insurer, upon payment of a loss, became subrogated to the right to recover damages from the carrier.

When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for

the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In a court of common law, it can only be asserted in his name, and, even in a court of equity or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured. *Comegys* v. *Vasse*, 1 Pet. 193, 214; *Fretz* v. *Bull*, 12 How. 466, 468; *The Monticello*, 17 How. 152, 155; *Garrison* v. *Memphis Ins. Co.*, 19 How. 312, 317; *Hall* v. *Railroad Cos.*, 13 Wall. 367, 370, 371; *The Potomac*, 105 U. S. 630, 634, 635; *Mobile & Montgomery Railway* v. *Jurey*, 111 U. S. 584, 594; *Clark* v. *Wilson*, 103 Mass. 219; *Simpson* v. *Thomson*, 3 App. Cas. 279, 286, 292, 293. That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in that right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in the case of a partial loss, and when no interest in the property is abandoned or accrues to him. *Hall* v. *Railroad Cos.*, *The Potomac*, and *Simpson* v. *Thomson*, above cited.

The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action, none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions.

For instance, if two ships, owned by the same person, come into collision by the fault of the master and crew of the one ship and to the injury of the other, an underwriter who has insured the injured ship, and received an abandonment from the owner, and paid him the amount of the insurance as and for a total loss, acquires thereby no right to recover against the other ship, because the assured, the owner of both ships, could not sue himself. *Simpson* v. *Thomson*, above cited; *Globe Ins. Co.* v. *Sherlock*, 25 Ohio St. 50, 68.

Upon the same principle, any lawful stipulation between the owner and the carrier of the goods, limiting the risks for which the carrier shall be answerable, or the time of making the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier; as, for instance, if the contract of carriage expressly exempts the carrier from liability for losses by fire; *York Co.* v. *Central Railroad*, 3 Wall. 107; or requires claims against the carrier to be made within three months; *Express Co.* v. *Caldwell*, 21 Wall. 264; or fixes the value for which the carrier shall be responsible; *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331. So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in *Mobile & Montgomery Railway* v. *Jurey*, 111 U. S. 584.

The stipulation in these bills of lading, that the carriers "shall not be liable for loss or damage by fire, collision, or the dangers of navigation," clearly does not protect them from liability for any loss occasioned by their own negligence. By the settled doctrine of this court, even an express stipulation in the contract of carriage, that a common carrier shall be exempt from liability for losses caused by the negligence of himself and his servants, is unreasonable and contrary to public policy, and therefore void. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Railroad Co.* v. *Pratt*, 22 Wall. 123; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174; *Railway Co.* v. *Stevens*, 95

U. S. 655. And it may be that, as held by Judge Wallace in a case in the Circuit Court, a stipulation that "no damage that can be insured against will be paid for" would not protect the carrier from liability for his own negligence, because that would be to compel the owners of the goods to insure against the negligence of the carrier. *The Hadji*, 22 Blatchford, 235.

But the stipulation upon the subject of insurance, in the bills of lading before us, is governed by other considerations. It does not compel the owner of the goods to stand his own insurer, or to obtain insurance on the goods; nor does it exempt the carrier, in case of loss by negligence of himself or his servants, from liability to the owner, to the same extent as if the goods were uninsured. It simply provides that the carrier, when liable for the loss, shall have the benefit of any insurance effected upon the goods.

It is conclusively settled, in this country and in England, that a policy of insurance, taken out by the owner of a ship or goods, covers a loss by perils of the sea or other perils insured against, although occasioned by the negligence of the master or crew or other persons employed by himself. *Waters* v. *Merchants' Louisville Ins. Co.*, 11 Pet. 213; *Copeland* v. *New England Ins. Co.*, 2 Met. 432; *General Ins. Co.* v. *Sherwood*, 14 How. 351, 366; *Davidson* v. *Burnand*, L. R. 4 C P. 117, 121.

Any one who has made himself responsible for the safety of goods has a sufficient interest in them to enable him to obtain insurance upon them.

Contracts of reinsurance, by which one insurer causes the sum which he has insured to be reassured to him by a distinct contract with another insurer, with the object of indemnifying himself against his own responsibility, (though prohibited for a time in England by statute,) are valid by the common law, and have always been lawful in this country; and in a suit upon such a contract, the subject at risk and the loss thereof must be proved in the same manner as if the original assured were the plaintiff. 3 Kent Com. 278, 279; *Sun Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485; *Mackenzie* v. *Whitworth*, L. R. 10 Ex. 142, and 1 Ex. D. 36.

So a common carrier, a warehouseman, or a wharfinger,

whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value, and the policy need not specify the nature of his interest. *Crowley* v. *Cohen*, 3 B. & Ad. 478; *De Forest* v. *Fulton Ins. Co.*, 1 Hall 84, 110; *Waters* v. *Monarch Assurance Co.*, 5 El. & Bl. 870; *London & Northwestern Railway* v. *Glyn*, 1 El. & El. 652; *Savage* v. *Corn Exchange Ins. Co.*, 36 N. Y. 655; *Joyce* v. *Kennard*, L. R. 7 Q. B. 78; *Commonwealth* v. *Shoe & Leather Ins. Co.*, 112 Mass. 131; *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527; *North British Ins. Co.* v. *London, Liverpool & Globe Ins. Co.*, 5 Ch. D. 569.

No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance, he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility. If it were true that a ship owner, obtaining insurance by general description upon his ship and the goods carried by her, could, in case of the loss of both ship and goods, by perils insured against, and through the negligence of the master and crew, recover of the insurers for the loss of the ship only, and not for the loss of the goods, some trace of the distinction would be found in the books. But the learning and research of counsel have failed to furnish any such precedent.

On the contrary, in one of the earliest cases in which the rule that a policy of insurance covers losses by perils insured against, though occasioned by the negligence of the servants of the assured, was judicially affirmed; the assured, being the owner of a ship, had chartered her for a West India voyage, and by the usages of trade bore the risk of bringing the cargo from the shore to the ship; the policy was upon the boats of the ship, and upon goods in them; and the amount recovered of the insurer was for goods being carried from the shore to the ship in

her boats, and lost by the wrecking of the boats in consequence of the misconduct and negligence of some of the ship's crew. Such was the state of facts to which Lord Chief Justice Abbott applied the language, cited and approved by Mr. Justice Story in *Waters* v. *Merchants' Louisville Ins. Co.*, 11 Pet. 222, and by Chief Justice Shaw in *Copeland* v. *New England Ins. Co.*, 2 Met. 442: "In this case, the immediate cause of the loss was the violence of the winds and waves. No decision can be cited, where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infinite number of questions as to the quantum of care which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy, in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters were not liable. These, and a variety of other such questions, would be introduced, in case our opinion were in favor of the underwriters." *Walker* v. *Maitland*, 5 B. & Ald. 171, 174, 175.

So in the recent case of *North British Ins. Co.* v. *London, Liverpool & Globe Ins. Co.*, it was assumed, as unquestionable, that insurance obtained by a wharfinger would cover a loss by his own negligence. 5 Ch. D. 569, 584.

As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being reimbursed the full value of the goods; but being valid as between the owner and the carrier, it does prevent either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation.

Nor does this conclusion impair any lawful rights of the

insurer. His right of subrogation, arising out of the contract of insurance and payment of the loss, is only to such rights as the assured has, by law or contract, against third persons. The policy containing no express stipulation upon the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defence to an action on the policy, according to two careful judgments rendered in June last and independently of each other, the one by the English Court of Appeal, and the other by the Supreme Judicial Court of Massachusetts. *Tate* v. *Hyslop*, 15 Q. B. D. 368; *Jackson Co.* v. *Boylston Ins. Co.*, 139 Mass. 508.

In *Tate* v. *Hyslop*, owners of goods, insured against risks in crafts or lighters, had previously agreed with a lighterman that he should not be liable for any loss in crafts except loss caused by his own negligence, and did not disclose this agreement to the underwriters at the time of procuring the insurance. The sole ground on which it was held that the owners could not recover on the policy was that this agreement was material to the risk, because the underwriters, as the assured knew, had previously established two rates of premium, depending on the question whether they would have recourse over against the lighterman. Lord Justice Brett observed that, but for the two rates of premium established by the underwriters and known to the assured, the omission of the assured to disclose their agreement with the lighterman could only have affected the amount of salvage which the underwriters might have, and would have been immaterial to the risk, and consequently to the insurance. 15 Q. B. D. 375, 376.

In *Jackson Co.* v. *Boylston Ins. Co.*, it was adjudged that, in the absence of any fraud or intentional concealment, the undisclosed existence of a stipulation between the assured and the carrier, like that now before us, afforded no defence to an action on the policy.

It may be added that our conclusion accords with the decision of Judge Shipman in *Rintoul* v. *New York Central Railroad*, 21 Blatchford, 439, as well as with those of Judge Dyer

in the District Court, and Judge Drummond in the Circuit Court, in the present case. 10 Bissell, 18, 38. See also *Carstairs* v. *Mechanics' & Traders' Ins. Co.*, 18 Fed. Rep. 473; *The Sidney*, 23 Fed. Rep. 88; *Mercantile Ins. Co.* v. *Calebs*, 20 N. Y. 173.

Decree affirmed.

MR. JUSTICE BRADLEY dissented.

GLASGOW, Executor, *v.* LIPSE.

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

Argued March 3, 4, 1886.—Decided March 15, 1886.

Payment in good faith at its maturity in Virginia in Confederate currency of a debt contracted there in 1860 to be paid there in 1862, and the receipt and acceptance of the same by the creditor, discharged the debt.

In 1860 two brothers, executors of the will of their father, who had resided in Virginia, and had died there, contracted in that State to convey, under a power in the will, real estate of the testator on the payment, among other things, of a bond then executed by the purchaser for the payment of a sum of money in 1862. One of the executors resided in Indiana, and continued to reside there during and after the close of the war. The other received in Virginia in 1862 (by request of legatees under the will who accepted the same in payment of their distributive shares) payment of the bond in Confederate money, and accounted for the same to the court in 1864. In a suit commenced by the surviving executor against the executor of the obligor on the bond to recover payment of the bond: *Held*, That the payment to the resident executor in Confederate currency was a valid payment.

This was a bill in equity to set aside a deed made by Samuel Lipse, executor of Moses Lipse, and to obtain payment of a bond executed by Glasgow's testator in his lifetime. The case is stated in the opinion of the court. For the understanding of the points in the argument it is sufficient to say: That Moses Lipse died in Virginia before the war, leaving several children, among whom were David H. Lipse, residing in Indiana, and Samuel Lipse, residing in Virginia: Also leaving real estate and a will

Argument for Appellee.

empowering his executors to sell real estate, and naming David H. and Samuel as his executors, both of whom qualified: That in 1860 the executors agreed with one Spears, in Virginia, to convey a tract of testator's real estate on receiving among other things payment of a bond then executed by him to them for the payment of a sum of money in 1862: That David continued to reside in Indiana during the war, and Samuel to reside in Virginia: That Spears' bond was paid to Samuel in Virginia in 1862, after its maturity, and Samuel presented his accounts in the proper court in 1864, showing receipt of such payment and division of the estate, which accounts were allowed and settled: That Samuel afterwards died, and David H. as surviving executor brought this suit against Spears' executor, to recover the sum alleged to be due on the bond, on the ground that the payment in Confederate currency was void.

Judgment below for the plaintiff, from which appeal was taken.

Mr. Thomas J. Kirkpatrick and *Mr. William J. Robertson* for appellant.

Mr. John S. Wise and *Mr. George W. Hansbrough* for appellee.

I. The *ex parte* settlement of the executors' accounts is no bar, even as to Lipse, the assistant executor, as against a debtor of the estate, who was no party to it; *Butterfield* v. *Smith*, 101 U. S. 570; *Utterback* v. *Cooper*, 28 Gratt. 233, 270; certainly not as to the other executor, who was no party to it, who was beyond the jurisdiction, and a public enemy. No notice could be served upon him, and notice was necessary. *Underwood* v. *McVeigh*, 23 Gratt. 409; *Connolly* v. *Connolly*, 32 Gratt. 657; *Singleton* v. *Singleton*, 8 B. Mon. 340; *Gray* v. *Stuart*, 33 Gratt. 351. Virginia Code 1860, ch. 132, §§ 9, 14 *et seq.*

II. The land was sold for specie or its equivalent in currency of the United States. *Hibb* v. *Peyton*, 22 Gratt. 561. The terms of the sale in 1862 show that the payment of the debt due in 1861 was to be in gold, or notes redeemable in gold. See *Fretz* v. *Stover*, 22 Wall. 198; *McBurney* v. *Carson*, 99 U. S.

567. It was law in Virginia that a debt contracted before the war and payable in specie could not be discharged by payment in Confederate notes without the consent of the party to whom it was due; *Alley* v. *Rogers*, 19 Gratt. 366; *Fretz* v. *Stover*, above cited; *Purdie* v. *Jones*, 32 Gratt. 827; *Ewart* v. *Saunders*, 25 Gratt. 203; *Tosh* v. *Robertson*, 27 Gratt. 270; *Pilson* v. *Bushong*, 29 Gratt. 229; still more so when the dealing is with a fiduciary; *Patteson* v. *Bondurant*, 30 Gratt. 94; *Pinckard* v. *Woods*, 8 Gratt. 140; *Fisher* v. *Bassett*, 9 Leigh, 119; *Cocke* v. *Minor*, 25 Gratt. 246; *Jones* v. *Clarke*, 25 Gratt. 142. See also *Ward* v. *Smith*, 7 Wall. 447; *Fretz* v. *Stover*, and *McBurney* v. *Carson*, above cited.

III. The testator created in his two executors a joint power and trust to sell his lands, and divide the proceeds, and both qualified. This power related to the division of the proceeds as well as the sale of the land, and could not be executed by one so as to discharge the other and his bondsmen from liability for unlawful execution. In Virginia delegated authority must be strictly adhered to. *Johnston* v. *Thompson*, 5 Call, 248; *Deneale* v. *Morgan*, 5 Call, 407; *McCrae* v. *Farrow*, 4 Hen. & Munf. 444. The Virginia act of 1862, attempting to validate such transactions is unconstitutional. It comes within the rulings in *Edwards* v. *Kearzey*, 96 U. S. 595. See also *Horn* v. *Lockhart*, 17 Wall, 570; *Williams* v. *Bruffy*, 96 U. S. 176.

Mr. Justice Field delivered the opinion of the court.

This case comes before us from the Circuit Court of the United States for the Western District of Virginia. The facts out of which it arises are briefly as follows: In December, 1859, Moses Lipse, of Botetourt County, Virginia, died possessed of considerable property, real and personal, in that county, and leaving twelve children surviving him. His will, made a few days before his death, after providing for the payment of his debts, directed that all his property should be sold by his executors, and the proceeds be equally divided between his children and their representatives, certain sums advanced to them to be deducted from their respective portions. He appointed his sons, Samuel and David, executors. The will

was proved and admitted to record by the county court of the county at its May term of 1860, and in June following the executors qualified and gave a bond with sureties in the sum of $30,000.

In August of that year the executors sold the personal property, and on the 10th of September following the real property. The sale of the latter was made to Charles C. Spears, a citizen of Virginia, and the contract of sale was signed by the parties. The property was supposed at the time to consist of three hundred and seventy-one acres, but the quantity was to be definitely ascertained by an actual survey. The consideration agreed upon was thirty-eight dollars an acre, of which one third was to be paid on the 3d of October, and the balance in two equal annual instalments on the 3d of October, 1861, and on the 3d of October, 1862. For these deferred payments Spears was to give his bonds, and the executors agreed to place him in possession of the property by the following Christmas, and to make him a good title for the same when all the purchase money should be paid. The survey made disclosed a larger number of acres than was estimated, carrying the purchase price to $14,858. Of this sum Spears paid one third on October 3, 1860, and gave his two bonds for the balance as agreed.

Early in 1861 Spears joined the Confederate army, leaving his affairs in the hands of William A. Glasgow, of Botetourt County, as his agent, and during the year Glasgow, as such agent, paid the first bond, though not on the day of its maturity, but $3,000 at one time and the balance at another. Samuel Lipse, the resident executor of Moses Lipse, called upon Glasgow each time to collect the money, and in his accounts charged himself with the amount as of the day the bond was due.

The cash payment was made in lawful money, and there is no evidence that the first bond was otherwise paid. It is in proof that the notes of the Confederate States did not become generally current in Virginia until after this period. Of the money received on this bond and of other moneys in the hands of the resident executor, the distributive shares belonging to

nine of the twelve legatees, the number then residing within the Confederate States, were paid to them and received without objection. Three of the legatees, including the co-executor, resided in Indiana, and the shares belonging to them remained charged to the resident executor in his account, which was subsequently examined by the commissioner of accounts, reported to the court and approved.

Before the second bond became due, Spears was killed in battle. His will appointing Glasgow his executor was, at the November term of the county court in 1862, proved and admitted to record, and Glasgow qualified as executor.

When the second bond became due, or about that time, Glasgow called upon the resident executor and offered to pay it in Confederate notes; but the executor expressed some unwillingness to receive the payment then, and a desire before doing so to see some other persons, referring to the legatees. One witness testified that Glasgow at that time counted out the Confederate money, and that the executor replied that he would not take it, that it was of no account; but said that he would take Glasgow's check on the Fincastle Bank for the amount, observing, in the hearing of the witness, that he thought he could get Fincastle money for the check, that is, notes of the bank at that place. It is of little moment, however, whether the refusal of the Confederate notes was or was not accompanied by expressions as to their value. Twenty days afterward the resident executor called upon Glasgow at his office, and said that he was ready to receive payment of the balance due for the land, that he had seen most of the heirs, and that they wanted their money. Glasgow thereupon gave him a check for the balance on the Farmers' Bank at Fincastle, which was near by, and he accepted it without objection. He claimed nothing more than the principal, saying, that as Glasgow was ready to pay it when due, he ought not to pay interest. This check was deposited by the executor in the bank, and against its amount he subsequently drew his own checks. These were paid in Confederate notes. It does not appear, however, that any inducements were held out by Glasgow to the executor to take those notes in payment, or that any ignorance existed on

his part as to their true character, or that Glasgow made any representation as to the kind of currency in which the check should be paid, or that any complaint was made to him that the bank had paid it in those notes. As between Glasgow and the resident executor the transaction was considered closed. The last bond of Spears was paid, and, as the conditions of sale were complied with, the resident executor, in April, 1863, nearly six months afterwards, executed a deed of the land to Glasgow as executor of Spears' estate, reciting therein the entire payment of the purchase money to the executors of Lipse, deceased, "part by the said Spears in his lifetime, and the balance by the said Glasgow, his executor, since his death." The power to sell the land being vested in the two executors, their joint execution of the deed would have been necessary to transfer the title, had not the act of the legislature of Virginia of the 5th of March, 1863, provided that whenever any fiduciary residing in that State had been authorized to exercise any power, or to do any act jointly with one or more fiduciaries residing within the limits of the United States, (meaning thereby in those States without the limits of the Confederacy,) it should be lawful for the fiduciary resident in the State to exercise such power and do such act without the concurrence of the non-resident fiduciary, and that the act should have the same force and effect as if it was the joint action of all the fiduciaries. *McRae* v. *Farrow*, 4 Hen. & Munf. 444.

The resident executor at once proceeded to distribute the money received on this last bond. Eight of the legatees took their respective shares without objection; as did five of the six children of a deceased legatee. Soon afterwards the resident executor rendered his account, showing the disposition of the estate, the moneys received, the expenditures incurred, the debts discharged, and the payment of their respective shares to eight of the legatees and to five children of another legatee. The account examined by a commissioner appointed by the court was approved, and his report confirmed. Thus the estate was closed except as to the payment of the shares to the three legatees residing in Indiana, and the payment of the sixth part of the share of another legatee to one of his children. It is not

necessary to inquire as to the disposition made of these unpaid legacies, for the suit is not to compel their payment. It is said that the interests of two of them and of one of the children of the deceased legatee were confiscated under proceedings of the Confederate government. If such were the case it would not affect the validity of the payment of the last bond of Spears, nor of the settlement by the court of the resident executor's account previously rendered.

This settlement remained unquestioned from the confirmation of the commissioner's report, on November 14, 1864, until January 25, 1879, more than fourteen years, before this suit was instituted. Its object is to charge Glasgow, as executor of Spears, with the second and third instalments of the purchase-money of the land, and compel him, as executor, to pay the same, with interest, to David H. Lipse, the surviving executor of Moses Lipse, the resident executor having departed this life, and to cancel and set aside the deed conveying the land, executed by the latter to Glasgow, as above stated; and, if the instalments should not be paid by Glasgow, to have the land sold and the proceeds applied to their payment; the complaint alleging that those instalments never were paid, that Confederate notes were given in pretended payment, and were received under compulsion, with sundry charges of deceit and fraud on the part of Glasgow to carry out a scheme to obtain possession of the property without discharging the just claim of the estate thereon. None of these charges of deceit, fraud and compulsion are sustained by any evidence. On the contrary, the conduct of the resident executor and Glasgow is shown to have been that of honorable and just men; no deceit was practised, nor any undue advantage taken by either of them.

It is undoubtedly true that an executor is chargeable with the utmost good faith in dealing with the estate intrusted to him. He cannot wantonly neglect the property or squander it by useless expenditures, or suffer it to go to waste without incurring personal liability for the consequent depreciation. Nor can he call in good investments when the money is not needed, nor accept the payment of debts for less than their face when the full amount can be recovered without unnecessary delay

and expense, nor in depreciated currency when better currency can be had, unless it can be advantageously used in meeting expenses, discharging debts, paying legacies, and the like. In all such cases he would be chargeable with a devastavit. He may, however, take payment of a debt, when not secured, in the best money he can get, when its safety requires its collection. Under these limitations he must do what, under the circumstances and situation, prudent men, managing their own estates, would do; and, when doubting, seek the authority and direction of the proper court. With respect to transactions during the late war, he could not under any circumstances invest in Confederate securities property or lawful money already in his hands. *Horn* v. *Lockport*, 17 Wall. 570, 573; *Lamar* v. *Micou*, 112 U. S. 452, 476.

If he fail in the discharge of his trust he is liable to parties injured thereby, as all trustees are liable in such cases. And parties combining and confederating with him to despoil the estate in any way may be held as participants in the devastavit and breach of trust. We may even concede the doctrine declared by the Court of Appeals of Virginia, that a debtor who pays to an executor in depreciated currency a debt payable in gold or its equivalent, knowing at the time that the currency is not needed for the payment of debts or legacies, or other uses of the estate, and that the safety of the debt does not require its collection, may be also charged as a participant in the devastavit. *Patteson* v. *Bondurant*, 30 Gratt. 94. The present case does not come under the doctrine. It falls within the class where, for debts payable in lawful money, the depreciated currency of the country where they were contracted and the executor resides can be used at its face value in payment of legacies, and, therefore, may be accepted by him without a breach of trust. The notes received had in October, 1862, to a great extent, superseded the use of coin, and become the principal currency of the Confederate States. All business transactions there were had with reference to them. They were a standard of value, according to which contracts were made and discharged. Having, therefore, an exchangeable value, they were sought for by residents within

the Confederacy. The resident executor there, however, hesitated to accept them in payment of the last bond of Spears, which, being made in October, 1860, must be considered as payable in lawful money, and he consulted the wishes of legatees in Virginia, among whom the greater part of the money was to be distributed. They desired him to take the notes, and received them in discharge of their distributive shares. So far as those legatees are concerned, their approval of his action was shown by their expressed wishes, and their acceptance of the notes. They, at least, are estopped from questioning the propriety of his conduct.

Glasgow's check called for dollars, and when it was received on deposit and placed to the credit of the resident executor, it was a matter between him and the bank whether he would receive Confederate notes for the amount. Had he been unwilling to receive them, and the bank had refused to give any other money, he should have notified the drawer, and, by returning the check, asked to be restored to his original position; but so far from taking that course he received them, and therewith paid the legatees in Virginia. Glasgow was informed when he gave the check that they wanted their money and were willing to take what he had offered. So, if we treat the check as intended to draw such notes, there is no ground on which the validity of the payment can be assailed, so far as the estate of Spears is concerned.

It is not necessary for us to determine whether or not the act of Virginia, allowing a resident fiduciary, authorized to execute a power or do an act jointly with one or more fiduciaries residing out of the Confederacy, to exercise such power or do such act without the concurrence of the non-resident fiduciary, was a valid exercise of legislative power, so as to justify the resident executor in executing the deed. It is a sufficient defence to the present suit that the entire purchase money for the land was paid, for it is upon the alleged non-payment of the last two instalments that the suit rests. He had full authority to collect them, and it was not necessary that his co-executor should join in the receipts. *Edmonds* v. *Crenshaw*, 14 Pet. 166. If the deed did not pass the title, a

court of equity would, after such payment, compel those holding the legal title to execute a sufficient deed.

As to the rights of the legatees, including the co-executor, residing in Indiana, only a word need be said. If they have just ground to complain of the resident executor, and their rights can at this date be judicially enforced, they must proceed by suit against his representatives, or, excepting the co-executor, against his sureties. *Morrow* v. *Peyton*, 8 Leigh, 54; *Lidderdale* v. *Robinson*, 2 Brock, 160. When such suit is brought it will be time enough to consider how far the settlement of his accounts can be impeached, and how far any remedy is affected by alleged laches. At present these questions require no answer.

The decree of the court below must be

Reversed and the cause remanded, with directions to dismiss the suit.

NEW PROVIDENCE *v.* HALSEY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Argued March 8, 1886.—Decided March 22, 1886.

In an action at law in a Circuit Court of the United States against a township to recover on bonds issued by the township, the plaintiff is not entitled to recover on bonds transferred to him by citizens of the State in which the town is situated for the mere purpose of being sued in a court of the United States. *Bernard Township* v. *Stebbins*, 109 U. S. 341, affirmed and applied.

A municipal bond in the ordinary form is a promissory note negotiable by the law merchant within the meaning of that term in the act of March 3, 1875. *Ackley School District* v. *Hall*, 113 U. S. 135, affirmed and applied.

The issue of township bonds by commissioners under the act of the legislature of New Jersey of April 9, 1868, "to authorize certain towns in the counties of Somerset, Morris, Essex and Union to issue bonds and take stock in the Passaic Valley and Peapack Railroad Company," was conclusive as to the amount that could be put out under the statute and estopped the township from setting up against a *bona fide* holder that the issue was in excess of the amount authorized.

In order to avail to stop costs, an offer to submit to entry of judgment should be made in open court, and the court be asked to act thereon, after due notice to the other party.

The case is stated in the opinion of the court.

Mr. Thomas N. McCarter for plaintiff in error.

Mr. Henry C. Pitney for defendant in error.

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

This suit was brought by Abraham Halsey, a citizen of California, to recover the amount due on twenty-six bonds, amounting in the aggregate, without interest, to $8200, given by the Inhabitants of the Township of New Providence, New Jersey, for stock in the Passaic Valley and Peapack Railroad Company. It is conceded that Halsey holds in his own right but nine of the bonds, on which there is due, without interest, $900. The rest belong to citizens of New Jersey, who assigned them to him for collection only. Of the nine which he holds in his own right, seven belonged at one time to his father, a citizen of New Jersey, who was a purchaser before maturity for value without notice. Three of these seven came to him on the distribution of his father's estate, and the other four he bought from his brothers and sisters, citizens of New Jersey, who got them in the same way. The remaining two he bought from a brother, who had bought from another brother, who was a *bona fide* holder for value, and both these brothers were citizens of New Jersey. The evidence does not show how much he paid for what he bought, but it does appear that he paid something.

The bonds were issued under the same statute which was before this court for consideration in *Bernards Township* v. *Stebbins*, 109 U. S. 341, and is found fully stated on pages 342, 343, and 344 of that case.

On the trial several questions arose, but the following are all that have been brought to the attention of this court by the argument for the plaintiffs in error:

1. Whether a recovery can be had in this action for the bonds

actually owned by citizens of New Jersey and held by Halsey only to collect for their account.

2. Whether Halsey can recover on the nine bonds he holds in his own right, inasmuch as he got them by assignment from citizens of New Jersey, who could not sue in the courts of the United States, and he is compelled to rely on the title of his assignors to avoid the matters pleaded in bar to the action.

3. Whether the issue of the bonds under the statute by the commissioners appointed for that purpose estops the Township from setting up as a defence against a *bona fide* holder that the original issue was in excess of the amount authorized.

The Circuit Court ruled against the Township on all these questions, and gave judgment upon a verdict of the jury for the full amount claimed, being $15,981.88. To reverse that judgment this writ of error was brought.

It is conceded that the ruling on the first of the questions was wrong, and that the judgment is erroneous to the extent of the bonds not held by Halsey in his own right. That was decided in *Bernards Township* v. *Stebbins*, above referred to.

The second question is disposed of by the case of *Ackley School District* v. *Hall*, 113 U. S. 135, where it was decided that a municipal bond in the ordinary form was "a promissory note negotiable by the law merchant," within the meaning of that term in the act of March 3, 1875, 18 Stat. 470, ch. 137, § 1, which allows a suit on instruments of that class to be brought in the courts of the United States by an assignee, notwithstanding a suit could not have been prosecuted in such court if no assignment had been made. These bonds are of that character. Such being the case, it is a matter of no importance that Halsey makes title to the bonds he owns through assignments by citizens of New Jersey.

The Court of Errors of New Jersey has recently decided in *Cotton* v. *New Providence*, 18 Vroom (47 N. J. L.) 401, following the rule laid down in *Mutual Benefit Life Ins. Co.* v. *Elizabeth*, 13 Vroom (42 N. J. L.) 235, that purchasers of bonds of the issue of those now in suit had the right to rely on the decision of the commissioners as conclusive in respect to the amount that could be put out under the statute. The language of the

court is, "When they [the commissioners] issued bonds they averred that the issue was within the limit. Construing the act by the rule laid down in the case cited, [*Ins. Co.* v. *Elizabeth*,] the legislative intent that their decision on this subject should be final, appears. The holder of the bonds had the right to rely thereon. For this reason I feel constrained to hold that bonds issued beyond the limit would be enforceable." To this we agree, and it is conclusive as to the correctness of the ruling of the court below upon the third question presented.

It follows that the judgment of the court below must be reversed. A question was, however, raised at the argument as to costs. Annexed to the brief of counsel for the defendant in error is a copy of what purports to be an offer by the Township to Halsey, after the decision of this court in *Bernards Township* v. *Stebbins*, and before the record in this case was printed, to allow the judgment to be reversed at once, so far as the bonds not owned by him were concerned, "with permission to the defendant in error to discontinue as to those bonds, and to strike from the record the counts founded thereon," and that as to the other bonds it be affirmed, "and that the court may make such order as to the costs incurred in this court as it shall deem just;" "or that the court be requested at once to pronounce judgment on the basis of the plaintiff being entitled to recover only upon the bonds" owned by him, "and that as to all the other bonds mentioned in the record the plaintiff was not entitled to recover," under the decision in *Bernards Township* v. *Stebbins*. We are asked now, on account of this offer, to adjudge that the plaintiff in error pay the costs which have been incurred in printing the record, including the clerk's fee for supervising. The offer, although printed in the brief, was not proved at the hearing, but if it had been we could not have given it the effect now asked. Offers of this kind made out of court cannot be considered by us. The offer should have been made in open court and the court asked to act thereon after the township had been notified in due form to show cause against it. The case of *Bernards Township* v. *Stebbins* was decided at the October Term, 1883, and the offer is said to have been made January 24, 1884. There was abundance of

time after the decision in that case had become known for counsel to have applied for an order in the premises before the end of that term, and before the record was printed. This was not done.

The judgment is

Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

RAND *v.* WALKER.

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

Submitted March 2, 1886.—Decided March 22, 1886.

A bill for the assignment of dower brought in a State court alleged that A, one of the defendants, in purchasing the property, acted as agent and trustee of B, and took and held title to the joint use and benefit of himself and B. The complainant and B were citizens of the same State ; A was a citizen of a different State. The answers took no notice of these allegations. *Held*, That the petition of A to remove the cause to the Circuit Court of the United States should be denied, as B was a necessary party to the suit.

The right to take steps for the removal of a cause to a Circuit Court of the United States on the ground of a separable controversy is confined to the parties actually interested in such controversy.

After removal of a bill in equity from a State court to a Circuit Court of the United States on motion of one of the respondents, the complainant filed a cross-bill alleging that a judgment, obtained in the Circuit Court in a suit in which she was not a party, after the removal, had been obtained collusively and did not conclude her : *Held*, That this presented no reason why the cause, having been improperly removed, should not be remanded.

The case is stated in the opinion of the court.

Mr. W. C. Goudy for appellant.

Mr. E. S. Isham for appellee.

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

This is an appeal under § 5 of the act of March 3, 1875,

18 Stat. 470, ch. 137, from an order of the Circuit Court remanding a suit which had been removed from a State court. The suit was brought in the Superior Court of Cook County on the 4th of April, 1881, by Martha A. Walker, widow of Martin O. Walker, deceased, a citizen of Illinois, against George C. Rand, Jr., Charles E. Brown, Thomas Brown, and Henry G. Tucker, citizens of New York, and John W. Doane, Samuel Otis Walker, Edward Stone Walker, Augustus L. Chetlain, and Charles Fargo, citizens of Illinois, for an assignment of dower in certain lots in Chicago. The bill charges that Martin O. Walker died on the 28th of May, 1874, seized of the lots described, and leaving Martha A. Walker, his widow, and the defendants Walker, his sole heirs-at-law; that on the first of August, 1874, Mrs. Walker, the widow, demanded of the heirs an assignment of her dower, which was refused; that in the beginning of the year 1875, the heirs conveyed the property to the defendant Fargo, who went into possession and also refused to assign dower, although requested; that the defendant Chetlain was administrator of the estate of the decedent, and that he, in 1878, as such administrator, sold and conveyed the property to the defendant Rand. The bill then proceeds as follows:

"And your oratrix charges on information and belief, and avers the fact to be, that said Rand, in making said purchase, acted in part as the agent and trustee of one John W. Doane, and took and held the title to said premises to and for the joint use and benefit of himself and of the said Doane; and your oratrix shows that ever since said last-mentioned conveyance said Rand and Doane have entered into and enjoyed the possession of said premises, but that said Doane and Rand, though often requested, have, ever since taking possession of said premises, wholly neglected and refused to set off and apportion to your oratrix her dower therein, by reason whereof the said Doane and Rand became, and still are, liable to your oratrix for damages for the detention of her dower in said premises since said second day of November, A.D. 1878.

"And your oratrix further shows that on or about the said second day of November, A.D. 1878, said Fargo conveyed said

premises to Carrie Walker, wife of said Samuel O. Walker, and on said last-mentioned day, and as part of the same transaction, said Carrie Walker and Samuel O. Walker conveyed said premises to said Rand, as your oratrix charges in part, in trust for said Doane, and that said Doane and Rand now hold said premises free from all encumbrance, except the estate of dower of your oratrix therein.

"And your oratrix insists that the said Samuel O. Walker and Edward S. Walker are liable unto your oratrix in damages for the detention of her dower in said premises from the time she demanded of them that her dower be set off in said premises until they conveyed said premises to said Fargo, to wit, the first day of January, A.D. 1875; and that said Fargo is liable to your oratrix in damages for the detention of her said dower from said last-mentioned day till the second day of November, A.D. 1878, and that said Doane and Rand are liable to your oratrix for damages for the like detention of her said dower rights in said premises from said second day of November, A.D. 1878."

It is then stated that the premises were subject to the lien of a deed of trust made to Charles E. Brown, in favor of Chauncey Tucker, now deceased, Henry G. Tucker, and Thomas Brown, but it is alleged that, for reasons set forth, this lien is no longer a charge on the property as against the dower which is claimed.

The defendants Brown and Tucker answered the bill on the 20th of June, 1881, denying the allegation that their deed of trust had in any manner been discharged as a lien on the property superior to the dower of Mrs. Walker. On the 26th of August, 1881, the defendants Doane and Rand filed a joint general demurrer to the bill. Separate demurrers of the same character were filed on the same day by the defendants, the Walkers, Chetlain, and Fargo. On the 5th of December, 1881, the demurrer of Rand and Doane was withdrawn, those of the Walkers overruled, and that of Fargo sustained, with leave to Mrs. Walker to amend her bill in ten days, which she did. Demurrers to the amended bill were filed by Chetlain and the defendants Walker, December 21, 1881. These de-

murrers were overruled February 1, 1882, and on the 10th of the same month answers were filed by the Browns and Tucker, by Fargo, by Edward Stone Walker, by Samuel Otis Walker, by Chetlain, and by Rand and Doane. In the answer of Rand and Doane, which was joint, reasons were given why dower had not been assigned, but the conveyances to Rand as charged in the bill were admitted. While in the answer it is stated that Rand alone holds the legal title under that conveyance, no reference whatever is made to the allegation in the bill that this title is held for the joint account of Rand and Doane, and that the premises had been since the conveyances in their joint possession.

On the same day that this answer was filed Rand presented his petition to the court for a removal of the suit to the Circuit Court of the United States. This petition set forth the citizenship of Mrs. Walker, Rand, the Browns, and Tucker, at the time of the commencement of the suit, and at the time of the presentation of the petition, the same as is above stated; that the petitioner alone held the legal title to the property, and that "in said suit there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between said Martha A. Walker, and your petitioner and the said Thomas Brown, Charles E. Brown, and Henry G. Tucker." The State court thereupon made an order transferring the cause to the Circuit Court of the United States. A copy of the record was entered in due time in the Circuit Court, whereupon a motion to remand was made by Mrs. Walker and denied by the court, but afterwards, on the 8th of June, 1885, after the cause had been argued at the final hearing, it was remanded. The evidence showed clearly that Doane had a substantial interest in the property under the title held by Rand. From the order to remand this appeal was taken.

Upon the argument here two positions were taken in support of the order appealed from, to wit:

1. That the petition for removal was not presented in time, and

2. That Rand had no controversy in the case to which Doane was not a necessary party.

Without considering whether, under the circumstances of this case, the order to remand could be sustained at the time it was made on the first of these grounds, we are entirely satisfied it was properly granted under the second. The suit is for an assignment of dower in lots the legal title to which is, according to the pleadings and the evidence, in Rand for the joint use and benefit of himself and Doane. Rand and Doane are also, as is alleged on the one side and not denied on the other, in joint possession, and the prayer of the bill is for a decree against them jointly for damages on this account as well as for the assignment of dower.

It is claimed, however, that, as Rand holds the legal title, Doane is an unnecessary and merely nominal party, because his interests are represented for all the purposes of the suit by Rand as his trustee. It is certainly true, as was said in *Kerrison* v. *Stewart*, 93 U. S. 155, 160, that "under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, . . . or to one by a stranger against him to defeat it in whole or in part." But this case has nothing in the pleadings, or elsewhere, to show that Rand was authorized to represent Doane in respect to the property any more than one tenant in common represents another. Having the legal title, a judgment against him in favor of one not chargeable with notice of Doane's equity might bind Doane as well as Rand, but here there is the notice, and the bill has been brought against both Rand and Doane on that account. So far as this suit is concerned, Doane is just as much a necessary party as he would be if the deeds under which Rand holds had in express terms provided that the conveyances were made for the joint use and benefit of the two, and certainly under those

circumstances, especially if the two were in actual possession, Doane would be as necessary a party as he would be if both the legal and the equitable title were in him. As the suit now stands, it is, so far as Rand and Doane alone are concerned, by a citizen of Illinois against one defendant a citizen of Illinois and another defendant a citizen of New York, to obtain an assignment of dower in property owned by the two defendants jointly, and in which they have a common interest. Both defendants are necessary parties, and consequently there cannot be a removal by one alone, because the controversy is not separable, nor by the two together, because as to them there is not the necessary citizenship.

It is argued, however, that the order to remand ought not to have been granted, because the bill shows there is in the suit a separable controversy between Mrs. Walker and the parties interested in the deed of trust to Charles E. Brown, trustee, in which the citizenship necessary for a removal exists. As to this, it is sufficient to say that neither of the parties to this controversy, if it be separable, a question which we do not decide, have petitioned for removal, and the right to remove a suit on the ground of a separable controversy is, by the statute, confined to the parties "actually interested in such controversy."

After the suit got into the Circuit Court a supplemental bill was filed by Mrs. Walker, in which she alleged that a certain judgment, which had been obtained in the Circuit Court of the United States after the removal, in a suit to which she was not a party, had been obtained by collusion between the parties thereto, and did not conclude her upon certain questions arising under the deed of trust to Brown. This, it is claimed, gave the Circuit Court jurisdiction independent of any question of removal, on the ground that thereafter the suit was one arising under the Constitution and laws of the United States within the meaning of the act of 1875. To this we cannot agree. The effort of Mrs. Walker is not to avoid the judgment as between the parties, but to show that as to her, she not being a party, it has no effect. This raises no question under the authority of the United States.

The order remanding the case is *Affirmed.*

DUNPHY *v.* SULLIVAN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Argued March 16, 1886.—Decided March 22, 1886.

Possession of land in Montana under claim of title for more than three years prior to August 1, 1877, perfected title as against adverse claimants.

Ejectment for a town lot in Montana. Defendant in error as plaintiff below claimed under a deed from the Probate Judge as trustee and mesne conveyances, and relied on a continued possession under claim of title from August, 1870, to October, 1877. The defendant below also claimed title from the Probate Judge as trustee through mesne conveyances. Judgment for plaintiff, which was affirmed by the Supreme Court of the Territory. The defendant brought this writ of error.

Mr. M. F. Morris for plaintiff in error.

Mr. Joseph K. Toole for defendant in error. *Mr. Edwin W. Toole* was with him on the brief.

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

This judgment is affirmed. The jury has found as a fact that Mrs. Sullivan, the defendant in error, was in the actual possession of the property, under a claim of title, from August 2, 1870, until October 4, 1877. This, of course, includes the time from the 22d of February, 1873, when it is claimed the adverse title of Dunphy began, to October 4, 1877. It sufficiently appears that the court directed the jury to find upon the special issues submitted, and no complaint is made of the charge as to what was necessary to create a title by adverse possession. We are not permitted to inquire whether the evidence was sufficient to support the verdict. From a time prior to February 22, 1873, until August 1, 1877, a title could be acquired, under the statutes of Montana, by three years' adverse possession. After that it required five years. It follows that

Statement of Facts.

Mrs. Sullivan's title to the property was perfected by her adverse possession before Dunphy entered into actual possession, and that the judgment in her favor on the special findings, as well as on the general verdict, was right.

Affirmed.

CORE & Another *v.* VINAL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Submitted March 15, 1886.—Decided March 22, 1886.

After trial of a cause in a State court, reversal of the judgment by the State Appellate Court, and remand of the same to the trial court for retrial, it is too late to remove it to the Circuit Court of the United States on the ground of a separable controversy.

A separable controversy under the acts regulating removals from State courts to Circuit courts cannot arise when defendants are sued jointly in trespass on the case and plead jointly the general issue.

Trespass on the case. Plaintiffs in error, Core and Compton, were defendants below. The action was commenced July, 1876, in the Circuit Court of Woods County, West Virginia. Defendants pleaded jointly in abatement that Compton was a resident in Michigan and had no estate in Woods County. This being overruled, they filed a joint plea of not guilty, in 1878, on which issue was joined. Trial was had in March, 1879. Verdict and judgment for plaintiff. The judgment was reversed by the Supreme Court of West Virginia, and the case remanded for a new trial in May, 1881. In August, 1881, the defendant Compton applied to the State court for a removal of the cause to the Circuit Court of the United States, and the application being refused, applied to the Circuit Court of the United States to docket the cause, alleging as follows: "Your petitioner further states that in the said suit above mentioned there is a controversy which is wholly between citizens of different States, and which can be fully determined as between

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them, to wit, a controversy between said petitioner and said John F. Vinal."

The cause being docketed as requested, plaintiff immediately moved to remand it. After hearing the parties this motion was granted, and thereupon the defendants sued out this writ of error. The cause being docketed here the defendant in error moved to advance it under Rule 32. This was granted, and the cause was then submitted.

No appearance for plaintiffs in error.

Mr. C. C. Cole for defendant in error.

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

The order remanding this cause is affirmed. The petition for removal was not filed in time and the suit was not removable. *Pirie* v. *Tvedt*, 115 U. S. 41; *Sloane* v. *Anderson*, *ante* 275, decided at this term.

Affirmed.

MACKIN & Another *v.* UNITED STATES.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argued March 2, 3, 1886.—Decided March 22, 1886.

A crime punishable by imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous crime, within the provision of the Fifth Amendment of the Constitution, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

This was an information filed by the District Attorney on January 20, 1885, in the District Court of the United States for the Northern District of Illinois, on § 5440 of the Revised Statutes, which is as follows:

"If two or more persons conspire, either to commit any

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offence against the United States, or to defraud the United States in any manner or for any purpose, 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 $1000, and not more than $10,000, and to imprisonment not more than two years."

The information contained seven counts, which were respectively for conspiracies to commit offences within § 5512, § 5511, and § 5403. The substance of the offence, as alleged in different forms in the various counts, was the breaking open of a package containing a return, by the judges and clerks of election, of an election held in a district of the city of Chicago to choose a Representative in Congress and certain State and county officers; the alteration of the certificate of the result of the election, the poll book, the tally list of the votes cast for each candidate, and a large number of the ballots; and the substitution of spurious papers in their stead.

In the District Court, the defendants were tried by a jury and convicted, and on March 21, 1885, were sentenced to pay a fine of $5000 each, and to be imprisoned for two years in the penitentiary of the State of Illinois at Joliet in said District.

A writ of error was sued out by the defendants, returnable at May Term, 1885, of the Circuit Court. At the hearing in that court, the two judges presiding were divided in opinion upon five questions of law, and, at the request of the counsel for both parties, certified to this court those questions, two of which were as follows:

"1. Whether the crimes, or any of them, charged against the defendants in the counts of the information, are infamous crimes, within the meaning of the Fifth Article of Amendment to the Constitution of the United States?

"2. Whether the defendants can or not be held to answer in the courts of the United States for the crimes charged, or any of them, against them herein, otherwise than on the presentment or indictment of a grand jury?"

The other questions certified related to the sufficiency of the several counts as setting forth any offence, and need not be particularly stated.

Opinion of the Court.

Mr. John C. Richberg and *Mr. Samuel Shellabarger* for plaintiffs in error.

Mr. Assistant Attorney General Maury (with whom was *Mr. Attorney General* on the brief) for defendants in error. *Mr. John B. Hawley* and *Mr. Richard S. Tuthill* also filed a brief.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

In *Ex parte Wilson*, 114 U. S. 417, it was adjudged by this court, upon full consideration, that a crime punishable by imprisonment for a term of years at hard labor was an infamous crime, within the meaning of the Fifth Amendment of the Constitution of the United States, which declares that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and therefore could not be prosecuted by information in any court of the United States.

The reasons for that judgment, without undertaking to recapitulate them in detail, or to restate the authorities cited in their support, may be summed up as follows: The Fifth Amendment had in view the rule of the common law, governing the mode of prosecuting those accused of crime, by which an information by the Attorney General, without the intervention of a grand jury, was not allowed for a capital crime, nor for any felony; rather than the rule of evidence, by which those convicted of crimes of a certain character were disqualified to testify as witnesses. In other words, of the two kinds of infamy known to the law of England before the Declaration of Independence, the Constitutional Amendment looked to the one founded on the opinions of the people respecting the mode of punishment, rather than to that founded on the construction of law respecting the future credibility of the delinquent. The leading word "capital" describing the crime by its punishment only, the associated words "or otherwise infamous crime" must, by an elementary rule of construction, be held to include any crime subject to an infamous punishment, even if they should be held to include also crimes infamous in their nature, inde-

pendently of the punishment affixed to them. Having regard to the object and the terms of the Amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it, no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may lawfully be imposed by the court. The test is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one; when the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury. The Constitution protecting every one from being prosecuted in a court of the United States, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to secure, or competent to defeat, the constitutional safeguard. What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another; and for more than a century, imprisonment at hard labor in the State prison or penitentiary has been considered an infamous punishment, in England and America.

The argument by which the soundness of those conclusions has been now impugned is, in substance, the same as the one submitted in that case, and has not convinced us that there was any error in the decision.

The judgments in *Hurtado* v. *California*, 110 U. S. 516, and *United States* v. *Waddell*, 112 U. S. 76, on which the counsel for the government rely, are quite in accord with the decision in *Wilson's Case*.

In *Hurtado* v. *California*, the point decided was that the provision of the Fourteenth Amendment of the Constitution, which forbids any State to "deprive any person of life, liberty or property, without due process of law," did not require an indictment by a grand jury in a prosecution for a capital crime in a State court. One of the reasons for so deciding was that the insertion in the Fifth Amendment, addressed to the United

States only, of a specific provision requiring indictments for capital or otherwise infamous crimes, as well as the general provision securing due process of law, showed that the latter was not intended to include the former; and the former must be taken to have been purposely omitted in the Fourteenth Amendment. 110 U. S. 534.

In *United States* v. *Waddell*, the prosecution was upon an act of Congress providing that any person convicted under it should be fined and imprisoned, and should "moreover be thereafter ineligible to any office or place of honor, profit or trust, created by the Constitution or laws of the United States." The only suggestion in the opinion, bearing upon the question before us, was the expression of a serious doubt whether the disqualification so declared did not make the crime an infamous one. 112 U. S. 82. That disqualification was in the nature of an additional punishment, which could only take effect upon conviction. *Kurtz* v. *Moffitt*, 115 U. S. 487, 501.

By the express provisions of acts of Congress, either a sentence "to imprisonment for a period longer than one year," or a sentence "to imprisonment and confinement to hard labor," may be ordered to be executed in a State prison or penitentiary; and the convict, while thus imprisoned, is "subject to the same discipline and treatment as convicts sentenced by courts of the State." Rev. Stat. §§ 5541, 5542, 5539; *Ex parte Karstendick*, 93 U. S. 396.

How far a convict sentenced by a court of the United States to imprisonment in a State prison or penitentiary, and not in terms sentenced to hard labor, can be put to work, either as part of his punishment, or as part of the discipline and treatment of the prison, was much discussed at the bar, but we have not found it necessary to dwell upon it, because we cannot doubt that at the present day imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the States and Territories, as well as of Congress.

In most of the States and Territories, by constitution or

statute, (as is shown in the supplemental brief of the plaintiffs in error),* all crimes, or at least statutory crimes, not capital, are classed as felonies or as misdemeanors, accordingly as they are or are not punishable by imprisonment in the State prison or penitentiary.

The acts of Congress, referred to at the argument, clearly show that the opinion of the legislative branch of the national government, so far as it has been expressed, is in full accordance with what we hold to be the true judicial construction of the Constitution.

The provision of § 1022 of the Revised Statutes of the United States, by which "all crimes and offences" against the elective franchise or the civil rights of citizens, under §§ 5506–5532, "which are not infamous, may be prosecuted either by indictment, or by information filed by a district attorney," does not undertake to define which of those crimes and offences are infamous, and therefore not to be prosecuted by information, but leaves that to be regulated by the paramount authority of the Constitution.

So the provisions of §§ 1044 and 1046 of the Revised Statutes, in the nature of a statute of limitations, by which no person can

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* On that brief the following are referred to:

States: Alabama, Code 1876, §§ 151, 4095; Arkansas, Digest 1884, § 1493; California, Penal Code 1872, § 17; Colorado, Constitution, Art 18, § 4; Georgia, Code 1882, § 4304; Illinois, Rev. Stat. 1874, ch. 38, § 277 (div. 2, § 5); Indiana, Rev. Stat. 1881, § 1573; Iowa, Code 1873, § 4104; Kentucky, Gen. Stat. 1883, ch. 29, art. 1, § 1; Maine, Rev. Stat. 1883, ch. 131, § 9; Massachusetts, Pub. Stat. 1882, ch. 210, § 1; Michigan, 2 Howells Stat. 1882, § 9430; Mississippi, Code 1880, § 3104; Missouri, Rev. Stat. 1879, § 1676; New York, Rev. Stat. (Ed. 1882), pt. 4, ch. 1, tit. 7, §§ 30, 31; Nebraska, Compiled Stat. 1881, pt. 3, § 247; Oregon, Gen. Laws 1874, p. 341, § 3; Tennessee, Code 1884, § 6051; Vermont, Rev. Laws, 1880, § 4334; Virginia, Code 1873, ch. 195, § 1; West Virginia, Code 1868, ch. 152, § 1; Wisconsin, Rev. Stat. 1878, § 4637.

Territories: Arizona, Compiled Laws 1877, ch. 11, § 4; Dakota, Penal Code 1877, ch. 1, § 5; Idaho, Rev. Laws 1874–5, p. 364, § 3; New Mexico, Compiled Laws 1884, § 663; Utah, Compiled Laws 1876, tit. 21, § 15; Washington, Stat. 1855, p. 78, § 11; Wyoming, Compiled Laws 1876, ch. 16, § 1.

To these may be added the following: Florida, Digest 1872, ch. 52, § 1; Minnesota, Stat. 1878, ch. 91 § 2; Ohio, Rev. Stat. 1880, § 6795.

be prosecuted, tried or punished for any offence not capital, or for any crime under the revenue laws or the slave-trade laws, "unless the indictment is found or the information is instituted" within a certain time after the committing of the crime or offence, do not prescribe or indicate what offences must be prosecuted by indictment, and what may be prosecuted by information.

Nor can any such effect be attributed to the similar phrase in the act of July 5, 1884, ch. 225, by which no person shall be prosecuted, tried or punished for any offence under the internal revenue laws, "unless the indictment is found or the information instituted within three years next after the commission of the offence, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases." 23 Stat. 122. The including, in a single clause, of two classes of offences, one of which may be prosecuted by information, is a sufficient reason for mentioning informations as well as indictments, without attributing to Congress an intention that both classes should be prosecuted by information; and imprisonment in the penitentiary is made the line of distinction between the two classes.

But the most conclusive evidence of the opinion of Congress upon this subject is to be found in the act conferring on the Police Court of the District of Columbia "original and exclusive jurisdiction of all offences against the United States, committed in the District, not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary." Act of June 17, 1870, ch. 133, § 1, 16 Stat. 153; Rev. Stat. D. C. § 1049. "Infamous crimes" are thus in the most explicit words defined to be those "punishable by imprisonment in the penitentiary."

The result is, that all the crimes charged against the defendants in this information are infamous crimes, within the meaning of the Fifth Amendment of the Constitution, and that the defendants cannot be held to answer in the courts of the United States for any of those crimes, otherwise than on a presentment or indictment of a grand jury; and therefore the first ques-

tion certified must be answered in the affirmative, and the second question in the negative, and the other questions certified become immaterial.

Ordered accordingly.

UNION PACIFIC RAILWAY COMPANY *v.* UNITED STATES.

UNITED STATES *v.* UNION PACIFIC RAILWAY COMPANY.

APPEALS FROM THE COURT OF CLAIMS.

Argued January 26, 1886.—Decided March 29, 1886.

Section 6 of the act of July 1, 1862, in aid of the construction of the railroads to the Pacific, required them to transport mails, troops, supplies, etc., for the government "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same service." The Union Pacific Railway Company filed its petition in the Court of Claims, setting forth the performance of such services for the government and its charges for the same, and averring that the several amounts were according to rates fixed by it both as respects the government and the public, which were fair and reasonable, and not exceeding the amounts paid by private parties for the same kind of service. The government denied the reasonableness of the rates, and averred that less amounts allowed by it were fair and reasonable. The Court of Claims, after hearing proof, found "that the amounts allowed and retained by the Treasury Department for transportation of mails as aforesaid, are a fair and reasonable compensation for the service and not in excess of the rates paid by private parties for the same service." *Held:* That this was a proper form of finding.

The provisions of § 6 of the act of July 1, 1862, respecting rates for transportation done by the Union Pacific Railway Company for the United States, govern such transportation over its bridge between Council Bluffs and Omaha.

The service rendered by a railway company in transporting a local passenger from one point on its line to another is not identical with the service rendered in transporting a through passenger over the same rails.

The findings in this case were before the court on a motion for a certiorari, reported in 116 U. S. 402. After that motion was denied the cause came on for hearing and decision on the merits. The case is stated in the opinion of the court.

Mr. John F. Dillon for The Union Pacific Railway Company.

Mr. Solicitor General for the United States.

Mr. Justice Matthews delivered the opinion of the court.

In the case of *Union Pacific Railroad Company* v. *United States*, 104 U. S. 662, on appeal from the Court of Claims, it was decided that the railroad company, by virtue of the sixth section of the act of July 1, 1862, ch. 120, 12 Stat. 489, 493, was entitled to be paid by the government for services rendered in the transportation of the mails over its road, and of the employés accompanying them, compensation at fair and reasonable rates, not to exceed the amounts paid by private parties for the same kind of service, and not such rates as were or might be prescribed by general laws regulating the compensation for similar service by other railway companies; and for the purpose of ascertaining and awarding the amount due for such services as had been rendered, and for which the suit had been brought, the judgment was reversed and the cause remanded to the Court of Claims.

In that court the cause was consolidated with two others between the same parties, having similar objects, and an amended petition was substituted, in which The Union Pacific Railway Company was plaintiff, that being the name of the consolidated corporation composed of The Union Pacific Railroad Company, The Kansas Pacific Railway Company, and The Denver Pacific Railway and Telegraph Company. In that petition the plaintiff alleged claims against the government for compensation for transportation of troops, mails, munitions of war, supplies, public stores, passengers, mail agents and clerks, and the transmission of dispatches, the details of which were set out in schedules attached thereto. Of these the sum of $3,768,568.60 was alleged to have accrued for services rendered by the Union Pacific Railroad Company prior and up to June 30, 1878, one half of which, it was admitted, should be retained by the government and applied, as required by section 5 of the act of July 2, 1864, to the payment of the

bonds issued by the United States in aid of the construction of the road; an additional sum of $1,415,415.25 was claimed to be due and payable in cash, for services rendered by the Kansas Pacific Railway Company for similar services, and the further sum of $94,206.20 for like services rendered by the Denver Pacific Railway and Telegraph Company.

It was also averred that the several amounts charged for the services so performed were according to the rates therefor which the railroad company had determined and fixed, both as respects the government and the public, and of which the government and the several departments were duly notified, which rates were fair and reasonable, and not exceeding the amounts paid by private parties for the same kind of service.

The United States filed an answer to this complaint denying generally all its allegations, and with it a counter claim for the recovery of the sum of $11,500,000, alleged to be due, as follows: $1,000,000, being five per centum on the net earnings of the Kansas Pacific Railway Company on the subsidized portion of its road from November 2, 1868, to December 31, 1882; $1,500,000, being five per centum of the net earnings of the Union Pacific Railroad Company from November 6, 1875, to June 30, 1878; and $9,000,000, as being twenty-five per centum of the gross earnings of the Union Pacific Railroad Company from June 30, 1878, to December 31, 1882, after deducting the necessary expenses actually paid within the year in operating and keeping the same in a state of repair, and also the sum paid within the year in discharge of interest on the first mortgage bonds.

To this counter claim the plaintiff answered, in substance, that the twenty-five per centum of the earnings referred to were required by law to be paid into a sinking fund for the benefit of the plaintiff, and to be used in liquidation of its obligations; that the amount so to be paid is such a sum, not exceeding the sum of $850,000 in any one year, as, added to the amount earned by the company for transportation for the defendants, will amount to twenty-five per centum of the net earnings of said company, no money being required to be paid into said sinking fund unless the compensation for transporta-

tion shall not equal twenty-five per centum of said net earnings; that during the period mentioned in the counter claim, to wit, from June 30, 1878, to December 31, 1882, the United States became and is still indebted to the plaintiff, on transportation account, in the sum of $7,158,166.06, as shown in schedules exhibited, one-half of which amount, $3,579,083.03, is applicable to bond and interest account, and the other half to the sinking fund account, which said last mentioned sum is equal to and a full satisfaction of all the demands of the defendant and of the obligation of the plaintiff to pay the said twenty-five per centum of its net earnings during the said period.

On these issues the Court of Claims ascertained from the evidence the facts in dispute, which are set forth in special findings, and on these findings its conclusions of law, that the plaintiff is entitled to be paid, on account of the matters set forth in the claim, the sum of $2,910,124.08; that the defendants, on account of the counter claim, are entitled to be paid the sum of $4,487,807.39; and that the United States are consequently entitled to judgment for the difference, amounting to $1,577,683.31, and judgment was so entered.

The United States appealed from so much of this judgment as allowed to the plaintiff the sum of $2,910,124.08 on its claim.

The plaintiff appealed from the whole judgment.

And the case is now here for determination on these cross-appeals.

The only question of law made upon its appeal by the plaintiff below is, that the Court of Claims failed in its finding of facts as to compensation claimed for transportation of the mails to meet the actual issue made by the pleadings. This issue, it is said, was an affirmation on the part of the plaintiff, and a denial on the part of the defendant, that the rates of transportation fixed and determined by the railway company, of which notice had been given to the proper department of the government, were fair and reasonable, and not in excess of what was paid by private parties for the same kind of service; whereas the finding of fact by the Court of Claims was, "that

the amounts allowed and retained by the Treasury Department for transportation of mails, as aforesaid, are a fair and reasonable compensation for the service, and not in excess of the rates paid by private parties for the same kind of service." A distinction is thus sought to be made between a *quantum meruit*, ascertained according to the rate prescribed by the act, and rates determined and fixed in the first instance by the railway company, not to be disturbed if they are found not to be in excess of the limit prescribed by the statute.

But, as it seems to us, this is a distinction without a difference. It is quite immaterial whether the amount actually found to be due for transportation of the mails, "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service," as required by the sixth section of the act of July 1, 1862, is ascertained upon evidence comparing them with the rates previously determined and fixed by the company, or with those allowed by the accounting officers of the Government. The only material thing is to adjudge what is due according to the rule prescribed by the statute. That the Court of Claims has done. In doing so, it has virtually decided the point of the issue; for if the company has charged rates producing a different amount, they are thereby declared not to be fair and reasonable, because whatever differs from the amount found by the court to answer this description cannot be supposed to fulfil it. There cannot be two differing rates for such compensation which will both correspond with the conditions prescribed by the act of Congress.

We come now to consider the appeal of the United States.

The first question arising upon this appeal relates to the charges which may be lawfully made to the Government for transportation services over the bridge of the Union Pacific Railway Company between Council Bluffs and Omaha. On this subject, the finding of the Court of Claims is as follows:

"The company's uniform rate, during the time covered by this suit, for the transportation of passengers between Council Bluffs and Omaha, over its bridge and approaches, a distance of 3.97 miles, was 50 cents each, which sum was included in the price

of tickets sold for longer or shorter distances. That was a fair and reasonable rate of compensation to be paid by the defendants, and not in excess of the rates paid by private parties for the same kind of service.

"The Treasury Department did not allow 50 cents for each passenger so transported for the defendants, but in each case, ascertaining over what railroad or public highway the passenger reached Council Bluffs or Omaha, and the rate per mile paid by him over such part of said railroad or public highway as he had thus travelled, the company was allowed only the same rate per mile for transporting such passenger between Council Bluffs and Omaha as he had so paid on the road leading to the bridge. On the roads leading to said bridge the rates per mile are different, and the rates on the same road differ according to distance travelled.

"The difference between the amount so allowed by the Treasury Department for the transportation of such passengers for the defendants and that which the company should be allowed if it has a right to charge 50 cents for each passenger so transported during the time above specified, is $3693.31.

"Similar rules were applied by the Treasury Department to the transportation of freight over said bridge, and the disallowance resulting therefrom amounted to $10,885.34. The rate claimed by the company for transportation of freight over said bridge was fair and reasonable, and not in excess of the rates paid by private parties for the same kind of service."

The contention of the Government in support of the allowances made by the Treasury Department, thus adjudged to be insufficient, is based on the act of February 24, 1871, ch. 67, 16 Stat. 430, under which it is claimed the bridge was built, which provides that—

"Said bridge may be so constructed as to provide for the passage of ordinary vehicles of travel, and said company may levy and collect tolls and charges for the use of the same; and for the use and protection of said bridge and property the Union Pacific Railway Company shall be empowered, governed, and limited by the provisions of the act entitled 'An Act to authorize the construction of certain bridges and to establish

them as post roads,' approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto."

The act thus referred to is chapter 246 of 1866, 14 Stat. 244, of which section 3 is as follows:

"Any bridge constructed under this act, and according to its limitation, shall be a lawful structure, and shall be recognized and known as a post-route, upon which, also, no higher charge shall be made for the transportation over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for the transportation over the railroads or public highways leading to the said bridge."

It is argued that this limitation, made by reference a part of the act of 1871, applies to charges to be made by the Union Pacific Railway Company for transportation over the bridge, considered as part of its railway line, and supersedes the legislative contract contained in section six of the act of July 1, 1862, whereby it was authorized to receive compensation at fair and reasonable rates, not in excess of those charged to private parties for similar service.

The Court of Claims held otherwise, and we think rightly. The Omaha bridge of the Union Pacific Railway Company was not constructed under the act of 1866. It was constructed under the original acts incorporating the company—the acts of July 1, 1862, and of July 2, 1864, and the act of February 24, 1871; and the reference in the last-named act to the act of 1866 was for the purpose of extending the provisions of the latter, so far as necessary to confer additional powers upon the railway company for the use and protection of the bridge, and contains no evidence of any intent on the part of Congress to change the rule as to rates of transportation over the line of the railway company as prescribed by section six of the act of July 1, 1862. In the case of the *Union Pacific Railroad Company* v. *Hall*, 91 U. S. 343, it was decided that the bridge in question became part of the railroad of the company, and that the company was bound to run and operate its whole road, including the bridge, as one connected and continuous line. The bridge, therefore, as part of the railroad, became subject to the provisions of the act of July 1, 1862, as to the rates to be paid

by the Government for transportation service over it, and there is nothing in the act of 1871 that changes the application of the rule fixing these rates.

The next question arising on the appeal of the United States relates to items charged for the transportation of passengers, on account of the Government, travelling between Council Bluffs and Ogden.

The finding of facts on the subject by the Court of Claims is as follows:

"The company's uniform rate for the transportation of passengers between Council Bluffs and Ogden, when said passengers purchase tickets at either of those places, is $78.50 each; but, by contracts with connecting railroad companies, the claimant receives from said companies who sell through tickets at reduced rates from New York, San Francisco, and other places over their own and the claimant's road, $54 only for each passenger carried between said Council Bluffs and Ogden upon said through tickets, as its proportion of money paid for the whole through distance.

"In computing the compensation set out in Finding IX. the Treasury Department allowed the claimant only $54 for each passenger carried for the defendants, when said passenger did not have a through ticket over its own and other roads, but took the train at Council Bluffs or Ogden upon an order from the defendants' authorized officers to proceed over the road between those places at the charge of the Government.

"The difference between $54 allowed as aforesaid and $78.50 claimed by the company for each passenger so transported by the claimant, is $2855.38 for the period covered by this suit.

"The court finds that $78.50 is a fair and reasonable rate of compensation to be paid by the defendants for the transportation of a passenger taking a train at Ogden or Council Bluffs and passing over the road between those places, without a through ticket purchased of other roads as aforesaid, and not in excess of the rates charged private parties for the same kind of service.

"In some instances the requisition for transportation presented to the agents of the company stated on its face that the

passenger was bound from seaboard to seaboard, and in others the requisition furnished no information on the subject.

"How much of the sum disallowed was for one and how much for the other kind of requisition is not shown, but the company concedes the reduction in the former cases."

The contention on the part of the United States is, that local passengers carried on its account between Council Bluffs and Ogden, shall be carried at the same rates as are charged for through passengers passing between those points, as part of a journey over the whole line, although a difference is made in respect to all other persons. But the Court of Claims has found as a fact that the amount found by it is based on rates between those points which are fair and reasonable, and not in excess of those charged to private persons for the same service. We cannot review this finding of fact, and no question of law arises upon it, unless it be one, whether the service rendered in transporting a local passenger between the two points is in law identical with that rendered in transporting a through passenger between the same points as part of the transit over the distance of the whole line. This we cannot affirm.

As the United States did not appeal from that part of the judgment of the Court of Claims finding the amount due on account of the counter claim, no question arises thereon.

We find no error in the judgment, and it is accordingly

Affirmed.

STURGES & Another, Executors *v.* UNITED STATES.

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

Argued March 24, 1886.—Decided March 29, 1886.

A testator died July 17, 1870, leaving by his will a legacy to his son payable "within three months after he shall arrive at the age of 21 years." The legatee arrived at the age of 21 on the 21st day of February, 1872. *Held*, That the legacy was not subject to a legacy tax.

Mason v. *Sargent*, 104 U. S. 689, applied.

Statement of Facts.

This was a suit against the executors of the will of Thomas T. Sturges to recover a legacy tax. The allegations in the complaint were:

"That heretofore, to wit, on the 17th day of July, 1870, in the district aforesaid, Thomas T. Sturges died possessed of certain personal property of the value of one hundred thousand dollars, and then and there, by his last will and testament, appointed the defendants respectively, his executor and executrix; that said will was then and there duly proved, and said defendants then and there received and had in charge or trust in the fiduciary capacity aforesaid a certain legacy or interest arising from personal property, which then and there passed by the terms of said last will and testament, which were as follows:

"'I give and bequeath to my son, George W. M. Sturges, the sum of one hundred thousand dollars, to his own use forever, to be paid to him within three months after he shall arrive at the age of twenty-one years, and which legacy or interest then and there amounted to and was of the clear value of one hundred thousand dollars.'

"That said George W. M. Sturges was then and there the son of said Thomas T. Sturges.

"That thereafter, to wit, on the twenty-first day of February, in the year one thousand eight hundred and seventy-two, said George W. M. Sturges arrived at the age of twenty-one years, and then and there became entitled to the possession and enjoyment of said legacy or interest, which was then and there of the value aforesaid, and to the beneficial interest in the profits accruing therefrom, and thereupon and by force of the statutes of the United States of America, in such case provided, there accrued and became due upon the 17th day of July, 1870, aforesaid, and payable on said 21st day of February, 1872, from the defendants to the plaintiffs, and the defendants became liable to pay then and there to the plaintiffs a duty or tax upon said clear value of said legacy or interest in the excess of the sum of one thousand dollars, at the rate of one dollar for each and every hundred dollars of excess of said value, to wit, the sum of nine hundred and ninety dollars, with

Statement of Facts.

interest thereon from the day last aforesaid, which, although then and there demanded, remains due and unpaid."

The defendants demurred to the declaration. The demurrer was overruled and judgment entered for the amount claimed and costs, which judgment was affirmed by the Circuit Court on appeal. This writ of error was brought to review the latter judgment.

Mr. J. Hubley Ashton for plaintiff in error. *Mr. Thomas Harland* filed a brief for same.

Mr. Assistant Attorney General Maury for defendant in error, submitted on the brief of *Mr. Solicitor General.*

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

This judgment is reversed on the authority of *Mason* v. *Sargent*, 104 U. S. 689, and the cause remanded, with instructions to reverse the judgment of the District Court and to send the case back to that court for further proceedings according to law.

Reversed.

PHŒNIX LIFE INSURANCE COMPANY *v.* WALRATH.

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

Submitted March 25, 1886.—Decided March 29, 1886.

The right to remove a suit from a State court to a Circuit Court of the United States, being once lost by reason of non-user "before or at the term at which said cause could be first tried and before the trial thereof," is not revived by a subsequent amendment of the pleadings which creates new and different issues.

This suit was commenced July 19, 1880, in the Circuit Court for Milwaukee County, Wisconsin, by the plaintiff in error against the defendant in error to recover sums of money

alleged to have been received by him as its agent and converted to his own use; and was put at issue August 26, 1880, by a plea of the general issue. At the trial in February, 1881, evidence offered by defendant was objected to on the ground that the defence which it disclosed should have been specially pleaded. Defendant then moved for leave to file a special plea, and the motion was denied. A verdict was then taken for plaintiff, and judgment entered, May 2, 1881, on the verdict. The Supreme Court of the State, on appeal, reversed the judgment in October, 1881, and remanded the cause for a new trial. The defendant in April, 1882, moved for leave to file an amended answer, which was granted, and plaintiff given time to reply to it. Pending this grant of time, plaintiff filed a petition to remove the case to the Circuit Court of the United States, on the ground that the petitioner "at the date of the commencement of the above entitled action, and long prior thereto, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and that the defendant was and is a citizen of the State of Wisconsin." The petition was granted and the case removed. In the Circuit Court of the United States, on motion of the defendant the cause was remanded to the State court. The plaintiff sued out this writ of error to review that judgment.

Mr. George P. Miller for plaintiff in error.

Mr. James G. Jenkins for defendant in error.

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

The order remanding this case is affirmed. The right to the removal of a suit under the act of March 3, 1875, 18 Stat. 470, ch. 137, is lost by a failure to file a petition "before or at the term at which said cause could be first tried and before the trial thereof," and it is not restored by an amendment of the pleadings afterwards so as to present different issues. As was said in *Babbitt* v. *Clark*, 103 U. S. 606, 612, "the act of Congress does not provide for the removal of a cause at the first term at which a trial can be had on the issues, as finally

Statement of Facts.

settled by leave of the court or otherwise, but at the first term at which the cause, as a cause, could be tried." This rule has been strictly adhered to. *Edrington* v. *Jefferson*, 111 U. S. 770, 775; *Pullman Palace Car Co.* v. *Speck*, 113 U. S. 84, 87; *Gregory* v. *Hartley*, 113 U. S. 742, 745. Here the suit was begun July 19, issue joined August 26, 1880, and a trial had February 23, 1881, which resulted in a verdict and judgment for the present plaintiff in error. This judgment was reversed by an appellate court October 19, 1881, and the cause sent back for a new trial. In the trial court an amended answer which contained a counter-claim was filed on leave May 20, 1882, and the petition for removal was not filed until September 13, 1882. This was clearly too late.

Affirmed.

EX PARTE PHŒNIX INSURANCE COMPANY & Others.

ORIGINAL.

Argued March 22, 1886.—Decided March 29, 1886.

Distinct decrees against distinct parties, on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined to give this court jurisdiction on appeal.

Rule to show cause why a writ of mandamus should not issue to the judges of the Circuit Court of the United States for the District of Vermont, commanding them to allow an appeal from decrees and rulings made by that court in a suit in equity, in which the petitioners were respondents, and Robert Fitton and Helen M. Fitton his wife were complainants. The relief sought in the bill was the discovery of certain policies of insurance made by the Phœnix Insurance Company, the Guardian Fire and Life Insurance Company, the North British Mercantile Insurance Company, and the Commercial Union Assurance Company through their agent, and that the defendants might be decreed to pay the complainant the sum of

$12,000 insured by the policies, the property insured having been destroyed by fire. Sundry proceedings in the suit were set forth in the petition, among which were that issues of fact were submitted to a jury on the law side of the court and a verdict thereon was had in favor of the complainants; and that thereupon a master found that the damages sustained by complainants were greater than the amount demanded in the bill; and then the petition made the following allegations:

"Thereafter, during the October Term of said Circuit Court, 1885, the complainants in said bill moved for a judgment against each of the respondents for three thousand dollars (being one-fourth of the said sum of twelve thousand dollars), with interest and one fourth of the costs of the suit, which motion, after the parties had been duly heard thereon, was granted by the court in an opinion filed by the aforesaid District Judge, December 29th, 1885, closing with the following decretal order: 'Let a decree for the orators be entered for the payments by the defendants each, respectively, to the oratrix of three thousand dollars, with interest and one-fourth of the costs of suit within thirty days from the entry of the decree.'

"And thereafter, at the same term, to wit, on the twenty-sixth day of January, A. D. 1886, the said Honorable Hoyt H. Wheeler, district judge, presiding, on motion of the complainants in said suit the following final decree was entered:

"'This cause came on to be further heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that each of said defendants pay to said oratrix the sum of three thousand dollars, with interest thereon from the 29th day of August, A. D. 1883, amounting to the sum of three thousand four hundred and thirty-three dollars and fifty cents; that each of said defendants pay to said orators one-fourth of the orators' costs in and about this suit, said one-fourth being taxed and allowed at the sum of one hundred and seven dollars and sixty-one cents, said sum due in equity, and said costs, amounting to the sum of three thousand five hundred and forty-one dollars and

eleven cents, and which said sum it is ordered, adjudged, and decreed shall be paid to said orators within thirty days from the twenty-sixth day of January, A. D. 1886, with interest from this last-named date to the time of payment, and thereof the said orators may have execution at the expiration of said thirty days against each of said defendants.'

"Done in court, in said term, this 26th day of January, A.D. 1886.

"HOYT H. WHEELER."

The petition then set forth a motion for allowance of an appeal, and that application was made for stay of proceedings "that the cause may pass to the Supreme Court," and denial of the motion and application upon the ground that "the cause was not appealable."

On the return of the rule a hearing was had.

Mr. W. S. B. Hopkins for petitioners.

Mr. Martin H. Goddard for respondents. The court declined to hear argument on the part of respondents.

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

The rule is well settled that distinct decrees against distinct parties on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined to give this court jurisdiction on appeal. *Seaver* v. *Bigelows*, 5 Wall. 208; *Ex parte Baltimore & Ohio Railroad Co.*, 106 U. S. 5; *Schwed* v. *Smith*, 106 U. S. 188; *Farmers' Loan and Trust Co.* v. *Turner*, 106 U. S. 265, 270; *Adams* v. *Crittenden*, 106 U. S. 576; *Hawley* v. *Fairbanks*, 108 U. S. 543; *Fourth National Bank* v. *Stout*, 113 U. S. 684; *Stewart* v. *Dunham*, 115 U. S. 61, 64. This is such a case. The suit was brought on a single instrument, by which, as it was adjudged, an agent of the several insurance companies named bound them severally, each for its proportionate share of one-fourth, to insure the property of Mrs. Helen M. Fitton for $12,000, and the decree is against each company separately for its separate obligation under this instrument, to wit, $3433.50, and no more. The bill alleged the

separate liability of each company, and prayed in substance, for decrees against them severally for the proportion assumed by each in the contract. Each company answered separately, all setting up the same defences.

Under these circumstances it was right for the Circuit Court to refuse the allowance of an appeal, and

The petition for a mandamus is consequently denied.

VAN RISWICK *v.* SPALDING and Others.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued March 10, 1886.—Decided March 22, 1886.

A creditor, who, by the terms of a trust deed executed in good faith by the debtor to secure payment of the debt, has the power to order the land to be sold either by public auction or private sale, and to direct the trustee to convey to the purchaser, and the amount of whose debt is thrice the value of the land, may accept the land in satisfaction of the debt, and cause it to be conveyed by the trustee to the debtor's children, as a gift to them from the creditor, without affording to other creditors of the debtor any just cause of complaint.

The case is stated in the opinion of the court.

Mr. T. A. Lambert for appellant.

Mr. Leigh Robinson for appellee.

Mr. Justice Gray delivered the opinion of the court.

This is a bill in equity by a judgment creditor of William E. Spalding against Spalding, his children, William W. Rapley, William H. Thomas, trustee, and George W. Bonnell, to set aside conveyances of land in Washington, and to have it sold and applied to the payment of Spalding's judgment debts.

The material facts of the case, as appearing by the pleadings and proofs upon which it was heard in the court below, are as follows:

Opinion of the Court.

The plaintiff's judgment was recovered on February 6, 1868. On December 20, 1867, Spalding being indebted to Rapley in the sum of $10,000, for which he had given him a promissory note, payable in ninety days, and Rapley having endorsed other notes of Spalding to the amount of $20,000, Spalding, by a deed in which his wife joined, conveyed all his real estate in Washington to Thomas, in trust to secure the payment of the note for $10,000, and to secure Rapley from loss by reason of his endorsements. The trusts declared in that deed were, that in case of Spalding's failure to pay any of the notes at maturity, or interest thereon, the trustee should, upon the written order of Rapley, sell the land by public auction; that Rapley might at any time during the continuance of the trust direct the trustee to sell the land, or any part thereof, at private sale to such persons, and upon such terms and conditions, as Rapley should deem most advantageous to all parties concerned, and make conveyances accordingly; that the proceeds of all sales under the trust should be applied, first, to pay the expenses of executing the trust, then, to pay all the notes, and lastly, to pay any balance remaining to Spalding and wife, their executors and administrators; and that the trustee should stand seized of any land remaining unsold, after satisfying the liens aforesaid, to the sole use and benefit of Spalding's wife and children, and sell or mortgage it as she should in writing appoint, and pay over the proceeds to her, or invest them as she should direct.

Mrs. Spalding died without having attempted to exercise this power; and all the land, except two lots, was sold by the trustee, according to the deed of trust, for the sum of $22,046, and applied to the payment of the notes endorsed by Rapley, and interest accrued thereon.

On March 27, 1876, Spalding and Rapley made a final settlement of all business between them, including the affairs of a partnership which had existed between them in other lands from before any of the transactions above stated; and Spalding, at Rapley's request, signed the following agreement:

"It is agreed this 27th day of March, A.D. 1876, between William W. Rapley and William E. Spalding, of the city of Washington in the District of Columbia, in full and final settle-

ment of all their partnership affairs and of all business heretofore existing between them, that the said Rapley does release and convey to George W. Bonnell (for such purposes as the said Spalding may direct) all the right, title, and interest of him, the said Rapley, in and to" [six lots of land, designated by squares and numbers, being the two lots aforesaid, and four others owned by Rapley,] "in the city of Washington in the District of Columbia; and in consideration of such release and conveyance the said Spalding does hereby release and acquit the said Rapley from any and all demand and claim whatever on account of their business aforesaid."

On the same day, Spalding, Rapley, and Thomas as trustee, executed a deed of the two lots to Bonnell, expressed to be in consideration of the payment of the sum of $2500. The value of these lots was admitted to be $3297. The record before us contains no copy of the deed, nor any further statement of its contents.

But the oral testimony proves, beyond controversy, that no money was actually paid for this conveyance; that at that time Spalding had no claim against Rapley; that no part of Spalding's note to Rapley for $10,000 had then or has since been paid; that Rapley decided to take the two lots in satisfaction of that debt to himself, and authorized and directed this conveyance to be made, without a sale by auction, in order to save expense, and with the sole object of having the land held by Bonnell in trust for Spalding's children as a gift to them from Rapley; and that Thomas and Spalding joined with Rapley in the deed to Bonnell, in order to perfect the legal title.

The facts of the case being understood, the law applicable to them is clear. There is no proof whatever that the trust deed from Spalding to Thomas was made with any intent to defraud Spalding's creditors. Under that deed, Rapley had the whole equitable title in the two lots, and the right to direct Thomas to sell them by private sale, for an adequate consideration, to pay the debt due him from Spalding. He in effect paid a greater consideration by accepting the lots in satisfaction of a debt for thrice their value. He might cause them to be con-

veyed to himself, to Spalding's children, or to any other person, without exceeding the powers conferred upon him by the trust deed, or affording to Spalding's creditors any just ground of complaint.

Decree affirmed.

YALE LOCK MANUFACTURING COMPANY *v.* SARGENT.

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

Argued March 15, 16, 1886.—Decided March 29, 1886.

The feature of varying eccentricity in the rollers is an essential part of the invention protected by letters patent No. 98,622 granted to James Sargent, January 4, 1870, for an improvement in permutation locks.

The case is stated in the opinion of the court.

Mr. Frederic H. Betts for appellant.

Mr. James Sargent in person and *Mr. Edward Wetmore* for appellee. *Mr. George Ticknor Curtis* was with them on the brief.

Mr. Justice Matthews delivered the opinion of the court.

The bill in this case was filed by the appellee for an injunction to restrain the defendant below, the appellant, from an alleged infringement of letters patent No. 98,622, dated January 4, 1870, granted to James Sargent for an improvement in permutation locks, and for an account, &c. On final hearing on bill, answer, replication, and proofs, there was a final decree for the complainant for an injunction and for $400.75 damages and costs. The defendant has appealed.

The question involved is the fact of infringement, and that in its turn depends upon the proper construction of the complainant's patent.

The specifications and claim of the patent, with the accompanying drawings, are as follows:

"Figure 1 is an elevation of the lock, with the back plate removed to show the interior.

"Figure 2, a vertical cross-section of the same.

"Figure 3, a diagram, showing the cam and the disconcerting eccentrics in perspective.

"Like letters of reference indicate corresponding parts in all the figures.

"*Nature of the Invention.*

"This lock is an improvement upon that of Linus Yale, in which an eccentric roller is combined with the cam for disconcerting the action upon tumblers.

"The invention consists in combining with the cam an arrangement of two or more eccentric rollers, of varying eccentricity, turning upon the same bearing, so that in revolving one or both may turn and alternate in action, thereby greatly increasing the difficulty of mapping out or locating the position of either.

"*General Description.*

"In the drawings—

"A represents the case of the lock;

"B, the cylinder for holding the tumblers or wheels;

"C, the spindle;

"D, the cam;

"E, the dog which falls to release the bolt; and

"G, the bolt.

"These are the ordinary parts employed in combination locks, and may be arranged in any desired manner; hence, they need no special description here.

"A single eccentric roller, H, pivoted, at *a*, to a suitable arm or bearing, and resting upon the cam D, has been before employed, as already stated.

"Its object is to disconcert the action inside the lock, so that an expert lock-pick or burglar cannot tell the position of the tumblers when operating upon the lock.

"It has been found by experiment, however, that such a de-

vice is not proof against the skill of an expert lock-pick, for, by the use of a delicate instrument attached to the spindle outside, and by careful manipulation, the shape and position of this roller can be actually mapped out or ascertained and the lock opened.

"To obviate this difficulty as far as possible, I combine with this roller one or more rollers H′, pivoted to the same arm or bearing, and resting upon the periphery of the cam in the same manner; but all these rollers are made of varying eccentricity, and of different shape, and, therefore, when the cam is turned, the several rollers strike at different positions, and when one touches the other may be removed from contact, thus alternating in action. They may also turn in different directions.

"By this means, owing to the different contact of the several rollers, the difficulty of mapping out and locating the same is very greatly increased.

"In transferring the action from one roller to the next, the loss of contact with the first disarranges the position, and thus renders it indefinite.

"In this manner, and for this reason, the addition of another roller to the one already in use does not produce an accumulation of the same effect in action, but produces a different action altogether, by breaking the continuity of rotation and movement and contact.

"I disclaim the employment of a single eccentric; but what I claim as my invention, and desire to secure by letters-patent, is—

"The arrangement of two or more rollers, H, H′, of varying eccentricity, when combined with the cam, in the manner and for the purpose specified."

Mr. Henry B. Renwick, an expert called by the complainant, in explanation of the patent, says:

"I have examined the patent, and believe that the words 'varying eccentricity,' as applied to the rollers, mean that the rollers shall have their axes at different points in their diameters. If the two rollers be each $\frac{3}{4}$ of an inch in diameter, and one have its axis $\frac{35}{1000}$ of an inch from the nearest point in its periphery, and the other have its axis $\frac{40}{1000}$ of an inch from the

Fig. 1.

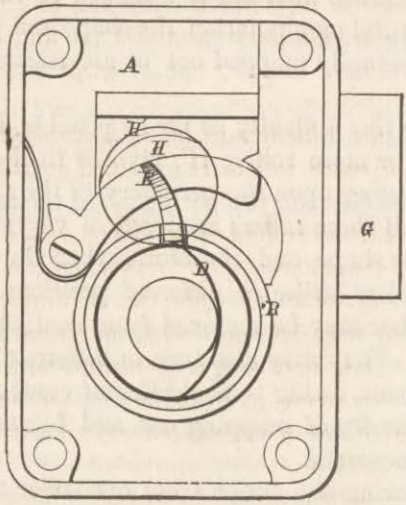


Fig. 2.

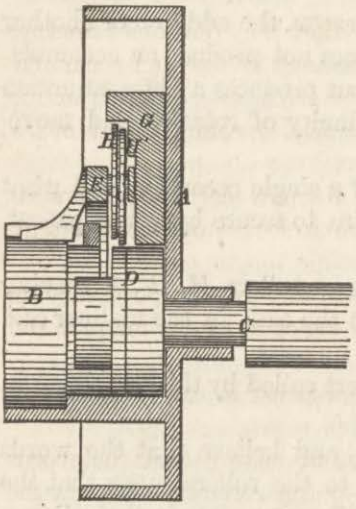
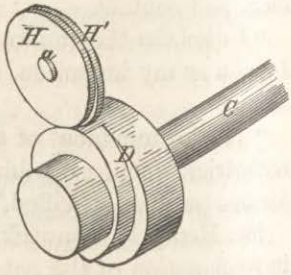


Fig. 3.



nearest point of its periphery, then they will be of varying eccentricity. This variation of distance of the axis from the nearest point of the periphery need be no greater than the

smallest distance that can be measured by the sensitive micrometers used in lock-picking, for the reason that the whole aim of the patented contrivance is to avoid picking by means of a micrometer."

The same witness was also examined upon the question of infringement, upon a comparison with the patent, of a lock made by the defendant, marked as an Exhibit Cole No. 1. He said:

"I have examined the lock Cole No. 1. It has two disconcerting rollers in combination with a cam upon which they ride. These rollers being for the purpose of preventing a lock-picker from ascertaining the position of the rotary tumblers by means of a micrometer, in this respect it is substantially identical with the contrivance described in the patent. Whether these rollers in the exhibit are of varying eccentricity or not I cannot positively determine, although they appear to be so by examination of them without instruments. A variation of eccentricity between the two rollers, which could be measured by a micrometer only, would be sufficient to secure the object which these rollers are designed to effect, and they may have such eccentricity, and yet it may be impossible to determine it by the eye alone."

On cross-examination he admitted that he could not tell with certainty whether the rollers were or were not of varying eccentricity. No other witness on the part of the complainant is able to prove the fact of a variation of eccentricity between the rollers used by the defendant, while, on the other hand, the testimony on the part of the defendant does not permit us to doubt that the rollers used in its locks are identical in their eccentricity and shape.

If, therefore, a variation of eccentricity in the rollers is a material feature of the invention, or is made material by the description and claim of the patent, no infringement has been proved.

It does not meet and answer the difficulty to say, as has been suggested in argument, that although the rollers in the defendant's locks may be of the same eccentricity and shape as respects each other, yet that, when in revolution, they vary in

eccentricity in reference to the cam which operates them, so that in action their eccentricity varies, and the same result is produced; because the description in the patent and the claim require that the variation of eccentricity should be between the rollers themselves, and not a variation in action in reference to the cam, and unless the same result is produced by the same means, there is no infringement of the invention. Besides, the fact is not as claimed. It is impossible mechanically for the rollers, being identical in eccentricity and shape with each other, to have the same relation at all times to the cam as though they varied in eccentricity. For, as is pointed out in the evidence on the part of the defendant, when the rollers are the same in eccentricity and shape with each other, there must be intervals of time at which "the two rollers having been rotated to a point at which their peripheries exactly coincided, both would revolve together for a short period, until some slight impediment or change in the periphery of the cam would cause one to bear more directly than the other upon the periphery of the cam, when this one would revolve with the cam, the other remaining stationary, and so on." And this feature in the action of two rollers, identical in eccentricity, it is said, introduces an additional irregularity into the operation of the mechanism, which increases its disconcerting power and adds to the difficulty of calculating the movement which enables the expert to pick the lock. So that the mode of operation is different, accordingly, as the rollers are of the same or varying eccentricities.

Were it otherwise, however, it would still be necessary to regard the feature of a variation of eccentricity as essential to the invention, because made so by the description and claim of the patent, although an equally good or even the same result might be obtained without it. The defendant does not use the same combination, and employs no device as an equivalent and substitute for the omitted element. It is not, therefore, liable as an infringer. *Water Meter Co.* v. *Desper*, 101 U. S. 332; *Gage* v. *Herring*, 107 U. S. 640.

The decree of the Circuit Court is accordingly

Reversed, and the cause is remanded, with directions to dismiss the bill.

KERR & Others *v.* SOUTH PARK COMMISSIONERS.

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

Argued January 21, 1886.—Decided March 29, 1886.

A jury being empanelled on the law side of the court below to settle an issue sent from the chancery side, rendered a verdict which was certified by the clerk to the chancery side, and thereupon a decree was entered in conformity with it. At the next succeeding term the court ordered a transcript of the evidence on the trial of the issue, together with the charge of the court, to be filed on the chancery side. *Held*, That this order *nunc pro tunc* was proper in order to prevent injustice, and was within the power of the court.

A verdict on an issue from chancery was taken on the law side of the court, and was subsequently set aside there, and a new trial ordered there, which was had with a second verdict on the same issue. This second verdict was certified to the chancery side of the court, and a decree was made there founded upon it, in which the setting aside of the first verdict was recited. *Held*, That this was an approval, adoption, and confirmation of the acts on the law side of the court recited in the decree.

Plaintiff's land was taken for a public park by right of eminent domain. On a trial before a jury to determine its value on the day when the Park Commissioners took possession of it, plaintiff offered to show the prices at which sales had been made of lands immediatetely adjoining the proposed park, which derived special benefit from its location, which sales were made after the exterior lines of the park had been determined. *Held*, That it was inadmissible.

The true rule for damages in this case is stated in *Cook* v. *South Park Commissioners*, 61 Ill. 116.

The case is stated in the opinion of the court.

Mr. Edward S. Isham for appellants.

Mr. Melville W. Fuller for appellees.

Mr. Justice Matthews delivered the opinion of the court.

The proceedings and decree brought here for revision by this appeal are in execution of the mandate of this court affirming a former decree in the cause, the appellants being the executors and devisees of William P. Kerr, the original complainant, in

whose names, upon his death since the decree, the cause has been revived.

The original litigation established the title of Kerr to the premises in controversy, subject to the right of the appellees, the South Park Commissioners, who had taken possession of the lands on August 27, 1870, to appropriate them for the public use as a part of a public park in the city of Chicago, on payment of their value on that day.

It was ordered by the decree that the South Park Commissioners pay to the complainant "the value of the premises on the twenty-seventh day of August, A.D. 1870, known and described as the south fractional half of section thirteen, in township thirty-eight, north of range fourteen, east of the third principal meridian, except lots 9, 10, and 15, in Chas. B. Phillips' subdivision of 26 acres off the west side of the S. W. ¼ of said section thirteen according to plat of same recorded in the recorder's office of Cook County, in book 98 of maps, p. 9, and the east half of said southwest quarter of said section thirteen, together with interest thereon from the twenty-seventh day of August, A.D. 1870, at the rate of 6 per cent. per annum, upon the conveyance of said premises by the complainant, William P. Kerr, and his assignees, claiming under him since the commencement of this suit, by deed which shall release to the South Park Commissioners all interest of the said complainant and his assignees. And it is further ordered that the value of said premises required to be paid be ascertained as follows: A jury shall be empanelled in this court, on the law side thereof, to hear the evidence submitted by both parties, and said jury shall determine by their verdict the value of the land hereinbefore described on the twenty-seventh day of August, A.D. 1870, the time when possession was taken by the South Park Commissioners, and the verdict shall be certified by the clerk to the chancery side of this court, and the amount so found shall be considered as the value of said premises on the day aforesaid, unless set aside or changed by the further order of this court. And it is further ordered that the complainant, William P. Kerr, make a deed and procure deeds to be made by all persons claiming under him since the commencement of this

suit, conveying to the South Park Commissioners the premises aforesaid, when they shall pay the amount found to be due, with interest from the twenty-seventh day of August, A.D. 1870, at the rate of six per centum per annum; and the court denies any relief to the complainant as to the east half of the southwest quarter of section 13 aforesaid, and it is ordered that the bill of complaint be dismissed as to that part of the premises. And it appearing to the court that the South Park Commissioners have commenced proceedings to condemn the undivided one-quarter of the west half of the southeast quarter of section twenty-four, in township thirty-eight, north of range fourteen, east of the third principal meridian, another of the tracts described in the bill belonging to the complainant, it is ordered that all questions touching the same be reserved for the further order of the court."

Afterwards, at the October Term, 1884, the issue directed by the decree of October 8, 1878, was tried by a jury, who returned a verdict fixing the value of the tracts of land in controversy, comprising one hundred and eleven acres, as of the date of August 29, 1870, at $155,400, which verdict was certified by the clerk to the chancery side of the court as by the decree was directed.

And thereupon, on January 20, 1885, the following decree was entered:

"This cause coming on to be heard upon the pleadings, orders, and decree of October eighth, 1878, herein, and the mandate of the Supreme Court herein filed May seventeenth, A.D. 1882, and the verdict of the jury rendered upon the law side of this court on the sixteenth day of December, A.D. 1884 (the motion to set aside the same having been overruled), and certified by the clerk to the chancery side of this court, determining the value of the tracts of land described in the decree herein entered on the eighth day of October, A.D. 1878, to have been on the twenty-seventh day of August, A.D. 1870, the sum of one hundred and fifty-five thousand four hundred dollars, and the evidence, rulings, and charge of the court upon the trial of the issue as to said value, it is hereby ordered, adjudged, and decreed that said amount of one hundred and

fifty-five thousand four hundred dollars be, and it is hereby, adjudged to be the value of said tracts of land at that date; and it appearing to the court that the said complainants cannot at present comply with said decree of October eighth, 1878, and that various claims are set up as against said complainants to said tract, or portions thereof, it is ordered that the South Park Commissioners pay into court the said sum of one hundred and fifty-five thousand four hundred dollars, with interest thereon from the twenty-seventh day of August, A.D. 1870, at the rate of six per cent. per annum to the date of such payment, and that upon such payment into court the said South Park Commissioners be discharged from further liability for interest in the premises, and that the distribution of said money when paid into court be reserved until further order.

"And the South Park Commissioners exhibiting to the court the pleadings, orders, proofs and decree of August twenty-sixth, 1882, in a certain cause on the chancery side of this court, wherein the South Park Commissioners was complainant, and Susie M. Kerr, Rosa L. Kerr, and Joseph B. Kerr, executors, etc., of William P. Kerr, deceased, and others were defendants, wherefrom it appears that on the twenty-ninth day of November, 1879, the sum of eighty-two thousand eight hundred dollars, and on the twenty-sixth day of February, 1880, the sum of seventy-two hundred dollars, of the moneys of the said South Park Commissioners came to the hands of the said Kerrs, complainants in this case, and that the sum of forty-two hundred and twenty dollars and nineteen cents was paid into this court in that suit December first, 1882, as appears from the order of this court in that cause on that day entered, all these moneys being paid on account of the lands in this cause mentioned; and it further appearing that the sum of twenty-five thousand dollars was paid into court in this cause on the eighteenth day of February, 1884, on account of said lands, it is ordered that said several sums of eighty-two thousand eight hundred dollars, with interest from November twenty-ninth, 1879; seventy-two hundred dollars, with interest from February twenty-sixth, 1880; forty-two hundred and twenty dollars and nineteen cents as of the date of the payment into court herein

provided for, and twenty-five thousand dollars with interest from February eighteenth, 1884, be applied on said principal sum of one hundred and fifty-five thousand four hundred dollars, and interest, and that the South Park Commissioners pay into court under this decree only the balance thereby arrived at, together with the commission provided by law thereon, and the sum of two hundred and fifty dollars, the commission on the sum of twenty-five thousand dollars so paid February eighteenth, 1884, as aforesaid, and interest thereon from that date.

"And it is also ordered that the deed of James R. Doolittle referred to in said decree of August twenty-sixth, 1882, in the cause of the South Park Commissioners against Susie M. Kerr and others may be executed and delivered to said South Park Commissioners; and that thereupon said sum of forty-two hundred and twenty dollars and nineteen cents may be taken from the registry of this court by said complainants Kerr without prejudice to any appeal in said cause in which said money was so paid into court, and deed directed to be delivered as aforesaid."

From this decree the complainants have brought the present appeal.

At the next succeeding term of the Circuit Court after that at which the decree appealed from was entered, it appears by the transcript of the record that the court permitted to be filed and made part of the record a certificate of the evidence adduced on the trial of the issue, together with the charge of the court to the jury, verified by the signature of the circuit judge. It appears also from the recitals in the decree of January 20, 1885, that the hearing had taken place upon the pleadings, orders, and decree of October 8, 1878, and the mandate of the Supreme Court filed May 17, 1882, and the verdict of the jury rendered upon the law side of the court on December 16, 1884, the motion to set aside the same having been overruled, certified by the clerk to the chancery side of the court, determining the value of the tracts of land described in the decree of October 8, 1878, to have been on August 27, 1870, the sum of $155,400, and the evidence, rulings, and

charge of the court upon the trial of the issue as to said value.

We cannot, as we are asked to do by counsel for appellees, disregard the evidence and rulings of the court on the trial of the issue, which are certified by the court as authentic and correctly reported, and which the decree recites to be the basis of its findings, because they were not certified and brought on the record at the same term at which the decree was entered. The subsequent certificate merely ascertains and verifies what proceedings took place before the court at the time of the hearing, and although they should regularly have been brought on the record at the same term, we know of no rule of chancery practice or procedure which forbids the making of a *nunc pro tunc* order to supply such an omission and to prevent injustice.

On the other hand, we are asked to disregard the verdict recited in the decree as a nullity, and consequently to reverse the decree itself on that account, because, as it is alleged, there was a prior verdict rendered on the same issue on November 5, 1883, which had never been regularly or lawfully set aside. But no such verdict appears in the record, otherwise than by a recital in an order of the court made on February 18, 1884, by which it is set aside and a new trial awarded. It is objected that that was a proceeding on the law side of the court, and that the verdict was never certified to the chancery side of the court, where alone proceedings to set it aside could have been properly taken. It is a little difficult, no doubt, to keep entirely separate, proceedings in the same cause, part of which take place on the law side, and part on the chancery side of the same court, when all are conducted by the same judge; but no confusion results in the present case, because whatever was done on the law side was approved and adopted by the chancellor, who, in framing his decree on the basis of the verdict of December 16, 1884, necessarily confirmed the action of the circuit judge in setting aside the previous verdict of November 5, 1883.

On the trial of the issue before the jury as to the value of the land in question taken by the appellees for the purposes of the park, the appellants offered to prove, as tending to show

the value of their land, the prices which had been actually paid on sales of similar property situated so as to adjoin the park, or be within its immediate vicinity, sales which had taken place after the lines of the park boundaries had been definitely ascertained and laid out. This evidence was rejected, and this ruling, together with the charge of the court to the jury on the point, are assigned as error to the prejudice of the appellants.

The portions of the charge of the court to the jury objected to on that ground are as follows:

"A number of witnesses testified that the agitation of the park project, the anticipation that the legislature would authorize the appropriation of lands to establish a park in the vicinity of the present South Park, and the introduction of the bill into the legislature, which finally became a law on the —— day of February, 1869, materially enhanced the value of lands embraced in the present park lines, as well as the lands adjacent thereto and in that vicinity. Any resulting benefits to the lands within the proposed park from this and other causes, such as the growth and prosperity, or the anticipated growth and prosperity of the city of Chicago, you should take in account in determining the amount that will fairly compensate the owner. But a number of witnesses also testified, and there seemed to be less agreement upon this point than upon some others, that the passage of the park act, its ratification by the people, and the fixing of the proposed park boundaries by the legislature, gave to the lands immediately fronting upon and in the vicinity of the park, including the Midway Plaisance and the boulevards, an additional value solely on account of their being without the proposed park lines, but adjacent to the park, the plaisance and the boulevards, or near enough thereto to receive the special benefits resulting from such improvements. In the nature of things the lands within the proposed park, and which were to constitute it, could not have been thus specially benefited, and the owner of the lands in question should be allowed nothing on the ground that his property was thus specially benefited. Even the witnesses who testified upon this branch of the case for the owner admitted that the outlying lands received a benefit from their

location or relation to the park which the lands constituting the park did not receive.

"Sales of property of like character and quality, similarly situated and affected by the same causes, made under circumstances likely to produce competition among bidders, are sometimes resorted to in determining the value of lands; but inasmuch as the lands adjacent to and in the vicinity of the park, plaisance, and boulevards received a special benefit, and were subject to a special burden by reason of the existence of the park, plaisance, and boulevards, their situation and that of lands embraced within the park lines were relatively so different that outside sales afforded no just grounds for determining the character of the lands taken for the park, and hence all evidence of such sales was excluded, and you are again instructed that there is no such evidence before you.

"It is for you to say whether any of the experts in giving their opinions of the value of the two tracts in question were influenced, if at all, by knowledge of sales of lands which received a special benefit by reason of their peculiar relation to the park, plaisance, and boulevards. To the extent that any of the witnesses based their opinions upon a knowledge of such sales, their evidence should be disregarded. It is for you to say, however, whether any of the witnesses gave opinions upon this basis.

"Situated as they then were, what were they worth in cash or on terms equivalent to cash in the market, if a market then existed for such lands? It is to be borne in mind—it was then known—that these lands were within the park lines and designated for park purposes. What would any one needing lands for residence, business, or any other purpose, have paid for them in cash? You are not at liberty to place a value upon those lands upon the basis of what some one might have been willing to have bought them for on time at the date named for purely speculative purposes.

"Now, what you are to do is simply [to] determine, as I instructed you yesterday, the value of that land on the 27th August, 1870. The market value was what land would have sold for in cash, or on such time and terms as would be equiv-

alent to cash. Was there any demand; was there any market for land situated as this was at that time? What evidence is there before you, if any, showing that the lands within the park lines, or the designated park lines, were changing hands after the passage of the park act?

"In that connection, however, you will bear in mind that many of the witnesses, most of them, perhaps, testified that the final passage of the park act, and its ratification, resulted in special benefit to the lands around the park and in its vicinity, and that the lands within the park lines did not receive this special benefit. For this special benefit you will allow nothing."

We think the evidence offered was properly excluded, and that the true rule for the valuation of the property was correctly and fairly stated in the charge of the court above quoted. It is strictly in accordance with the law of Illinois as understood and expounded by the Supreme Court of the State.

In *Cook* v. *South Park Commissioners*, 61 Ill. 115, 123–4 the court say:

"The court did not err in refusing to give the eighth, ninth and tenth instructions for appellant. The eighth and ninth are substantially that, if lands adjacent to the park generally increased in value in consequence of the prospect of establishing a public park, then the lands of appellant must share in such increase. This does not fairly or necessarily follow. The adjacent lands would probably, from their peculiar situation, derive a special benefit, and were subject to a special burden. The lands needed for the park must be purchased and the park maintained by special assessments upon the adjacent lands. Their situation relatively was so different that they were not a proper standard by which to judge the value of the lands taken for the park."

We find no error in the decree, and it is accordingly

Affirmed.

KERR & Others *v.* SOUTH PARK COMMISSIONERS.

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

Argued January 21, 1886.—Decided March 29, 1886.

The subject-matter in controversy in this suit is disposed of by the decree rendered below and affirmed in the suit between the same parties *ante* 379.

The case is stated in the opinion of the court.

Mr. Edward S. Isham for appellants.

Mr. Melville W. Fuller for appellees.

Mr. Justice Matthews delivered the opinion of the court.

The subject-matter in litigation in this cause is embraced in the decree between the same parties just affirmed, which settles the whole controversy between them.

In the present suit, the bill of complaint was filed by the South Park Commissioners, who, in pursuance of negotiations with Kerr, had advanced certain sums of money to enable the latter to protect his title to a part of the lands taken for the purposes of the park, and, as security for the same, took an assignment of certain encumbrances by way of mortgage or deed of trust upon the premises, but in fact intending that the money so advanced should be treated as a payment on account of the value of the lands of Kerr taken by them for public uses. Notwithstanding that, the present suit was pressed to a decree for the foreclosure of the lands covered by the deed of trust, and a strict foreclosure in substance was decreed, by directing that, unless the representatives of Kerr repaid to the complainants the amount of their advances, the trustee holding the legal title to the premises in controversy should convey them to the complainants on payment of a further small sum of $3454.17. The present appeal is from this decree.

In the cause just disposed of, the same advances made by the South Park Commissioners are allowed to them in the decree as credits on account of payment of the value of the whole

tract of one hundred and eleven acres, which, of course, is inconsistent with the decree now complained of. That decree is accordingly

Reversed, and the cause is remanded for further proceedings in conformity with equity and justice and not inconsistent with this opinion.

FULKERSON & Others *v.* HOLMES & Others.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Argued March 11, 1886.—Decided March 22, 1886.

In ejectment, after proving a patent of the premises from the State of Virginia to S. Y. in 1787, the plaintiff offered in evidence a duly recorded deed from S. C. Y., his son and sole heir, to J. H., dated in 1819, proved the handwriting of the magistrate who took the acknowledgment of it and the signature of a witness who had been dead over fifty years, and showed that the patent and deed were found among the papers of J. H. after his death in 1834. *Held*, That the deed was admissible in evidence as an ancient document without further proof.

An ancient deed reciting the death, intestate, of a former owner of lands conveyed by it, and that the grantor in the deed was his only son and heir in whom title to the lands vested on his death, and conveying the lands to a person under whom the plaintiff in an action of ejectment claimed, is admissible in evidence at the trial of that action, after the lapse of over sixty years, in order to prove the pedigree of the son.

The proof in this case fails to show that the lands in controversy had become forfeited to the State of Virginia for non-listing for taxation or for non-payment of taxes, at the time when the patents were issued under which the defendants claim title.

This was an action of ejectment. The defendants in error were the plaintiffs in the Circuit Court, and were the heirs at law of John Holmes, deceased. They brought the action in August, 1871, to recover a tract of three thousand acres of land in Lee County, in the State of Virginia. The defendants pleaded the general issue. The case was tried by a jury, and there was a verdict for the plaintiffs, on which the court

rendered judgment, and the defendants sued out this writ of error.

It appeared from the bill of exceptions that the plaintiffs, to sustain the issue on their part, offered in evidence a patent from the Commonwealth of Virginia to Samuel Young, dated May 7, 1787, for the premises in controversy, which was admitted without objection.

They next offered a deed for the same premises from Samuel C. Young to John Holmes, dated July 12, 1819. This deed recited the grant by the Commonwealth of Virginia to Samuel Young of the premises in controversy, that Samuel Young, the patentee, had died intestate, that Samuel C. Young, the grantor, was his only child and heir, and that the title to said lands had vested in him. Appended to the deed was a certificate of acknowledgment, dated July 15, 1819, at the Eastern District of Pennsylvania, purporting to have been taken by Richard Peters, United States judge for the district of Pennsylvania, and signed by him. The deed appeared also to have been witnessed by John Shaw and John Craige. Immediately after the certificate of acknowledgment appeared what purported to be the receipt of Samuel C. Young for the consideration money mentioned in the deed, which was $10,400, signed by him and witnessed by John Craige. The plaintiffs proved the handwriting of Judge Peters to the certificate, and the death of John Shaw, one of the witnesses, which took place more than fifty years before the trial. Appended to the deed was the following certificate of registration:

"Virginia: At a court begun and held for Lee County, at the court-house thereof, on the 15th day of January, 1838, this indenture of bargain and sale for land between Samuel C. Young, of the one part, and John Holmes of the other part, was admitted to record upon the certificate of Richard Peters, judge of the Pennsylvania district of the United States.

"J. W. S. Morrison, D. C."

The deed bore the following endorsement:

"Recorded in the clerk's office of the County Court of Lee, in book No. 7, page 401.

"Teste: J. W. S. MORRISON, D. C."

The plaintiffs also introduced evidence tending to show that the patent to Samuel Young, and the deed from Samuel C. Young to John Holmes, were found among the papers of the latter after his death in 1834.

They also offered the testimony of John Holmes, a son-in-law of John Holmes, the grantee of the land, who testified that he knew that said grantee owned a tract of 3000 acres of land in Lee County, Virginia, and that the deed for the land was in the possession of John Holmes, the elder, at the time of his death; that at the request of one of the executors of John Holmes, the elder, and of the family, the witness, in the year 1836, went to Virginia to examine the lands; that he took with him a map and plan and two deeds, one being the patent above mentioned for the lands in controversy, the other the deed from Samuel C. Young to John Holmes for the same lands; and that these papers had been in his possession or under his control for a period of thirty-seven or thirty-eight years. On his said visit the witness went upon the lands with Peter Fulkerson, who lived in sight of them, and who, as well as Frederick D. Fulkerson and Mr. Ewing, brother-in-law of the latter, recognized him as representing the owners of the land. It was at that time called the "Holmes plantation." There were no intruders upon the land and no one in actual possession. In 1840 Frederick D. Fulkerson treated by letter with the witness for the purchase of the land, and in 1846 James Fulkerson wrote the witness to learn the least he would take for the land, and repeated his inquiry in the year 1847. It may be here stated that the defendants claimed possession under patents issued, one to the Peter Fulkerson above mentioned, dated October 30, 1838, and another to said Frederick D. Fulkerson and James Fulkerson and Elizabeth Fulkerson, dated October 31, 1846, and by subsequent conveyances from said patentees.

Having introduced this evidence the plaintiffs rested.

One of the defences set up to the action by the defendants

was, that under the laws of Virginia the lands in controversy had been forfeited to the State, and the title by reason thereof had, *ipso facto*, reverted to the State, and was, therefore, out of the plaintiffs.

The acts of the State of Virginia applicable to the present case, providing for the forfeiture of lands delinquent for the non-payment of taxes, were as follows:

The second section of the act of February 27, 1835, after reciting, by way of preamble, that whereas it was "known to the general assembly, that many large tracts of land lying west of the Alleghany Mountains which were granted by the Commonwealth before the first day of April, eighteen hundred and thirty-one, never were, or have not been for many years last past, entered on the books of the commissioner of the revenue where they respectively lie," declared that every owner of any such tract of land should, on or before the first day of July, 1836, enter, or cause to be entered on the books of the commissioner of revenue for the county in which the lands lay, any land owned by him the title of which came through grants by the Commonwealth, and have the same charged with all taxes and damages in arrears properly chargeable thereon, and pay all such taxes and damages which had not been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March 10, 1832, and upon failure to do so, such lands, not in the actual possession of said owner, should become forfeited to the Commonwealth after the first of July, 1836. Laws of Virginia, 1834, 1835, ch. 13, pages 11, 12.

The second section of the act of March 10, 1832, referred to in the statute just recited, provided that all taxes and damages due and chargeable on lands lying west of the Alleghany Mountains, returned delinquent for the year 1831 or any previous year, and which had not been redeemed, or exonerated by former laws, should be discharged, and the lien of the Commonwealth therefor relinquished, provided said taxes and damages did not exceed $10. See Laws of Virginia, 1832, ch. 73, pages 66, 67.

By successive acts of the Legislature of Virginia (act of

Statement of Facts.

March 23, 1836, ch. 3, page 7, acts of 1835–36; act of March 30, 1837, ch. 8, page 9, acts of 1836–7; act of March 15, 1838, ch. 8, pages 16, 17, acts of 1838) the time for entering lands upon the books of the commissioners of revenue, and paying the taxes and damages charged thereon, and thereby saving them from forfeiture, was extended to the first day of July, 1838.

In order to prove the forfeiture of the land in controversy to the State of Virginia the defendants introduced "a table of tracts of land in Lee County assessed with taxes," certified on September 5, 1876, by the Auditor of Public Accounts of the State of Virginia. This table showed that three tracts of land, containing in the aggregate 6300 acres, had been listed for taxation, against Samuel Young, of Philadelphia, for the years from 1827 to 1832 inclusive. The taxes on the three tracts for the five years from 1827 to 1831 inclusive were, according to the table, unpaid, and amounted in all to 38 cents. The taxes for 1832 were marked paid.

The Auditor of Public Accounts certified that the books of Lee County prior to 1827 were missing; that the records showed that the taxes on said three tracts of Samuel Young had been paid up to and including the year 1822; that the taxes were released to 1831, inclusive; and that said lands were returned among the unascertainable lands in 1832, and subsequently dropped from the commissioners' books of Lee County.

To rebut this testimony introduced by the defendants, the plaintiffs put in evidence the certificate of the deputy sheriff of Lee County, dated December 14, 1837, to the effect that he had placed a tract of land in the name of Samuel Young, for 3000 acres, which was returned in the year 1834 not ascertainable, on the commissioners' books of said county of Lee, and taxed the damages thereon. They also introduced "an extract," certified September 5, 1875, by the Auditor of Public Accounts, "from the land books of the commissioners of the revenue for the county for Lee, for the years 1838 to 1875, both inclusive," of lands assessed successively to John Holmes, John Holmes, Jr., and John Holmes's estate, for each of said years. The extract showed that a tract of 3000 acres of land, conveyed by Samuel C. Young, was listed for taxation to John

Holmes and John Holmes, Jr., of Philadelphia, and to the estate of John Holmes, for the years above mentioned; the taxes down to 1874, excepting one year, appeared to have been paid or released by law.

The evidence having been closed, the court, at the request of plaintiffs, charged the jury as follows: "That if they believed from the evidence in the cause that the Commonwealth, by letters-patent, on the 7th day of May, 1787, granted to Samuel Young the parcel of 3000 acres of land in the declaration mentioned; that Samuel C. Young was the only child and heir of Samuel Young; that Samuel C. Young conveyed the said 3000 acres, by deed of the 12th day of July, 1819, to John Holmes, of the city of Philadelphia, Penn.; that said John Holmes was dead; and that the plaintiffs were his heirs; then the title to this land was satisfactorily traced to the plaintiffs; and that, in consequence of the antiquity of the deed of Samuel C. Young to John Holmes of 12th July, 1819, and its custody by said Holmes, the jury might be justified by the testimony tending to prove an acknowledgment of this title by those under whom defendants claim, to accept the recitals of said deed as to the heirship of Samuel C. Young."

At the request of the defendants the court charged the jury: "That the plaintiffs have attempted to show a right under Samuel Young's patent, and that they cannot derive title from Samuel C. Young, unless they prove to the satisfaction of the jury that Samuel Young's rights passed by deed, devise, or descent to Samuel C. Young, under whom the plaintiffs claim."

Having given these charges, the court refused the defendant's request to charge the jury as follows: "That the recital in the deed of Samuel C. Young, that he is the only heir of Samuel Young, has been permitted to be read to the jury as evidence; yet it is left to the jury to decide, from all the facts and circumstances in evidence before them, whether Samuel Young is dead or not, and whether Samuel C. Young is his only son and heir or not, and unless they should be clearly satisfied from the evidence that Samuel C. Young is the son and heir of Samuel Young, then they should find for the defendants."

Argument for Plaintiffs in Error.

The defendants also asked the court to instruct the jury upon the question of the forfeiture of the lands in controversy under the laws of the State of Virginia, above recited, but the court refused to instruct the jury on this point.

Mr. John A. Buchanan for plaintiffs in error.

I. It was error in the court to allow said deed to be read in evidence without instructing the jury that the recitals therein as to the death of Samuel Young and the heirship of Samuel C. Young were not evidence against the plaintiffs in error, even if it were admissible at all, without proof of its execution, or of possession, accompanying and held under it.

The said recitals in the deed were clearly inadmissible:

1. Because such recitals are not evidence of the facts recited as to third persons, who do not claim under, but adversely to the title which the deed purports to convey. *Wiley* v. *Givens*, 6 Gratt. 277, 286.

2. Such recitals could not be received as evidence of pedigree, because the relationship of Samuel C. Young, the declarant, to Samuel Young was not established; and it was not shown that the declarant was dead. These two facts must be shown by evidence independent of the recitals. *Blackburn* v. *Crawfords*, 3 Wall. 175, 187; 1 Wharton's Evidence, § 218, and cases cited; 2 Starkie, 205, and note; *Gregory* v. *Baugh*, 4 Rand. (Va.), 611; *Chapman* v. *Chapman*, 2 Conn. 347; *Fort* v. *Clarke*, 1 Russell, 601, 604; *Speed* v. *Brooks*, 7 J. J. Marsh. 119.

These recitals were made by Samuel C. Young in his own interest, and upon no principle of law can such acts be evidence in favor of those who claim under him, to establish the facts stated in the recitals as against these persons. *Edwards* v. *Ballard*, 14 B. Mon. 289, 290.

II. The court erred in refusing to instruct the jury upon the question of forfeiture. The forfeiture was clearly shown; but if it were not, there was evidence tending to show it, and it was the plain duty of the court, in such a case, to instruct the jury upon that question. *Farish* v. *Reigle*, 11 Gratt. 697; *Early* v. *Garland*, 13 Gratt. 1–14; *Hopkins* v. *Richardson*, 9 Gratt. 485–496.

Opinion of the Court.

Mr. Patrick Hagan and *Mr. William Pinkney Whyte* for defendants in error. *Mr. John A. Campbell* also filed a brief for same.

Mr. Justice Woods, delivered the opinion of the court. He stated the case as above reported and continued:

It is first assigned for error that the Circuit Court "allowed the deed from Samuel C. Young to John Holmes to be read in evidence without instructing the jury that the recitals therein in respect to the death of Samuel Young and the heirship of Samuel C. Young were not evidence against the defendants, even if it were admissible at all, without proof of its execution or possession accompanying and held under it."

The deed of Samuel C. Young to John Holmes was rightfully admitted in evidence, as an ancient deed, without proof by the subscribing witnesses, or of possession by the plaintiffs or those under whom they claimed. When offered it was more than sixty years old; it was produced from the custody of the heirs of John Holmes, the grantee, who claimed the lands described therein. It, as well as the patent for the same land from the Commonwealth of Virginia to Samuel Young, was shown to have been found among the papers of John Holmes. The lands described therein were shown to have been listed for taxation to John Holmes, or to his heirs, for a period beginning with the year 1838 down to and including the year 1875, which was after the bringing of this suit; and it appeared that during that time they had paid the taxes assessed on said lands, or the same had been released to them by law. It was further shown, that the judge before whom the acknowledgment of the deed had been made was dead; that his signature to the certificate of acknowledgment was genuine; that the deed had been recorded in the county where the lands lay for more than forty-two years before it was offered in evidence; and that before and after the deed was put upon record the lands described therein were reported to be the lands of John Holmes, the grantee, and his heirs, and were known and designated in the neighborhood where they lay as the "Holmes plantation."

This state of facts amply justified the admission of the deed

in evidence, as an ancient document, without other proof. *Caruthers* v. *Eldridge*, 12 Gratt. 670; *Applegate* v. *Lexington & Carter County Mining Co.*, decided at the present term, *ante*, 255, and cases there cited.

The question is, therefore, fairly presented, whether the recitals made in the deed of Samuel C. Young to John Holmes, to the effect that Samuel Young, the patentee, had died intestate, leaving one child only, namely, the said Samuel C. Young, the grantor, were admissible in evidence against the defendants, who did not claim title under the deed.

The fact to be established is one of pedigree. The proof to show pedigree forms a well settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity; for, as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice. Taylor on Evidence, ed. 1872, § 571. Traditional evidence is, therefore, admissible. *Jackson* v. *Cooley*, 8 Johns. 127; *Jackson* v. *Browner*, 18 Johns. 37; *Jackson* v. *King*, 5 Cowen, 237; *Davis* v. *Wood*, 1 Wheat. 6. The rule is that declarations of deceased persons who were *de jure* related by blood or marriage to the family in question may be given in evidence in matters of pedigree. *Jewell* v. *Jewell*, 1 How. 219; *Blackburn* v. *Crawfords*, 3 Wall. 175; *Johnson* v. *Lawson*, 2 Bing. 86; *Vowles* v. *Young*, 13 Ves. 140, 147; *Monkton* v. *Attorney-General*, 2 Russ. & Myln. 147, 159; *White* v. *Strother*, 11 Ala. 720. A qualification of the rule is, that, before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself. *Monkton* v. *Attorney-General*, 2 Russ. & Myln. 147, 156; *Attorney-General* v. *Kohler*, 9 H. L. Cas. 653, 660; *Rex* v. *All-Saints*, 7 B. & C. 785, 789. But it is evident that but slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy.

Applying these rules, we are of opinion that the recital in the deed of Samuel C. Young to John Holmes, supported as it was by the circumstances of the case shown by the evidence, was admissible, as tending to prove the facts recited, namely, that Samuel Young, the patentee, was dead, and Samuel C. Young, the grantor, was his only child and heir.

As the deed in which the recital was made was entitled to be admitted in evidence, it stands upon the same footing as if its execution had been proved in the ordinary way. The fact, therefore, that, on the twelfth day of July, 1819, the date of the deed, in the city of Philadelphia, before Richard Peters, United States Judge, and two other persons as witnesses, Samuel C. Young, the grantor in the deed mentioned, made the declarations in question, may be taken as established.

It is not disputed that when, upon the trial of the case in the Circuit Court in October, 1880, the deed containing the recitals was offered in evidence, the declarant, Samuel C. Young, was dead. It only remained, therefore, to offer some evidence that the declarant, Samuel C. Young, was related to the family of Samuel Young. One circumstance relied on to show his relationship was the similarity of names. This, after the lapse of so great a time, was entitled to weight. Another fact was that the patent to Samuel Young for the land in controversy was found with the deed of Samuel C. Young to John Holmes among the papers of the latter after his death. The well-known practices and habits of men in the transfer of title make it clear that the patent was delivered to Holmes by Samuel C. Young, when the latter delivered his own deed to Holmes for the premises conveyed by the patent. There was, therefore, persuasive proof that on January 12, 1819, Samuel C. Young had in his possession, claiming it as a muniment of his title, the patent issued by the Commonwealth of Virginia to Samuel Young; and the presumption is that his possession of the patent was rightful. The fact that Samuel C. Young, representing himself to be the son and heir of Samuel Young, had in his rightful possession the title papers of the latter to a valuable estate, is a fact tending to prove the truth of his asserted relationship.

Opinion of the Court.

Another circumstance of weight is that Samuel C. Young, having assumed, as the son and sole heir of Samuel Young, to convey the landed estate of the latter, and his grantees having for more than sixty years claimed title under his conveyance, the right of Samuel C. Young to make the conveyance has never, so far as appears, been questioned or challenged by any other person claiming under Samuel Young.

After a lapse of sixty-one years we think these circumstances were sufficient to prove that Samuel C. Young was of the family of Samuel Young, and that the declaration of the former, deliberately made in an ancient writing, signed, sealed, witnessed, acknowledged, and recorded, to the effect that the declarant was the only child and heir of Samuel Young, and that the latter was dead, was of right admitted in evidence, as tending to prove the facts so recited. This conclusion is sustained by the case of *Deevy* v. *Cray*, 5 Wall. 795, which is directly in point. See also *Carver* v. *Astor*, 4 Pet. 1; *Crane* v. *Astor & Morris*, 6 Pet. 598; *Garwood* v. *Dennis*, 4 Binn. 314; *Stokes* v. *Daws*, 4 Mason, 268; *Jackson* v. *Cooley*, 8 Johns. 127. In view, therefore, of the circumstances of the case, there was no error in the refusal of the court to instruct the jury that said recital was not evidence against the defendants.

The next and only other ground of error alleged by the defendants is, that the court refused to charge the jury on the question of forfeiture. We think there was no error here.

The forfeiture of the lands in controversy is alleged to have occurred by virtue of the provisions of the second section of the act of February 27, 1835. Two classes of lands were declared subject to forfeiture by this act. The first was lands which had never been entered upon the books of the commissioners of revenue for the county in which the lands lay.

There is a failure to show that the lands in question had never been listed for taxation upon the books of the commissioners of Lee County, within whose limits they were included. It is true the certificate of the Auditor of Public Accounts, introduced by the defendants, states that the records of Lee County prior to 1827 are missing. But it can hardly be maintained that when a party shows his inability to prove

an essential fact, the fact may be inferred from his inability to prove it.

But the same certificate shows that the lands of Samuel Young were placed on the books of the commissioners of Lee County for six years, namely, from 1827 to 1832 inclusive, and that the taxes on the same lands had been paid up to and including the year 1832. Upon the showing of the defendants themselves, it appears that the lands in question do not belong to the class which had never been entered upon the books of the commissioners of revenue.

Nor are the defendants any more successful in showing that the lands in controversy fell within the second class liable to forfeiture, namely, those which for many years previous to February 27, 1835, the date of the act declaring the forfeiture, had not been entered upon the books of the commissioners of revenue. For, referring to the second section of the act of March 10, 1832 (Laws of Virginia, 1832, ch. 73, p. 67), it appears that only those tracts of land on which the unpaid taxes exceeded $10 were liable to forfeiture under the act of February 27, 1835. There is no proof that the taxes and damages on the lands in question exceeded that amount. On the contrary, if the table of lands showing the taxes thereon for the years 1827 to 1832 inclusive, certified by the Auditor of Public Accounts, includes the lands in controversy, as the defendants contend, the taxes thereon for all the years stated amounted to only 38 cents, and the taxes were, therefore, released and relinquished by the second section of the act of March 10, 1832. And if this table did not include the lands in controversy, then there is an entire failure to show what the taxes were. The defendants, therefore, have failed to prove that the lands in controversy were liable to forfeiture under the act of February 27, 1835.

But there is affirmative proof that no forfeiture could have occurred, for the time for entering the lands on the commissioners' books for taxation and for paying the taxes, and thereby preventing forfeiture, was extended, as has been stated, to the first day of July, 1838, and it was shown by the certificate of Crabtree, the deputy sheriff, that as early as December 14,

1837, the lands in controversy were placed upon the tax-books and the damages thereon taxed; and it was further shown that the State of Virginia never claimed the lands as forfeited, but from the year 1838 down to the beginning of this suit, a period of more than thirty-three years, had assessed and collected taxes therefor from the plaintiffs and those under whom they claim. It follows that the failure to show a forfeiture of the lands under the act of February 27, 1835, was complete. It would, therefore, have been the duty of the court, if it gave any instruction upon this branch of the defence, to say to the jury that the defendants had failed to maintain it. It can hardly be urged by them, as a ground for the reversal of the judgment, that the court did not so charge. *Brobst* v. *Brock*, 10 Wall. 519; *Phillips Construction Co.* v. *Seymour*, 91 U. S. 646.

Judgment affirmed.

HOYT & Another *v.* RUSSELL.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Submitted March 11, 1886.—Decided March 22, 1886.

A Territorial Court is bound to take judicial notice of the statutes of the Territory in operation affecting a subject brought before it in the regular course of procedure.

On May 8, 1873, the Legislature of Montana enacted that any person who should thereafter discover a mining claim should file in the office of the recorder of the county a statement in some material respects different from the statement previously required by law to be filed in such case, and that the act should take effect on and after its passage. On that date a statute was in force there which provided that "all acts of the Legislature declaring that they should take effect from and after their passage shall so take effect only at the seat of government, and in other portions of the Territory, allowing fifteen miles from the seat of government for each day." On the 13th of May, 1873, at a place in the Territory in which the act of May 8, 1873, had not come into force, H & G discovered a lode, and located it, and subsequently filed a notice of location complying in all respects with the law as it was before the passage of the act of May 8, 1873, but not complying with the requirements of that act. R, who had made a conflicting location, filed an adverse claim under Rev. Stat. § 2326. On the trial, the

court refused to receive proof of the location by H & G, because they did not also prove affirmatively that the act of May 8 had not taken effect at the lode at the time of the location, by reason of its distance from the seat of government: *Held*, That the court should have taken judicial notice of the fact that that statute was not then in force there, and that it was error to exclude the evidence for the want of such proof.

The case is stated in the opinion of the court.

Mr. William Chumasero for plaintiffs in error submitted on his brief.

No appearance for defendant in error.

Mr. Justice Field delivered the opinion of the court.

This is an action to determine the right of the parties to the possession of certain mining ground situated in Lewis and Clark County, in the Territory of Montana. The plaintiffs in error, Hoyt and Gonn, defendants in the court below, allege that on the 13th day of May, 1873, they discovered a silver-bearing quartz lode in that county, which they named "Mammoth Lode," and then proceeded to locate it by placing stakes so as to mark its extent; and that on the 29th day of that month they filed in the recorder's office of the county a notice or declaratory statement of the location, describing the claim. In October, 1877, Gonn conveyed his interest to Mary A. Hoyt, and she subsequently filed an application for a patent in the land office at Helena, in the Territory.

Russell, the plaintiff below, the defendant in error here, also claimed a silver-bearing quartz lode in that county, which, he alleges, he and one Bassett discovered in 1867, duly located, and named "The J. H. Russell Lode." The claims of these parties—Hoyt and Russell—conflicted, and in opposition to her application he filed his adverse claim under the statute, Rev. Stat. § 2326, and in due time commenced this action, joining Gonn as a defendant with her.

The plaintiff made proof of his location. The defendants' notice of location was accompanied by an affidavit that they were citizens of the United States and of the Territory; but the other matters set forth therein were not sworn to, and for this

omission it was excluded. The action of the court on other points became of little moment in the face of this ruling; if that was correct, their proof of right to the disputed ground failed.

Their lode was located under an act of Montana of December 26, 1864, and the act of Congress of May 10, 1872. The act of Montana provided that notice of the discovery of any lead, lode, or ledge should be filed for record in the office of the recorder of the county in which the same was situated, within fifteen days from the date of discovery, and that at the same time an oath should be taken before the recorder that all the claimants were *bona fide* residents of the Territory. Session Laws of Montana of 1864, page 328. The act of Congress does not require an affidavit. It merely prescribes that the record, subsequently made, where one is required by the regulations of the mining district, shall contain the names of the locators, the date of the location, and such a description, by reference to some natural object or permanent monument, as will identify the claim. Rev. Stat. § 2324. By an act of the Legislature of Montana, passed on the 8th of May, 1873, it was provided that any person who should *thereafter* discover a mining claim upon any vein or lode bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, should, within twenty days after the discovery, file for record in the office of the recorder of the county a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States. Extra Session of 1873, 84.

Another act then in force provided that all acts and joint resolutions, declaring that they should take effect from and after their passage and approval by the governor, should so take effect only at the seat of government and in other portions of the Territory, allowing fifteen miles from the seat of government for each day. Rev. Stat. Montana, § 785. That seat was then at Virginia, in Madison County. The pleadings admit that the ground in controversy is situated in Lewis and Clark County, and in Township No. 8 North, Range 5 West; but there was no evidence as to its distance from Virginia. It

was contended that the court should have taken judicial notice of the distance and declared that the ground was so far distant that the act of May 8, 1873, was not in force there at the time of the discovery of the lode and its location. But the court replied that while courts would take judicial notice of what is generally known within the limits of their jurisdiction; of the divisions of a State or Territory into towns or counties; of the leading geographical features of the land; of the positions of important cities and towns and of government surveys of the public lands, no principle or authority authorized or required them to take judicial notice of the place where mere private property was situated, or its distance from the seat of government; that matters only of public importance and notoriety were within the scope of what courts will take judicial notice of; and that matters of mere private concern, as the location or situation of a farm or a mining claim, or its distance from the seat of government, were not within the operation of the principle.

It is undoubtedly true that judicial notice is not taken of purely private concerns, when they are not connected with or necessarily involved in a matter of a public nature; but it is otherwise when they are so connected or involved. For example, a court will take notice of the boundaries of the State or Territory where it holds its sessions, and of judicial districts, and municipal subdivisions within it. If the public surveys have established the distance from its capital to any such subdivision, the court will take notice of the fact, and if private property be shown to be within that subdivision, its distance also from the capital will be judicially noticed—notice of the general fact embracing all the facts included in it. In the present case, the court below was required to take notice of the extent of its jurisdiction, not only of the subjects placed by law under its cognizance, but of its extent territorially. It should have known judicially whether the laws of the Territory, which it was appointed to expound, were in operation with reference to a subject brought before it in the regular course of procedure. It was bound to know whether they were in force in the township designated in the county of Lewis and Clark on the 13th

day of May, 1873, and that necessarily involved a knowledge of its distance from the capital of the Territory. It may be that the judge's information on the subject was at fault, and calculations and inquiries on the subject may have been necessary. Such is the case with reference to a great variety of subjects of general concern, of which courts are required to take judicial notice. Information to guide their judgment may be obtained by resort to original documents in the public archives or to books of history or science or to any other proper source. In this case, it appears by the government maps of the Territory, upon which the public surveys are marked, that the distance from the seat of government to the nearest point of the township in which the mining ground in controversy is situated exceeds seventy-five miles. The act of May 8, 1873, was not, therefore, in force there on the 13th of May, the day of the discovery of the "Mammoth lode." The court having become informed on this subject, should have so declared, and its conclusion would not have been open to contest before the jury. It erred, therefore, in excluding the notice of the defendants' location for the omission stated, because no proof was offered of the distance of the disputed ground from the seat of government, where the act took effect on the day of its passage. The court said that if there were any exception to it by reason of the distance of the Mammoth lode from that place, the defendants should have made the fact appear by proof, holding that the act not having been complied with, the notice was inadmissible in evidence.

It is not necessary to express any opinion whether, after the passage of the act of Congress of 1872, the legislature of the Territory could add any further requirement touching the record of notices of location. It is sufficient for the reversal of the judgment that the court required proof of a fact of which it was bound to take judicial notice.

Judgment reversed, and cause remanded for a new trial.

SIOUX CITY & ST. PAUL RAILROAD COMPANY & Others *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* SIOUX CITY & ST. PAUL RAILROAD COMPANY & Others.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

Argued March 16, 1886.—Decided March 29, 1886.

The title of the railroad companies within the ten-mile limit to lands granted by Congress to Iowa by the act of May 12, 1864, 13 Stat. 72, relates back to the date of the grant, and where two roads cross each other they take such granted lands in equal moieties; but the title to indemnity or lieu lands outside that limit is acquired by priority of selection, approved by the Secretary of the Interior.

The case is stated in the opinion of the court.

Mr. John W. Cary for the Chicago, Milwaukee & St. Paul Railway Company.

Mr. John C. Spooner and *Mr. J. C. Swan* for the Sioux City & St. Paul Railroad Company & Others submitted on their brief.

Mr. Justice Miller delivered the opinion of the court.

These are cross-appeals from a decree of the Circuit Court for the District of Iowa.

In that court the Chicago, Milwaukee and St. Paul Railway Company brought its bill in chancery on the 4th day of March, 1879, against the Sioux City and St. Paul Railroad Company, which in due time was answered.

The subject of contest in this suit was the right to certain lands granted by Congress to the State of Iowa to aid in building two railroads, whose right to the lands became vested in one or both of these companies, however named originally. The grant of the lands was by a single statute, and was to the

State as a trust for the construction of two roads which necessarily crossed each other, and by the act of Congress the place of crossing was to be in O'Brien County. The act granted for the aid of each road every alternate section of land designated by odd numbers for ten sections in width on each side of said roads, and in the event that any of these odd sections had, when the lines of the roads were definitely located, been sold or otherwise disposed of, the usual grant of lands in lieu of them should, by the Secretary of the Interior, be caused to be selected, provided they were in no case to be located more than twenty miles from the lines of the roads. 13 Stat. 72, ch. 84.

The roads to be benefited by this grant have both been completed, and both companies are entitled to the odd sections within ten miles of their lines of road, and to the indemnity lands, so far as they can be found of odd numbers within twenty miles. But as the roads cross each other these limits also cross and overlap, and the claims to the odd sections within those limits necessarily conflict. This presents questions which, at the time the suit was brought, were important, because the value of the land in controversy is large, and because many other land grants to railroad companies presented the same difficulty. But during the pendency of this suit in the Circuit Court, and on appeal here, all these questions have, it is believed, been decided by this court, so that nothing remains but to apply the principles of these decisions to the admitted facts of this case. *Cedar Rapids Co.* v. *Herring*, 110 U. S. 27; *Kansas Pacific Co.* v. *Atchison, Topeka & Santa Fé Co.*, 112 U. S. 414; *Sioux City & St. Paul Co.* v. *Winona Co.*, 112 U. S. 720.

1. It was claimed by the Chicago, Milwaukee and St. Paul Company, which, for brevity, will be called the Milwaukee Company, that, by reason of the prior location of the line of its road through the lands where the crossing finally took place, they acquired a priority for their entire claim to the exclusion of the other company within the limits of the lap. That is, that when their line was definitely located they became immediately entitled to every odd section within ten miles of the road and to the paramount right of selection of indemnity lands within twenty miles.

2. The Sioux City road asserted, by virtue of the fact of the *prior construction* of their road through the overlapping lines of the grant, that they had secured the paramount right which the other company claimed by reason of prior location.

Both these contentions are wrong. The title acquired from the United States relates back to the date of the grant, and neither company can obtain any superiority of title by any act done by it or by any omission to act by the other, provided there is no forfeiture of the grant. This principle is fully decided in the case of *Sioux City & St. Paul Railroad Co.* v. *Winona & St. Peter Railroad Co.*, 112 U. S. 720. In such case the companies take the lands coming within the conflicting lines in equal undivided moieties.

In the opinion above referred to it was held that, while this rule applied to what are called lands in place, that is, those odd sections found within the ten-mile limit of the road, as those ten miles conflicted with each other, it did not apply to lieu lands or indemnity lands which were to be *selected* outside of the ten-mile limit. The reason of this was said to be that, with regard to the odd sections found within the original limits of the grant undisposed of when the line of the road was definitely located, that location ascertained the sections which passed by the grant and fixed the right to such sections, whether it was the whole or the moiety of them.

But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior. In a case, therefore, where two companies had this right of selection within the same limits, priority of title might be created by priority of selection, or some other mode than location of the road or priority of construction.

The Circuit Court, in its decree, disregarded this distinction between lands found in place within ten miles of each road and those within the indemnity limits, and applied the tenancy in common principle to the lands claimed as indemnity for others not found within the ten miles, as well as to those found within those limits and not sold or disposed of.

It appears from the record in this case, that there are within

the lap of the twenty mile limits of both roads, subject to the grants to these roads, both for lands in place and for lieu or indemnity lands, $189{,}595\frac{98}{100}$ acres which constituted the subject matter of this controversy.

1. Of these, $63{,}796\frac{24}{100}$ acres are within the ten mile limit of the Sioux City road, and *not* within the ten mile limit of the Milwaukee road, though they are within its twenty mile limit. The result of the rule on which the Circuit Court acted was to divide these lands equally between the two companies.

But the principles we have stated, and which were fully considered in *The St. Paul Company* v. *The Winona Company*, exclude the Milwaukee Company in this case from invading the ten mile limit of the Sioux City road to seek indemnity for losses by reason of lands within its own ten mile limit previously disposed of. This $63{,}796\frac{24}{100}$ acres being odd sections within the ten mile limit of the Sioux City road, and not within the ten mile limit of the Milwaukee road, belonged exclusively to the former, and the latter company had no interest in them. The decree is in that respect erroneous and must be reversed, and all these lands given to the Sioux City Company.

2. Of the lands in controversy there were $33{,}071\frac{8}{100}$ acres within the ten mile limit of the Milwaukee road, and *not* within the ten mile limit of the Sioux City road, but within its twenty mile limit, which, according to the ruling of the Circuit Court, were equally divided between the two companies. For the same reasons which govern with regard to the $63{,}796\frac{24}{100}$ acres just disposed of, this part of the decree must be reversed and these $33{,}071\frac{8}{100}$ acres given to the Milwaukee Company.

3. Of the lands in controversy there were $50{,}539\frac{73}{100}$ acres within the ten mile limits of both roads. This the decree of the Circuit Court held to belong to the companies in equal undivided moieties, and appointed commissioners to make partition of them. This part of the decree was upon the principles we have stated correct, and must be affirmed.

4. There remains to be considered $42{,}188\frac{93}{100}$ acres found to be within the twenty mile or indemnity limit of both roads, and not within the ten mile or absolute grant limit of either road. As these lands are within the category of those to which no

title accrued until a *selection* of them was made for one road or the other, there might arise some difficulty about priority of right between the two companies. But we are of opinion that the circumstances in which the title to these lands has been placed by the action of the State of Iowa, which was a trustee in the matter for both parties, and of the Commissioner of the General Land Office, the decree of the court dividing these lands equally between the parties was just.

So far as any selection was made of these lands it was by the State of Iowa, and the legal title was conveyed to her. Though they were certified to her by the Secretary of the Interior for the benefit of the Sioux City Company, and though the State conveyed them to that company, it is obvious that both the Secretary of the Interior and the Governor of Iowa acted under the mistaken idea that the earlier construction of its road or its earlier location by the Sioux City Company gave it a priority of right in these indemnity lands, and as there was not enough to satisfy the demands of both companies, nor, indeed, of either of them, they, for that reason, conveyed them all to the Sioux City Company. We think the action of the Secretary of the Interior, and of the Governor of Iowa, under this mistake of law and of their powers, and especially the Governor of Iowa, the common trustee of both these companies, cannot have the effect of destroying the rights of the parties. There was in fact no selection. All were wrongfully conveyed to the Sioux City Company.

That part of the decree, therefore, which divides these lands equally and directs the commissioners to make partition of them is also affirmed.

As both parties appealed from the decree of the Circuit Court, and as each of them has succeeded in obtaining a reversal of an important part of the decree, the costs of the appeal will be equally divided between them, and the case remanded to the Circuit Court, with instruction to render a decree in conformity with this opinion.

KNAPP *v.* HOMEOPATHIC MUTUAL LIFE INSURANCE COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Submitted March 16, 1886.—Decided April 5, 1886.

A policy of insurance, made to a wife on the life of her husband, contained this clause: "This policy of insurance, after two annual premiums shall have been paid thereon, shall not be forfeited or become void by reason of the nonpayment of premiums; but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit: The net value of the policy when the premium becomes due and is not paid shall be ascertained according to the combined experience or actuaries' rate of mortality, with interest at four per cent. per annum. Four fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumption of mortality and interest aforesaid; or at his option may receive a paid up policy for the full amount of premium paid: Provided, That unless this policy shall be surrendered and such paid up policy shall be applied for within ninety days after such nonpayment of premium as aforesaid, then this policy shall be void and of no effect." *Held*, that the words "paid up policy," in the proviso, included an insurance for the amount of the original policy for a time computed according to its net value at the time of the failure to pay a premium, as well as an insurance for the term of the original policy for an amount computed according to the premiums paid; and that the wife was not entitled to have the policy continued or renewed in either form, without surrendering it and applying for a new policy within ninety days after the nonpayment of a premium. *Held, also*, that the rights of the parties were not affected by the husband having procured a cancellation of the original policy by fraudulently representing that the wife was dead.

This was an action brought March 19, 1878, by a citizen of Massachusetts against a corporation established by the laws of New York, upon a policy of insurance, by which the company, "in consideration of the representations made to them in the application for this policy, which is hereby made a part of this contract, and of the sum of $47.40 to them in hand paid by Abby Knapp, wife of Charles L. Knapp, and of the quarterly payment of a like amount on or before the sixteenth days of

Statement of Facts.

July, October, January and April in every year during the continuance of this policy," insured the life of the husband, for the sole use of the wife, in the amount of $5000 for the term of his natural life, beginning on April 16, 1869, payable at the office of the company in New York to her, if living, in thirty days after notice and proof of his death.

The application declared that "neglect to pay the premium on or before the day it becomes due shall and will render the policy null and void, and forfeit all payments made thereon, unless otherwise specially provided for in the policy."

The policy contained the following clause: "This policy of insurance, after two annual premiums shall have been paid thereon, shall not be forfeited or become void by reason of the nonpayment of premium; but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit: The net value of the policy when the premium becomes due and is not paid shall be ascertained according to the 'combined experience' or actuaries' rate of mortality, with interest at four per cent. per annum. Four fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium and the assumptions of mortality and interest aforesaid; or at his option may receive a paid up policy for the full amount of premium paid: Provided, that unless this policy shall be surrendered and such paid up policy shall be applied for within ninety days after such nonpayment as aforesaid, then this policy shall be void and of no effect."

A trial by jury having been duly waived, the Circuit Court found the following facts: The policy was issued April 14, 1869, in the city of New York, where the husband and wife then lived. It was taken out by the husband, who signed the application in the wife's name as her attorney. It was in the possession of the wife in 1871, and of the husband before and afterwards. The premiums were paid for several years, mostly by the husband, but one or two by the wife. She lived apart from her husband nearly all the time after February, 1872. On January 16, 1874, a premium became due and was not

paid. On February 26, 1874, the husband represented to the company that his wife was dead, the company believed the representation to be true, and he surrendered the policy, taking from the company $260 in money, and a new policy, concerning which the only evidence was that it had been forfeited before his death, which happened September 17, 1874. Very soon after his death, the wife sent to the company for information about the policy, and her agent was told by the company that it was forfeited. A considerable time after this, being advised that she might have some rights under the policy, she gave due notice and proof of loss, and more than thirty days afterwards brought this action to recover the full amount insured. The net value of the policy when the nonpayment of the premium occurred, if reckoned in the mode pointed out in the policy, would have been sufficient to continue it in force until after the death of the husband.

On these facts, the Circuit Court ruled as matter of law that the policy was forfeited by the neglect to pay the premiums and to call for a paid up policy, and rendered judgment for the defendant, and allowed a bill of exceptions tendered by the plaintiff.

Mr. Samuel W. Clifford Jr. and *Mr. Mark A. Blaisdell* for plaintiff in error.

Mr. Stillman B. Allen and *Mr. Alfred Hemmenway* for defendant in error.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

The cancelling of the policy, in consequence of the husband's fraudulent representation that the wife was dead, had no effect upon her rights. It is not relied on by the defendant; and there is nothing in the case to show that it in any way influenced the conduct of the plaintiff by preventing her from paying the premiums or making the election required by the policy.

The contract of insurance, made and to be performed in New

York, between a corporation and a citizen of that State, is to be governed by the law of New York. By that law, in respect to the payment of or the neglect to pay premiums, a married woman stands like any other person insured. *Baker* v. *Union Ins. Co.*, 43 N. Y. 283. And there is no statute which affects this case.

The decision, therefore, depends upon the true construction of the nonforfeiture clause in the policy.

The single purpose of this clause is that, after two annual premiums shall have been paid, a failure to pay any subsequent premium shall not have the effect of avoiding the whole insurance, but the assured shall have the right to an insurance for such a sum and such a time as the premiums already paid would equitably cover. The policy does not declare that it shall continue of itself, without any act of the assured. On the contrary, it stipulates that "the party insured shall be entitled to have it continued in force for a period to be determined" by ascertaining, according to certain rules, the net value of the policy at the time of failure to pay a premium, and making the amount of that value, considered as a single premium, the basis for determining the time for which there shall be a temporary insurance for the full amount of the original policy. It then prescribes an alternative by which the party insured, "at his option, may receive a paid up policy for the full amount of premium paid."

In short, the forfeiture of the policy, by a failure to pay any premium after the first two, is not absolute, but qualified; and the party insured is entitled to be insured according to the sum already paid in premiums, either for the full amount of the original policy, so long as that sum would pay for it, or else for the full term of the original policy for such amount as that sum would pay for.

Then follows the proviso: "that unless this policy shall be surrendered and such paid up policy shall be applied for within ninety days after such nonpayment as aforesaid, then this policy shall be void and of no effect."

It is contended on behalf of the plaintiff, that the words "such paid up policy" show that this provision refers only to

a new insurance determined by the second method, that is, for the full term of the original policy, and for an amount depending upon the sum already paid in premiums; and that if the assured does not seasonably apply for such an insurance, she still remains insured for the full amount for a time computed according to the sum paid.

But the proviso does not say that, upon a failure to surrender the original policy and to apply for a paid up policy, the original policy shall stand good for a temporary insurance; but that it "shall be void and of no effect." The result of either of the two methods already prescribed, for determining the extent of the insurance, is a paid up policy. According to either method, there is to be no further payment of premium, nor is the original policy continued in force; but the assured is to have the benefit of the sum already paid in premiums, by being insured, either for the amount of the original policy for a time to be determined, or for the time of the original policy for an amount to be determined. Taking the whole clause together, it is clear that the assured is to have the benefit of that sum in one of two ways at her election, and that election must be made within a certain time. As that time expired without any election, or any excuse for not making one, the forfeiture became complete under the express provisions of the policy, and the Circuit Court rightly held that the action could not be maintained.

Judgment affirmed.

MARSHALL *v.* HUBBARD.

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

Argued January 11, 1886.—Decided March 22, 1886.

In order to recover for injuries caused by false representations, through which plaintiff was induced to perform an act and was injured thereby, it is necessary to establish the making of the false representations by defendant; that he knew them to be false and uttered them with intent to deceive

Statement of Facts.

plaintiff and to induce him to act upon them; and that plaintiff relied upon them and acted, and suffered injury thereby.

When, after giving a party the benefit of every inference that can fairly be drawn from all the evidence, it is insufficient to authorize a verdict in his favor, it is proper for the court to give the jury a peremptory instruction for the other party.

Defendant in error, as plaintiff, commenced this suit in a State court of Wisconsin to recover of plaintiff in error on two promissory notes made by him and payable to defendant in error. The defence pleaded was failure of consideration. The State court admitted evidence to show the failure, and the Supreme Court of Wisconsin, after verdict and judgment, reversed the latter for misdirection in this respect, 50 Wisc. 322, and remanded the cause for a new trial. Plaintiff below then petitioned for removal of the cause to the Circuit Court of the United States on the ground of prejudice and local influence, averring that when the action was commenced he was, and still was, a citizen of Texas. The cause being removed the defendant below filed in the Circuit Court an amended answer also setting up false and fraudulent representations of plaintiff respecting the property, for the purchase of which the notes were given, known to him to be such, made by him with intent to induce defendant to purchase the property and to make the notes; that solely induced thereby defendant did make and give the notes; and that he suffered damage thereby as set forth in the answer. A jury was called, and after all the evidence on both sides was in, the court, among other things, instructed the jury as follows:

"Now, there are certain elements of fact that must be shown to have existed to entitle a party to succeed in such a defence. In the first place, it must be shown that the representations were made; in the second place, that the representations, if made, were fraudulent; in the third place, that the defendant relied upon the representations; and in the fourth place, that he had a right to rely upon them. Those are four material elements of fact that must enter into the case.

"It has been argued that the proof here is totally inadequate to show that the representations, if any were made, were fraud-

ulent, and I must say there is one item of testimony which came from the defendant himself which tends pretty strongly to show that there was not fraud in the transaction. That was the statement that while the plaintiff did represent to him that there were three million feet of merchantable pine on the land, he said, also, that if it should prove not to be so, he would make good the deficiency. If that statement was made by the plaintiff at the time, as thus testified to by the defendant himself, it would seem to be a strong circumstance tending to take out of the representations their alleged fraudulent character. However, the court would strongly hesitate, in view of all the proof that is in upon this question of fraud, before it would take that question, or either of the four questions of fact that I have stated, from the jury. But there are certain other elements of fact which necessarily enter into this defence. Not only must the representations be made, not only must they be fraudulent, and not only must it appear that the party relied, and had a right to rely, upon them, but it must also be shown that the representations were material to the contract or transaction which took place between the parties; and, further, that injury has been sustained, damage has resulted to the defendant from the alleged fraudulent representations. These are as essential as any of the other elements of fact which must be shown in establishing such a defence. I repeat, that it must appear that the defendant has sustained damages which are chargeable to the alleged fraudulent representations, and for which, therefore, the plaintiff is legally responsible; and it is an important question in this case, and not one free from difficulty, since the case is somewhat peculiar.

"I think, therefore, that upon the proofs the case is within the rule laid down by the Supreme Court of the United States, namely, the court can now see, upon the evidence that bears upon the question of materiality of the representations, and alleged injury to the defendant, that if the jury were to render a verdict against the plaintiff it would have to set that verdict aside. If that be so, the court ought not to hesitate in directing a verdict. This being the view which I take of the case, I must hold that the defence which is interposed here is not,

under the proofs, maintainable, and hence that the plaintiff is entitled to a verdict for the amount of his claim, namely, the principal of the notes and the interest on the same."

Mr. T. R. Hudd for plaintiff in error.

Mr. J. D. Markham for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

We concur with the Circuit Court in holding that the alleged false representations of Hubbard to Marshall in reference to the quantity of pine upon the land in question could not have resulted in any injury to the latter, of which he could complain as against the former, unless, at the time the representations were made, it was understood, with Hubbard's knowledge, that Gillen and Monroe were to surrender their purchase, and that Marshall was to take their place with reference to the land and pine. Under such an arrangement, Gillen and Monroe would be released from their obligations to Hubbard, while Marshall would occupy the position of a purchaser of the land and the pine, the title remaining in the plaintiff. The evidence, however, fails to connect Hubbard with any such understanding or arrangement. The evidence shows nothing more, as between the parties to this suit, than a purchase by Marshall of certain property rights which Hubbard held, including Gillen and Monroe's obligation to him in reference to the land in question. Marshall was aware of the extent of that obligation, and took from Hubbard the writing of May 23, 1874, which recites that Hubbard had sold and assigned to him "all his right, title, and interest in and to a certain contract executed and entered into by and between the said Stephen Hubbard, Nicholas Gillen, and Hugh Monroe, which said contract is dated 23d of May, 1873,"—Hubbard reserving the right to enforce the covenants contained in that contract in his own interest and behalf, in case of default in the payment of either of the notes executed by Marshall to him. So clearly, in our judgment, does the evidence show that this was the only contract between the parties to this suit, that a verdict based upon any other view ought to have been set aside.

Opinion of the Court.

Giving the defendant the benefit of every inference that could have been fairly drawn from the evidence, written and oral, it was insufficient to authorize a verdict in his favor. Such being the case, a peremptory instruction for the plaintiff was proper. *Pleasants* v. *Fant*, 22 Wall. 116, 143; *Montclair* v. *Dana*, 107 U. S. 162; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, 483; *Anderson County* v. *Beal*, 113 U. S. 227, 241; *Baylis* v. *Travellers' Ins. Co.*, 113 U. S. 316, 320.

The judgment is

Affirmed.

LITTLEFIELD *v.* TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF FLORIDA.

REED *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Argued March 9, 10, 1886.—Decided March 29, 1886.

On the facts: *Held*, That the bonds in controversy should be surrendered to the Trustees of the Internal Improvement Fund of the State of Florida, and should be applied by them in accordance with the prayer of their answer.

The case is stated in the opinion of the court.

Mr. Horatio Bisbee, Jr., for appellant Littlefield.

Mr. J. Augustus Johnson and *Mr. John A. Henderson* for appellant Reed submitted on their brief.

Mr. Wayne McVeagh for appellees.

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

These appeals relate to the ownership of $103,000 in amount of certain bonds of the Pensacola and Georgia Railroad Com-

pany and the Tallahassee Railroad Company. For convenience they will be hereinafter referred to as "one hundred and three bonds." Many of the matters involved were under consideration by this court in *State of Florida* v. *Anderson*, 91 U. S. 667, and *Railroad Companies* v. *Schutte*, 103 U. S. 118, to which reference is made for a general history of the transactions out of which the present controversy arose.

The facts on which the rights of these parties depend we find to be as follows:

The railroads of the two companies above named were sold by the Trustees of the Internal Improvement Fund of the State of Florida on the 20th of March, 1869, under the provisions of the internal improvement act of Florida, passed January 6, 1855, to pay certain bonds, of which those now in dispute are a part. A statement of the provisions of this act will be found in the report of the case of the *State of Florida* v. *Anderson*, beginning at page 670. A conveyance of the railroads to the purchasers at the sales was obtained, to use the language of the counsel for the appellant in Littlefield's case, "through a well planned and cleverly executed fraud," without the payment of about $472,000 of the purchase money. This sum represented an equal amount of bonds outstanding, which included the one hundred and three now in question. A history of the facts connected with this transaction will be found in the report of *Railroad Companies* v. *Schutte*, beginning at page 121. George W. Swepson was under obligations to pay what remained due on the purchase money, or, which is the same thing, to get up and surrender to the Trustees of the Internal Improvement Fund the outstanding bonds for cancellation.

On the 24th of June, 1869, an act was passed by the general assembly of Florida by which George W. Swepson, Milton S. Littlefield, and their associates, were incorporated under the name of the Jacksonville, Pensacola and Mobile Railroad Company. The important provisions of the charter of this company will be found in the report of the *Schutte Case* at page 123, and following. Afterwards the title to the two railroads which had been purchased was transferred to the corporation thus created. On or before the 10th of November, 1869, Mil-

ton S. Littlefield succeeded to all the rights of George W. Swepson in the premises, and became bound to take up and surrender the outstanding bonds, or pay the balance due on the purchase money in cash.

On the 2d of August, 1869, drafts were drawn by George W. Swepson on and accepted by Milton S. Littlefield, in favor of Edward Houston, for $109,140. These drafts grew out of transactions between the parties relative to the Jacksonville, Pensacola and Mobile Railroad Company and the Florida Central Railroad Company, and in some way Houston held one hundred and ten of the bonds of the Pensacola and Georgia Railroad Company and Tallahassee Railroad Company as collateral security. These bonds were part of those outstanding which Swepson was bound to take up and surrender, and they included the one hundred and three now involved. The drafts were likewise among the obligations which Littlefield assumed to pay when, in November following, he took Swepson's place in these transactions.

On the 13th of May, 1870, Littlefield entered into a contract with Houston, by which he bought the drafts above mentioned, and certain shares of the stock of the Florida Central Railroad Company, and gave his draft for $163,020.70 on S. W. Hopkins & Co., the financial agents of the Jacksonville, Pensacola and Mobile Company, therefor. Under this contract Houston was to hold the one hundred and ten bonds as collateral for the draft then given, and to deliver them to Littlefield when this draft was paid. Various other contracts were afterwards made between Littlefield and Houston which looked to a payment of the draft through the securities of the Florida Central Railroad Company, but no payment was in fact made before June 8, 1870, when Littlefield, as president of the Jacksonville, Pensacola and Mobile Company, was in negotiation with Harrison Reed, governor of Florida, for an exchange of the bonds of the company for those of the State, under the provisions of the charter. In the progress of these negotiations it was found that the unpaid purchase money stood in the way of the exchange, and thereupon Littlefield, still acting as president of the company, addressed a letter to the governor,

who was also *ex officio* one of the Trustees of the Internal Improvement Fund, a copy of which is as follows:

"TALLAHASSEE, FLA., *June* 8, 1870.

"Hon. Harrison Reed, Gov. State of Florida.

"SIR: I have the honor to state that in addition to the bonds of the Pen. & Geo. and Tallahassee Railroad Companies already deposited with the Board of Trustees Int. Imp. Fund, I have at the railroad office $41,350.

Bro't over		$41,350
And have secured	$110,000	
" "	70,000	
" "	15,000	
		195,000
		$236,350
Total outstanding		$227,250

Respectfully, M. S. LITTLEFIELD,
Pres't J., P. & M. R. R. Co."

The $110,000 bonds here referred to were those held under the contracts between Littlefield and Houston. After this letter Littlefield delivered to the governor a draft of which the following is a copy:

"$227,250. TALLAHASSEE, *June* 8, 1870.

"On demand, when in funds, pay to the order of his Excellency, Harrison Reed, Gov., two hundred and twenty-seven thousand two hundred and fifty dollars, value received, and charge the same to account of—

M. S. LITTLEFIELD,
"*Pres't J., P. & M. R. R. Co.*

"To Messrs. S. W. Hopkins & Co., 71 Broadway, N. Y."

This draft was never paid, but on its delivery the exchange of bonds of the State for those of the company was made by the governor, acting for the State, and by Littlefield, acting

for the railroad company. Out of this exchange the suits of the *State of Florida* v. *Anderson* and *Railroad Companies* v. *Schutte* arose, as well as much other litigation in the courts of the State and of the United States.

After the delivery of the State bonds to Littlefield the draft of $163,020.70 held by Houston was paid by Hopkins & Co. out of the proceeds of the sale of these bonds, or upon their security, and on the 12th of April, 1871, an agreement was made between Houston and S. W. Hopkins & Co., the drawees, by which the one hundred and three bonds in question were deposited with Mariano D. Papy, to be held by him and not delivered to any person unless directed to do so by M. S. Littlefield and S. W. Hopkins & Co. jointly, or unless directed to be delivered to Littlefield by Hopkins & Co., or to Hopkins & Co. by Littlefield. It was also further agreed that there should be no delivery to Littlefield until certain suits which had been begun against Houston, and which were particularly described, had been dismissed. On the 14th of June, 1872, Papy was directed by Hopkins to deliver the bonds to Littlefield on the dismissal of the suits. It was stipulated at the hearing of the present case below that these suits had then been dismissed, but at what precise time does not appear.

On the 17th of July, 1872, Edward C. Anderson, Jr., and others, holders of some of the $472,000 of unpaid bonds, began a suit in the Circuit Court of the United States for the Northern District of Florida, for themselves and all other holders of like bonds who might choose to become parties plaintiff, on the usual terms, against the Jacksonville, Pensacola and Mobile Railroad Company and others, including Milton S. Littlefield and the Trustees of the Internal Improvement Fund, to subject the railroad of the railroad company, defendant, to the payment of their bonds. On the same day the one hundred and three bonds in the hands of Papy were by him delivered, under an order of the Superior Court of Chatham County, Georgia, to "T. Mayhew Cunningham, cashier of the Central Railroad and Banking Company of Georgia, to be by him deposited in the vault of the said bank, and there to be safely kept subject to the further order of the court." Afterwards,

in April, 1873, they were deposited by Cunningham with the Circuit Court of the United States for the Northern District of Florida, subject to the orders of that court in the Anderson suit, where they have ever since remained.

On the 18th of June, 1875, the following order in reference to these bonds was entered in the Anderson suit:

"It is further ordered, that the said master shall give immediate notice through the public gazettes heretofore used by him for such purpose to all parties who may claim an interest, direct or indirect, in the bonds which have been deposited with him by T. Mayhew Cunningham, trustee; that he hold said bonds in his custody subject to the final order of this court; that the said bonds are claimed by the Trustees of the Internal Improvement Fund as having been purchased from Edward Houston by the Jacksonville, Pensacola and Mobile Railroad Company, under agreement with said trustees, for the purpose of cancellation; that upon petition filed with him, the said master, and ten days' notice to the said trustees, and at any time before the first day of the next term of the court, he will take testimony touching the claim or interest or title of any such petitioner upon or to the said bonds, or any part thereof; and that unless petition be filed in accordance with this order, all right, title and interest of any such person to or in the said bonds would be forever adjudged to be barred."

The notice required by this order was duly given, and on the 13th of July, 1876, the Trustees of the Internal Improvement Fund filed their petition in the master's office, asking that the bonds be delivered to them, claiming title under the transaction between Littlefield and the governor on the 8th of June, 1870, at the time of the exchange of bonds, and also under a decree of the Circuit Court of Duval County, Florida, on the 20th of August, 1875, in a suit brought by them on the 20th of March, 1872, against the Jacksonville, Pensacola and Mobile Railroad Company, Milton S. Littlefield and others, in which their right to the bonds under their claim was fully established as against all the parties to that suit. Calvin Littlefield was, however, not a party.

On the 18th of March, 1872, John H. Miller began a suit

against Milton S. Littlefield in the Circuit Court of Duval County, Florida, to recover a debt of $50,000. In this suit a judgment was rendered April 18, 1872, for $50,708, and on the 15th of November, 1872, Miller filed a creditor's bill in the Circuit Court of the United States for the Northern District of Florida to subject the one hundred and three bonds to the payment of the judgment as the property of Milton S. Littlefield. Under this bill a decree was rendered December 2, 1873, directing a sale of the bonds for that purpose. Afterwards, on the 5th of August, 1875, the bonds were sold to Robert J. Washington, whereupon he appeared in the Anderson suit and asked leave to defend his interest and title. Washington afterwards, on the 22d of December, 1881, assigned his interest in the bonds to Edward J. Reed.

On the 23d of May, 1877, J. Fred. Schutte and others, holders of State bonds given in exchange for the bonds of the Jacksonville, Pensacola and Mobile Railroad Company, brought a suit in the Circuit Court of the United States for the Northern District of Florida for the foreclosure of the statutory lien of the State as security for the bonds of the railroad company given in exchange for those of the State. In the bill it was claimed, among other things, that this lien of the State was superior to that of the Trustees of the Internal Improvement Fund for the balance of the original purchase money, and as to the one hundred and three bonds the following averment was made:

"Complainants are informed and believe that said defendant, Milton S. Littlefield, made some agreement with said George W. Swepson to perform the obligations which the latter undertook with said trustees to do, viz., to purchase said unpaid Pensacola and Georgia and Tallahassee Railroad Companies' bonds; that said Littlefield did in fact purchase of said Edward Houston one hundred and three of said bonds in performance of such contract, which bonds are now deposited in the registry of this court to the credit of a cause therein pending, in which Edward C. Anderson et al. are plaintiffs and the Jacksonville, Pensacola and Mobile Company et al. are defendants; that said bonds are claimed by divers persons under some

contract with said Littlefield, which persons had full knowledge that said bonds were paid for out of the money for which the bonds issued by Governor Reed to the said Jacksonville, Pensacola and Mobile Company were sold as before set forth; [and that] said one hundred and three bonds have never been in the actual possession of said Littlefield. Complainants are advised that they should be delivered to said Trustees of the Internal Improvement Fund, and they should take such proceedings as may be necessary to procure the same to be done."

On the 31st of May, 1879, a decree was entered in the cause declaring that the Trustees of the Internal Improvement Fund had a first lien on the property of the Jacksonville, Pensacola and Mobile Company "to secure the payment to said trustees of the sum of $463,175.27, and interest thereon since March 20, 1869, at the rate of eight per cent. per annum," and directing a sale for the benefit of the Schutte bondholders, subject to this prior lien. This prior lien was on account of the unpaid purchase money at the original sale, and the amount found due included the one hundred and three bonds; but there was no express adjudication as to the ownership of these bonds, or as to the right of the railroad company or of the Schutte bondholders to have them applied towards the satisfaction of the debt to the trustees. From this decree the Schutte bondholders did not appeal, but on appeals by some of the other parties to the suit the decree was affirmed by this court January 17, 1881, *Railroad Companies* v. *Schutte*, and under its authority the road was afterwards sold.

On the 14th of February, 1882, Calvin Littlefield filed in the Anderson suit a petition to have the one hundred and three bonds delivered to him, and in his petition he stated that the Trustees of the Internal Improvement Fund and Edward J. Reed also claimed an interest. As to his own title, he stated that, on the 13th of July, 1871, Milton S. Littlefield assigned the bonds "in possession and control of M. D. Papy" to him as security for the payment of a debt of $50,000, and that on the 11th of January, 1872, this assignment was made absolute "that the expenses of a foreclosure may be avoided."

Opinion of the Court.

The evidence shows that while the suit of *Miller* v. *Littlefield*, above referred to, was pending, and under which the bonds were sold to Washington, these title papers of Calvin Littlefield were sent by him to J. J. Finlay, an attorney-at-law at Jacksonville, Florida, for some purpose, and that under date of December 24, 1873, Finlay wrote a letter to Littlefield which contained the following:

"As General Littlefield had not yet been examined before the master in chancery in the matter of the creditor's bill, about which I wrote you in my last, the agreement above mentioned reached me in time to enable him to answer more fully and satisfactorily as to the ownership of the stocks and bonds mentioned in said agreement. He will answer that these securities belong to you and not to him. I am of the opinion that you are the *bona fide* owner of these securities under and by virtue of said agreement, and that any decree made in the case of *Miller* v. *M. S. Littlefield* is not binding on you, for the reason that you were not, and are not, a party to said suit. For the present, therefore, I do not see that it is necessary to take any step or incur the expense of any independent proceeding in the matter. As things progress, however, if it should become important for the protection of your interests to institute proceedings it can be done."

It does not appear that Calvin Littlefield gave any notice of this assignment to Papy while the bonds were in his hands. or to any one else claiming an adverse interest prior to the filing of his petition.

Edward J. Reed answered the petition, setting up his title as the assignee of Washington, and asking that the bonds be delivered to him. The Trustees of the Internal Improvement Fund also answered, setting up their title, and asking that the bonds be surrendered to them and credited on the decree in the Schutte case "as of and for the amount due on said bonds, principal and interest, on the 12th of April, 1871."

The Circuit Court, on the 23d of June, 1882, decreed that the bonds be surrendered to the Trustees of the Internal Improvement Fund, and applied in accordance with the prayer of their answer. From this decree Calvin Littlefield and Edward

J. Reed took appeals, which have been docketed here as separate causes.

Upon the facts found, and about which there is substantially no dispute, we have no hesitation in affirming the action of the Circuit Court. Although the contracts under which the bonds passed from the hands of Houston to Papy, and from Papy to the Circuit Court in the Anderson suit, were in the name of Milton S. Littlefield, all payments for the bonds after June 8, 1870, were made from the funds of the Jacksonville, Pensacola and Mobile Company. What was done by Littlefield, at the time of the exchange of bonds with the governor, had the effect of transferring the one hundred and three bonds to the Trustees of the Internal Improvement Fund, subject to the lien of Houston as security for his draft of $163,020.70. When that draft was paid and the lien satisfied, the equitable title of the trustees was perfected, and thereafter the bonds were held by Papy, and his successors in possession, for them. It follows that, at the time Littlefield undertook to transfer the bonds to Calvin Littlefield, he had nothing to transfer. All his interest had long before been passed to the trustees. Neither does Calvin Littlefield occupy the position of a purchaser without notice of the prior claim of the trustees, because when he took his title the bonds were in the possession of Papy, who was in legal effect trustee for whom it might concern.

The same is true of the claim under which Edward J. Reed holds. When the bill was filed by Miller to subject the bonds to the payment of his judgment against Littlefield, they belonged to the trustees and not to Littlefield, and consequently nothing passed by the sale in that suit.

It is contended, however, that, as the trustees "insisted in the Schutte case on a lien for the full amount of the unpaid purchase money which was decreed to them, and that the one hundred and three bonds were outstanding," they "are estopped now from claiming that these one hundred and three bonds should be delivered to them and cancelled, and a credit given therefor on such decree." This it is claimed amounted to an abandonment by the trustees of their title to the bonds under the arrangement between Littlefield and

the governor, which enured to the benefit of Milton S. Littlefield or his assigns. To this we cannot agree. No issue was made in that suit as to the actual ownership of the bonds. The Trustees of the Improvement Fund did not claim that they were not entitled to the bonds, nor that the amount due on them should not be credited on the account for unpaid purchase money if their title should be established, but that until it was established no such credit should be given. Neither did the Schutte bondholders claim that the credit should be given at once, but that the necessary proceedings be had to establish the title and thus secure the application. When the decree was rendered the title had not been settled, and so no credit was then allowed, but nothing was done to prevent the trustees from making good their claim then pending in the Anderson suit, and, if successful, from giving the proper credit on the decree. That is what they are seeking to do here. Having presented their petition for a delivery of the bonds, they were met by the counter petitions of Calvin Littlefield and Reed, and thus the rights of all the parties have been presented for final adjudication. The question involved is not one of security but of title. The bonds are held by the court for whom it may concern, and the point to be settled is to whom shall they be delivered. Aside from the claim of abandonment put forth by Calvin Littlefield, they belong, as we have seen, to the Trustees of the Improvement Fund, as Milton S. Littlefield, the common source of title, first conveyed to them. It is conceded that the trustees have never actually reconveyed to Milton S. Littlefield; neither have they executed any formal conveyance or release to Calvin Littlefield. All they have done is to take a decree in their favor for what would be due them if their title should fail; and this, while a suit was pending to establish that title. Other parties were foreclosing a mortgage junior to theirs, and it became necessary to fix the amount of their prior lien. This the other parties were willing should be done before their disputed title was settled, and so to save themselves from loss in case of defeat they took a decree for what would be their due in that event. To that the junior mortgagees did not object. Their effort had been to

defeat the prior lien altogether. Having failed in that, they were willing to submit to a decree for the larger amount, leaving the disputed question as to the one hundred and three bonds to be settled afterwards in the proceeding that had been begun for that purpose, or any other that might be instituted. This was not an abandonment by either party. The decree was silent as to these bonds, and the petition for their delivery to the trustees on file in the Anderson suit, where the bonds were, was allowed to remain. It is now being prosecuted by the trustees as a mode of obtaining satisfaction of the decree in their favor. If they succeed it may enure to the benefit of the purchasers at the sale under the Schutte decree, but of this Calvin Littlefield has no right to complain. If he did not own the bonds it is a matter of no importance to him what disposition the trustees may make of them. All his rights depend alone on his ownership. If he is not the owner he is entirely out of all the litigation between the rest of the parties. Neither the railroad company nor the Schutte bondholders, who are alone interested in the amount for which the sale was made, are here to complain. The trustees alone can control the bonds. Having protected all who had the right to look to the original unpaid purchase money for the satisfaction of their bonds, they have performed their whole duty as trustees, so far as the bondholders are concerned.

The decree of the Circuit Court is affirmed.

STONE *v.* SOUTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

Argued March 5, 1886—Decided April 5, 1886.

A State court is not bound to surrender its jurisdiction of a suit on petition for removal, until a case has been made which on its face shows that the petitioner has a right to the transfer; and if it decides against the removal and proceeds with the cause, its ruling is reviewable here after final judgment.

All issues of fact made upon a petition for removal must be tried in the Circuit Court.

Opinion of the Court.

A suit between a State on the one side and citizens on the other, cannot be removed on the ground of citizenship.

A suit against partners to recover money received, for which they are jointly liable, cannot be removed on the ground of a separable controversy on the petition of one of the partners.

The case is stated in the opinion of the court.

Mr. William E. Earle for plaintiff in error.

Mr. Charles Richardson Miles, Attorney General of South Carolina, and *Mr. James Lowndes* for defendant in error.

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

This suit was brought by the State of South Carolina, in the Court of Common Pleas of Richland County, on the 1st of August, 1877, against Daniel T. Corbin and William Stone, partners as attorneys at law under the name of Corbin & Stone, to recover a balance claimed to be due for moneys collected by the firm for the State and not paid over. On the 27th of April, 1878, Stone presented to the court a petition for the removal of the suit to the Circuit Court of the United States for the District of South Carolina. The statement in the petition material to the question arising on this writ of error is as follows:

"That the petitioner is now, and was at the time when this action was commenced, a citizen of the State of New York and a resident therein, and his co-defendant is a citizen of South Carolina, and the plaintiff is also a citizen of the State of South Carolina. That, under and by virtue of the statutes of the United States and of the State of South Carolina, this suit is one in which there can be a final determination of the controversy, so far as the petitioner is concerned, without the presence of his co-defendant as a party to the cause."

The State court proceeded with the suit notwithstanding the petition, and after a trial gave judgment against both defendants. During the whole of such proceeding Stone denied the jurisdiction of the court after the filing of his petition. The Supreme Court of the State affirmed the judgment of the Common Pleas, and to reverse this judgment of affirmance the present writ of error was brought.

Opinion of the Court.

A State court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. *Yulee* v. *Vose*, 99 U. S. 539, 545; *Removal Cases*, 100 U. S. 457, 474. It is undoubtedly true, as was said in *Steamship Company* v. *Tugman*, 106 U. S. 118, 122, that upon the filing of the petition and bond—the suit being removable under the statute—the jurisdiction of the State court absolutely ceases, and that of the Circuit Court of the United States immediately attaches, but still, as the right of removal is statutory, before a party can avail himself of it, he must show upon the record that his is a case which comes within the provision of the statute. As was said in *Insurance Company* v. *Pechner*, 95 U. S. 183, 185, "his petition for removal when filed becomes a part of the record in the cause. It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the suit.' Having once acquired jurisdiction, the court may proceed until it has been judicially informed that its power over the cause has been suspended." The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the State court in the case ends and that of the Circuit Court begins.

All issues of fact made upon the petition for removal must be tried in the Circuit Court, but the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. If it decides against the removal and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under section 709 of the Revised Statutes. *Removal Cases*, 100 U. S. 457, 472; *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 141; *Kerr* v. *Huidekoper*, 103 U. S. 485; *Railroad Co.* v. *Koontz*, 104 U. S. 5, 15; *Chesapeake & Ohio Railroad Co.* v. *White*, 111 U. S. 134, 137. If the State court proceeds after a petition for

removal it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction. What effect the writ of *certiorari* provided for in § 7 of the act of 1875, to require the State court to make return of the record to the Circuit Court, would have upon the further power of the State court to proceed we do not now decide, as no such writ was issued in this case.

It only remains to consider whether on the face of this record it appears that the suit was removed from the State court by the presentation of the petition of Stone, and about that little need be said. It is not pretended that the suit was one arising under the Constitution or laws of the United States, and it certainly is not one between citizens of different States. The State of South Carolina is the sole plaintiff, and the defendants are citizens, one of South Carolina and the other of New York. The cause of action is joint, and only one of the defendants petitions for removal. There is no statute which authorizes the removal of a suit between a State and citizens on the ground of citizenship, for a State cannot in the nature of things be a citizen of any State. In *Ames* v. *Kansas*, 111 U. S. 449, the removal of a suit arising under the Constitution and laws of the United States brought by a State against a corporation amenable to its own process, was sustained, but this was because of the subject-matter of the action, and not because of the citizenship of the parties.

Neither is there any separable controversy in the case, such as might, if the necessary citizenship existed, allow Stone alone to remove the suit without joining Corbin with him in the petition for removal. The money sued for was received by the defendants as partners, and they are liable jointly for its payment, if they are liable at all. Such a case is not removable unless all the parties on one side of the controversy unite in the petition. *Removal Cases*, 100 U. S. 457; *Blake* v. *McKim*, 103 U. S. 336; *Hyde* v. *Ruble*, 104 U. S. 409.

The judgment of the Supreme Court of South Carolina is

Affirmed.

Syllabus.

UNION TRUST COMPANY *v.* ILLINOIS MIDLAND RAILWAY COMPANY.

BORG & Another *v.* ILLINOIS MIDLAND RAILWAY COMPANY.

WARING & Others *v.* UNION TRUST COMPANY.

FLETCHER & Others *v.* ILLINOIS MIDLAND RAILWAY COMPANY & Another.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Submitted January 12, 1886.—Decided April 5, 1886.

Three railroad companies in Illinois, with roads, one from Peoria to Decatur, one from Paris to Decatur, and one from Paris to the Indiana line, in the direction of Terre Haute, Indiana, each, before September, 1874, issued bonds secured by a mortgage on its road. In September, 1874, each of the other two companies conveyed its road to the Peoria and Decatur Company, the latter assuming "all the bonded and floating indebtedness" of the other companies. In November, 1874, it changed its name to that of the Illinois Midland Company, and in January, 1875, issued bonds secured by a mortgage covering all its property, original and purchased, with the view of exchanging them, dollar for dollar, for the bonds of the sectional roads. In September, 1875, the owner of a majority of the stock of the companies, with judgment creditors of the Paris and Decatur Company, brought a suit in equity in a State Court in Illinois against the Illinois Midland Company, to have a receiver of all its property appointed, and an account taken of all the claims and liens of its stockholders and creditors, and of those of the sectional companies, and to have them paid and adjusted according to equity. Such a receiver was immediately appointed, with power to run the road. In December, 1876, the Union Trust Company, trustee in the mortgages on the Paris and Decatur road, the Paris and Terre Haute road, and the Illinois Midland road, filed a bill in the proper Circuit Court of the United States in Illinois to foreclose those three mortgages; and in September, 1877, it was made a defendant in the State court suit, on its own petition, alleging a default by October 1, 1875, in the payment of interest on the bonds embraced in all three of the mortgages. In February, 1878, it filed two bills in the same Federal court, each for the foreclosure of one of the two sectional road mortgages held by it. In April, 1878, it removed into that court the State court suit.

Syllabus.

In August, 1881, holders of Paris and Decatur bonds filed a bill in the same Federal court to foreclose the Paris and Decatur mortgage. By an order made in June, 1882, that court consolidated all the suits. Successive receivers, each displacing the prior one, were appointed by the State court in August, 1876, and by the Federal court in December, 1878, and April, 1882. In June, 1882, a special commissioner was appointed to report as to the certificates of indebtedness issued by the receivers. He made his report in April, 1883, and, on exceptions to it, an interlocutory decree was made in June, 1884, making specific adjudications as to various receiver's certificates and other receiver's debts, and directing the commissioner to report as to other matters. He did so in January, 1885, and exceptions were filed to the report. A final decree in June, 1885, disposed of the litigated questions, and provided for a sale of the mortgaged property and the distribution of the proceeds. Holders of Paris and Decatur bonds appealed because the decree gave to sixteen receiver's certificates priority over those bonds. When the first order was made under which six of the certificates were issued, neither any of the Paris and Decatur bondholders, nor their trustee, were parties to the suit, but before any other order was made under which any of the certificates were issued, the trustee was made a party, and the Paris and Decatur interest had been in default for ten months when such first order was made : *Held*,

(1.) Certificates issued for necessary repairs must be allowed priority.

(2.) It is no objection to this rule, that the suit in which the first receiver was appointed was not brought by the bondholders, or their trustee ;

(3.) The bill in that suit was sufficient to enable a court of equity to administer the property and marshal the debts ;

(4.) It was sufficient, if the bondholders and their trustee were, after they were made parties, heard as to the merits of such first order, and the application of the money for which the certificates were issued ;

(5.) The certificates issued to pay tax liens are to have priority ;

(6.) Persons having no connection with the case or the parties, who take directly from the receiver receiver's certificates issued to pay for necessary repairs, are not bound to see to the application of the proceeds ;

(7.) The holders of interest-bearing receiver's certificates, taken within the limit of discount allowed by the court in the order authorizing the certificates to be issued, are entitled to the face of the certificates and the interest ;

(8.) Receiver's certificates issued to replace earnings diverted from paying for operating expenses and ordinary repairs, to pay for replacing worn-out parts of the road, while large debts had been incurred for the operating expenses and ordinary repairs, are to be allowed priority ;

(9.) It was not necessary to have the express consent of the bondholders, to create a lien prior to the bonds on the *corpus* of the property, on the facts of this case, and in view of the neglect of their trustee to interpose all the while the road was openly in the charge of the receiver, and being run, with the interest on the bonds in arrear ;

(10.) Items for wages due employés of receiver ; debts due from them to other railroad companies, and for supplies and damages ; wages due employés

of the road within six months immediately preceding the appointment of the first receiver; and debts incurred for the ordinary expenses of the receivers in operating the road may be allowed priority out of the *corpus* of the property, if there is no income fund, after scrutiny and opportunity for those opposing to be heard;

(11.) The terms of the first order appointing the receiver did not impair or exclude the authority of the court to give priority to the claims above mentioned;

(12.) It is proper to apportion among the three sectional roads, in proportion to their lengths, the items so allowed priority of lien, which include the terminal expenses and track rentals of the three sectional roads, although such expenses and rentals were different for each of them;

(13.) The objection that there was no authority to buy the Paris and Decatur road cannot prevail, because the non-action of the bondholders and their trustee, in allowing the court and the receivers to go on contracting debts in respect to the line operated as a unit, under circumstances where no separation can be made as to the matters questioned, and where important rights have accrued on the faith of the unity of the interests, amounts to such acquiescence as should operate as an estoppel.

As to 994 Paris and Decatur bonds, surrendered and exchanged absolutely for Illinois Midland bonds, and marked "cancelled," they cannot be reinstated and put on a footing with bonds not exchanged, because the contracts under which they were exchanged were complied with, and the transaction was completed, no surrender of any of the bonds having been made dependent on the surrender of any other bonds, or of the whole.

There being five several properties to be sold, it is proper to put up for sale each of the five separately, and then all five in gross, and, if the highest bid for the five in gross exceeds the aggregate of the highest separate bids, to strike off and sell the whole as an entirety to the person making the bid, and divide the proceeds into five parts, in proportion to the separate bids, and make distribution accordingly.

Certain debts due by the receivership to other railroads for rent of track, materials and stores supplied, labor performed, and traffic balances, the debts having been purchased by other parties, are to be allowed priority.

Debts for large sums of money borrowed by the receiver without previous authority from the court, are not to be allowed priority, although the moneys were applied to pay expenses of the receivership, repairs, supplies, and pay-rolls, and to replace moneys which had been so applied; because there never could be any difficulty in obtaining an order of the court, if one were proper, to borrow money to a specified total amount, for specific purposes.

Rents due for use of rolling stock, and money due for extraordinary depreciation of rolling stock, and certain other items, were not allowed priority in this case.

No priority or preference among the debts and claims, whether receiver's certificates or other debts, given precedence over the mortgage bonds, was allowed, (except as to debts for taxes, and receiver's certificates issued to

borrow money to pay taxes, or to discharge tax liens), although, in the orders under which some of the certificates so given precedence were issued, it was declared that each certificate should be a lien on the property in respect of which it should be issued, superior to all mortgage bonds and receiver's debts, except receiver's debts theretofore declared, by order of court, to be special liens on such property.

Each one of the two principal appellants having succeeded in part on his appeal, no costs were allowed in this court for or against any party, and the expense of printing the record was charged equally on such two appellants.

The case is stated in the opinion of the court.

Mr. Edward S. Isham and *Mr. Wheeler H. Peckham* for Union Trust Company.

Mr. Edward S. Isham for Borg & others.

Mr. H. Crea and *Mr. Charles A. Ewing* for Waring & others.

Mr. John M. Butler, *Mr. John T. Dye* and *Mr. W. P. Fishback* for Fletcher & another.

Mr. H. S. Greene for Wabash, St. Louis & Pacific Railway Company.

Mr. John M. Palmer and *Mr. Josiah M. Clokey* for Sylvester & others.

Mr. Justice Blatchford delivered the opinion of the court.

The Peoria, Atlanta and Decatur Railroad Company was incorporated as an Illinois corporation, in 1869, to construct a railroad from Peoria, in Tazewell County, in a general southeasterly direction, through Atlanta, in Logan County, to Decatur, in Macon County. Such of the road as was constructed was built in 1873 and 1874, from a point five miles east of Peoria, on what is now the Wabash, St. Louis and Pacific Railroad, to a place called Maroa, on the Illinois Central Railroad, thirteen miles north of Decatur. It did not reach either Peoria or Decatur, and the company owned no station grounds or terminal facilities at either place, but used, by lease, five

miles of what is now the Wabash, St. Louis and Pacific Railroad, to reach Peoria, and thirteen miles of the Illinois Central Railroad, to reach Decatur. On the 25th of April, 1872, the company executed a mortgage to James F. Secor, as trustee. The mortgage recited that the company had commenced to construct a railroad to "extend from Cunningham's crossing, five miles from the city of Peoria, on the Toledo, Peoria and Warsaw Railway, thence southeast, to a point at or near to the city of Decatur," "a distance of about sixty-seven miles," and it covered the company's franchises, and its road and property, as constructed and to be constructed, acquired and to be acquired, "commencing at Cunningham's crossing, five miles from the city of Peoria, on the Toledo, Peoria and Warsaw Railway, to the city of Decatur," "a distance of sixty-seven miles." It was given to secure 1300 coupon bonds of the company, of $1000 each, payable to bearer, amounting to $1,300,000, carrying semi-annual interest at seven per cent. per annum, and payable May 1, 1902. The mortgage provided that on default continuing more than sixty days in the payment of any interest on any bond, the trustee, on the request of the holders of a majority of the bonds, might and should take actual possession of the mortgaged property, and operate the road, and receive its income, to pay the bonds, or, on the written request of the holders of at least one-half of the outstanding bonds, cause the mortgaged property to be sold at public auction, and convey it to the purchaser, and, "after deducting from the proceeds of said sale the costs and expenses thereof, and of managing such property," apply the proceeds to pay the principal and interest of the bonds. The mortgage also provided that the trustee should "be entitled to have proper compensation for every labor or service performed by him in the discharge of this trust, in case he shall be compelled to take possession of said premises and manage the same." This mortgage was delivered and duly recorded.

The Paris and Decatur Railroad Company was incorporated as an Illinois corporation, in 1861, to construct a railroad from Paris, in Edgar County, westwardly to reach Decatur. This road was constructed, in 1871 and 1872, from Paris to a point

on the Illinois Central Railroad about two miles south of Decatur, and, although it had its own station and grounds at Decatur, it entered them by using, by lease, about two miles of the track of the Illinois Central Railroad. On the 1st of July, 1871, the Paris and Decatur Company executed a mortgage to Joseph U. Orvis and William Adams, Senior, covering its franchises and its line of road and property, constructed and to be constructed, acquired and to be acquired, extending from Paris to Decatur, "a distance of seventy-five miles," to secure 800 coupon bonds of $1000 each, and 800 coupon bonds of $500 each, in all $1,200,000. The mortgage was delivered and recorded, and the bonds were put into the hands of the trustees, and some of them were issued but afterwards retired, and all of them were destroyed, but the mortgage remains on record, not released. On the 1st of July, 1872, the Paris and Decatur Company executed a mortgage to the Union Trust Company, a New York corporation, covering its franchises, and its road and property, constructed and to be constructed, acquired and to be acquired, extending from Paris to Decatur, "a distance of seventy-five miles," to secure 2400 coupon bonds, of $500 each, payable to bearer, in all $1,200,000, carrying semi-annual interest at seven per cent. per annum, and payable July 1, 1892. The mortgage provided, that in case default in paying any interest on any bond should continue for six months after demand, the principal of all the bonds should forthwith become due, and the lien might be at once enforced, in which case it should be lawful for the trustee to enter on the mortgaged property, and to use and operate it until it should be sold under the power contained in the mortgage, or under the decree of a competent court, "and until such time, and from time to time, to make all needful repairs and replacements, and such useful alterations, additions and improvements to said railroad as may be necessary for the proper working of the same, and to receive the tolls, freights, incomes, rents, issues and profits thereof, and, after deducting the expenses of operating and managing the said railroad and other property, and of the said repairs, replacements, additions and improvements, as well as just compensation for its own services and for the services and disburse-

ments of such attorneys and counsel as it may employ, to apply the moneys accruing as aforesaid to the payment of said bonds *pro rata*." The mortgage also provided, that, in case default should be made and should continue as aforesaid, the trustee might, and, upon the written request of the holders of at least one thousand of the bonds outstanding, should, foreclose the mortgage by legal proceedings, or should sell the mortgaged property at public auction at New York or at Paris, and convey it to the purchaser; and that, in case of such sale, the trustee should deduct from the proceeds its just allowances for the expenses thereof, including attorney's and counsel fees and disbursements, "and all expenses which may be incurred in operating, managing or maintaining the said railroad, or in managing the business thereof, as well as just compensation for the services of said trustee," and thereafter apply the proceeds to pay the principal and interest of the bonds *pro rata*. This mortgage was delivered and duly recorded.

The Paris and Terre Haute Railroad Company was organized as a corporation, under the general railroad laws of Illinois, in 1873, and the road was built in 1873 and 1874. It runs eastwardly from Paris to Farrington, in Illinois, a point on the St. Louis, Vandalia and Terre Haute Railroad, seven miles west of Terre Haute, and the company uses, by lease, the track of the latter road to reach Terre Haute. On the 1st of April, 1874, the company executed a mortgage to the Union Trust Company, covering its franchises and its road and property, constructed and to be constructed, acquired and to be acquired, extending from Paris to the junction with the St. Louis, Vandalia and Terre Haute Railroad, a distance of about fourteen miles, to secure 280 coupon bonds, of $1000 each, payable to bearer, in all $280,000, carrying semi-annual interest at the rate of seven per cent. per annum, and payable April 1, 1894. The mortgage contained like provisions with the Paris and Decatur mortgage as to what might be done after six months' default in interest, and as to taking possession of the property, and as to the powers of the trustee, and as to foreclosure or sale and disposition of the proceeds. This mortgage was delivered and duly recorded.

On the 19th of September, 1874, the Paris and Decatur Company conveyed by deed to the Peoria, Atlanta and Decatur Company, in consideration that the latter company thereby assumed "all the bonded and floating indebtedness" of the former company, the railroad then in operation, described as extending from Paris to Decatur, "passing into and through the counties of Edgar, Coles, Douglass, Moultrie and Mason," including the franchises of the former company, and all its property acquired and to be acquired.

On the same day the Paris and Terre Haute Company conveyed by deed to the Peoria, Atlanta and Decatur Company, in consideration that the latter company thereby assumed the payment of "all the bonded and floating indebtedness" of the former company, the railroad then in operation, described as extending from Paris to the line between Indiana and Illinois, "passing into the counties of Edgar and Clark," including the franchises of the former company, and all its property acquired and to be acquired.

These purchases on these terms were authorized by the stockholders and directors of the purchasing company, and by the respective stockholders and directors of the selling companies, and the deeds were delivered and duly recorded.

On November 2, 1874, the Peoria, Atlanta and Decatur Company, under the provisions of the general law of Illinois, changed its name to that of the "Illinois Midland Railway Company." On the 1st of January, 1875, that company executed to the Union Trust Company a mortgage covering all of its property, including that so purchased, to secure 8350 coupon bonds, of $500 each, in all $4,175,000, bearing semi-annual interest at seven per cent. per annum, and payable January 1, 1905. This mortgage was delivered and recorded.

On the 11th of September, 1875, Robert G. Hervey and two other parties filed a bill in equity in the Circuit Court of Edgar County, Illinois, against the Illinois Midland Railway Company. It set forth that Hervey owned a majority of the stock of the corporations above named, and that the other plaintiffs were judgment creditors of the Paris and Decatur Company,

with executions returned unsatisfied; that there were judgments to the amount of about $200,000 against the Illinois Midland Company, on account of the construction and operation of the various corporations, and pending suits against it for about $100,000, on like account, and executions out against it for over $100,000, on debts of the various corporations, on which its property was advertised for sale; that certain creditors and stockholders of the Paris and Decatur Company, a minority in number and amount, were threatening to have the Illinois Midland Company and its property placed in the hands of a receiver; that the plaintiffs represented a majority of the stock in all of the corporations, and desired to have a receiver of the franchises, railways and rolling-stock of the corporations appointed immediately, and without further notice, or the rights of the creditors and stockholders would be irreparably prejudiced; that negotiations were pending, which the plaintiffs believed would be successful, to raise sufficient money to pay off all judgments, liens and claims against the company, if left under the present control, or under that of the holders of a majority of the stock; that, to effect such loans or advances of money, it was absolutely necessary that the respective debts of the various corporations should be ascertained, and, when their respective liabilities to each other and to their respective creditors were fixed, they could, on their joint stock and assets, raise sufficient money to relieve them from their embarrassments and pay all their creditors; that, if a receiver was appointed to take charge of them and settle their affairs, their credit would be restored as soon as their condition should be adjudged by the court; and that they had ample assets, if not sacrificed by sales on execution and construction liens, to pay all indebtedness and leave a sufficient surplus to run the road for the benefit of the stockholders. The prayer of the bill was, that a receiver be appointed of all the rights and franchises of the Illinois Midland Company, and of all the property in its control, and that an account be taken of all the claims, liens and liabilities of its stockholders and creditors, and of those of the corporations above named, and they be ordered to be paid and adjusted, as the respective rights and interests

of such stockholders and creditors should appear; and for further and other relief, according to equity.

On the same day the Illinois Midland Company appeared to the bill by attorney, and waived notice, and submitted itself to the court for such order in the premises as might in equity be right and proper, and the judge of the court, at chambers, made an order appointing as receiver George Dole, of Paris, and requiring him to give a bond for $75,000, with security, and then to "forthwith take possession of all the personal, real and mixed property of every kind belonging to or in the possession of said Illinois Midland Railway Company, including the property formerly owned and possessed by the Peoria, Atlanta and Decatur Railroad Company, the Paris and Decatur Railroad Company, and the Paris and Terre Haute Railroad Company, and, if necessary, to sue for, in the name of said receiver, and recover, all the property of said company or companies, whether real, personal or mixed, and whether in possession or in action." The order also provided as follows:

"It is further ordered, adjudged and decreed, that said receiver be, and is hereby, empowered and directed to carry on the business of said railway companies until the respective rights of the parties in interest can be fully ascertained and determined, under and subject to the revision and direction of this court, and until otherwise ordered by this court, and to use and employ the property, franchises, rights of way, roadbed, tracks, locomotives, rolling-stock, machinery, fixtures, and property of whatever kind or nature; and said receiver shall be, and hereby is, invested with all the rights and franchises vested by law in said railway company or companies, in the execution of the duties and trusts aforesaid. Said receiver shall have authority to employ all necessary and proper agents, attorneys, officers and laborers, and to fix and alter the compensation of said agents, attorneys, officers and laborers, subject to the revision of this court. Said receiver shall also have authority, subject to the revision of this court, to make such repairs and necessary additions to said railway, or railroads, and property, as may be essential to the interests and safety of the same, and proper in his judgment for carrying on said bus-

iness; also to make all contracts that may be necessary in carrying on the business of said company or companies, subject to like supervision of this court; also to collect in his own name, as receiver aforesaid, all debts, claims or demands, of whatever kind or nature, owing, or that may become due and owing, to the said company or companies, or to said receiver, from any and all sources. Said receiver is also ordered to make a full, true and correct inventory of all the property that may come into his hands as such receiver. It is further ordered, adjudged and decreed, that, out of the moneys that shall come into the hands of said receiver from the operation of said railway, he shall: *First.* Pay all current expenses incident to the creation or administration of this trust, and to the operating of said railway or railroads. *Second.* Pay all sums due or to become due connecting or intersecting lines of railroads, arising from the interchange of business, and for track service of other railroads used by said Illinois Midland Railway Company in the operation of its lines, and all amounts now legally due from said railway company or companies for taxes. *Third.* Pay all amounts due to all operatives and employés and attorneys and agents of said company or companies, for any service rendered said company or companies since the 11th day of March, A. D. 1875. *Fourth.* Pay all amounts due for supplies purchased and used in operating said railway or railroads by said company or companies, for supplies furnished to laborers and credited against their labor, since the 11th day of March, A. D. 1875. *Fifth.* And all amounts due from said railway company for or on account of the rental of rolling-stock; and the money belonging to said railway company, except as heretofore directed, shall be held by said receiver until he is authorized to disburse the same under the order or decree of this court. *Sixth.* And said receiver is further authorized, in case it is proper in his judgment, with the sanction of the court, to use any balance of funds arising from the operating of said railway or railroads, for the purpose of protecting such of the real or personal property of said corporation or corporations, under lien, sale, pledge, mortgage or contract. It is further ordered, that, upon demand, the said

company or companies, their officers or agents, shall forthwith deliver over to the receiver all the property aforesaid, and that neither said company or companies, nor any officer or agent or employé of said companies, shall interfere with or molest the possession or enjoyment of any of said property in the possession of or placed under the control of said receiver. It is further ordered, that said receiver shall retain possession and continue to discharge the duties and trusts aforesaid, until the further order of this court in the premises; and that he shall, from time to time, make report of his doings in the premises, and may, from time to time, apply to this court for such other and further order and direction in the premises as he may deem necessary and requisite to a due administration of said trust, and said receiver is hereby vested, in addition to the powers aforesaid, with all the general powers of receiver in cases of this kind, subject to the supervision of this court." The bond was given and was approved by the court, and at September Term, 1875, an order was made entering of record the order at chambers, and the receiver's bond and oath, and directing him to proceed, as before ordered.

On the 16th of October, 1875, an amended bill was filed, the plaintiffs in which were Hervey, and also William Waring, Henry Waring, and Charles Waring, partners, as Waring Brothers, and thirty-one other persons. It set forth that Hervey then owned 27,500 shares, or $1,375,000, of the 32,000 shares, at $50 each, or $1,600,000, of the capital stock of the Paris and Decatur Company; and 14,200 shares, or $1,420,000, of the 20,000 shares, at $100 each, or $2,000,000, of the capital stock of the Peoria, Atlanta and Decatur Company; and 4500 shares, at $100 each, or $450,000, being the entire capital stock of the Paris and Terre Haute Company. It also set forth that Waring Brothers then owned one-fourth, or $500,000, of the capital stock of the Illinois Midland Company; and 1543 of the bonds of that company; and 885 others of its bonds, which they had taken in exchange for 885 bonds of the Paris and Decatur Company, of like amount. The other plaintiffs were judgment and general creditors of the four corporations, whose debts were stated at $108,112.23, on account of the

construction and operation of the various companies. The amended bill averred that, in consequence of the facts set forth in the original bill, and which were repeated, the Illinois Midland Company was unable to transact its necessary business; that the executions and levies referred to had removed from its use a large portion of its rolling-stock; that the suits and judgments had seriously impaired its credit, and it was unable to procure the necessary supplies, materials and labor to successfully operate the road; and that some of the hands employed in maintaining its track had declined to labor further, whereby its track had become unsafe. The prayer of the amended bill was the same as that of the original bill.

The further action of the court in regard to the receiver and his successors, and their proceedings, will be referred to hereafter, as questions in regard to those proceedings shall be considered.

On the 15th of February, 1876, Albert Grant and Maurice Grant, partners, as Grant Brothers & Co., of London, and also James F. Secor, petitioned and were admitted to be defendants, and on the same day they filed their respective answers to the amended bill. Grant Brothers & Co. claimed to own 1200, or one-half of the Paris and Decatur bonds, 1200 of the 1300 Peoria, Atlanta and Decatur bonds, and all (280) of the Paris and Terre Haute bonds; and that the lien of their bonds was superior to the claims of any of the plaintiffs.

The answer of Secor set up his mortgage, and alleged that none of the interest due May 1, 1875, on the bonds of the Peoria, Atlanta and Decatur Company, had been paid, and he had been requested by the holders of a majority of those bonds to take steps to protect their interests; and that by the terms of the mortgage he was entitled to take possession of the road for the benefit of the bondholders. He asked that the court would order the receiver to turn over to him the property covered by the mortgage of the Peoria, Atlanta and Decatur Company.

On the 4th of October, 1876, the Paris and Decatur Company and the Paris and Terre Haute Company were made defendants to the bill, and they severally appeared on October 10, 1876, and at the March Term, 1877, put in answers.

Opinion of the Court.

On the 5th of December, 1876, the Union Trust Company filed a bill in the Circuit Court of the United States for the Southern District of Illinois, against the four corporations and Hervey and Secor, to foreclose the three mortgages made to the Union Trust Company. But this suit does not appear to have been further prosecuted, except that by the interlocutory decree of June 11, 1884, hereafter mentioned, it was consolidated with the other causes.

At September Term, 1877, the Union Trust Company was, by order, made a party defendant in the Hervey suit, "with all the rights and privileges as though it had been an original defendant," on its petition setting forth a default July 1, 1875, in the payment of interest on the Paris and Decatur bonds, and that it had demanded and been refused payment of such interest, and that the principal and interest of the bonds had become due, and that a majority of the holders of the bonds had required it to proceed to foreclose the mortgage; and that the same was true as to a default October 1, 1875, in the payment of the interest on the Paris and Terre Haute bonds, and as to a default July 1, 1875, in the payment of the interest on the Illinois Midland bonds.

On the 15th of February, 1878, the Union Trust Company filed a bill in the Circuit Court of the United States for the Southern District of Illinois, against the Paris and Decatur Company and the Illinois Midland Company, to foreclose the Paris and Decatur mortgage, alleging a default January 1, 1876, in the payment of interest on the Paris and Decatur bonds; that the Illinois Midland Company, in issuing its 8350 bonds, intended to exchange them, dollar for dollar, for the bonds of the other three corporations; and that more or less of the Paris and Decatur bonds were exchanged, and some were, on exchange, marked cancelled, but the persons who exchanged them claimed that the purchases by the Peoria, Atlanta and Decatur Company of the other two roads were void, and that the bonds issued by the Midland Company were void, and that the exchange and cancellation of the Paris and Decatur bonds were void, and that those bonds remained the property of their former owners.

On the same day the Union Trust Company filed a bill in the same Federal court against the Paris and Terre Haute Company and the Illinois Midland Company, to foreclose the Paris and Terre Haute mortgage, alleging a default October 1, 1875, in the payment of interest on the Paris and Terre Haute bonds, and containing, in regard to the exchange of those bonds, like allegations with those above set forth as to Paris and Decatur bonds, in the bill to foreclose the Paris and Decatur mortgage.

On the same day Secor filed a bill in the same Federal court, against the Illinois Midland Company, to foreclose the Peoria, Atlanta and Decatur mortgage, alleging a default May 1, 1875, in the payment of interest on the Peoria, Atlanta and Decatur bonds.

On the 6th of April, 1878, by an order of the State court, the Hervey suit was, on a petition filed by the Union Trust Company, removed into the Circuit Court of the United States for the Southern District of Illinois.

On the 13th of August, 1879, the last two suits brought by the Union Trust Company and the suit brought by Secor were consolidated by the Federal court.

On the 31st of August, 1881, Abe Freidenberg, on behalf of himself and other holders of Paris and Decatur bonds, filed a bill to foreclose the Paris and Decatur mortgage, in the same Federal court.

The last two suits brought by the Union Trust Company, the suit brought by Secor, the Hervey suit, the Freidenberg suit, and a suit which had been brought in the same Federal court, by the Kansas Rolling-Mill Company, in January Term, 1879, against the Illinois Midland Railway Company and others, were consolidated by an order made June 23, 1882.

Many of the contested questions in these cases arise out of the transactions of the receiver originally appointed and his successors, especially in issuing receiver's certificates; and the contest, as presented to this court, is substantially one between the Paris and Decatur bondholders on one side, and those who claim a priority of lien over the bonds on the other.

On the 31st of August, 1876, Richard J. Rees was, by an order made at chambers, by the Judge of the State court, in

the Hervey suit, appointed receiver in the place of Dole, resigned, and the order was confirmed by the court at the September Term, 1876. On the 10th of December, 1878, Louis Genis was, by an order made by the Federal court in the Hervey suit, appointed receiver in the place of Rees, resigned. On the 4th of April, 1882, by an order made in the Freidenberg suit, David H. Conklin was appointed receiver in the place of Rees, resigned, and on the 13th of April, 1882, a like order was made in the Hervey case. Genis having filed his final report, the court made an order, on May 13, 1882, appointing a special commissioner to examine and report thereon, and on the correctness of Genis' accounts. By an order made June 13, 1882, power was given to the commissioner to examine witnesses as to the contents of the report and the acts of Genis as receiver. By an order made June 22, 1882, the commissioner was directed to investigate and report in detail the number and amount of certificates of indebtedness issued by the several receivers, and for what purpose they were issued, and to whom, and the number and amount of such as were special liens on any of the property, and the character of the charge of all which were not specific liens. By an order made June 23, 1882, it was ordered that the issues in the consolidated causes be made up by a day named, and that by that day the commissioner report the amount of receiver's certificates outstanding, for what they were given, and by whom held, and the amount of the receivers' indebtedness and to whom due.

On the 18th of April, 1883, the commissioner made a report, as to the matters referred to him, to which exceptions were filed by Freidenberg, by the Union Trust Company and Secor, and by judgment creditors of the Paris and Decatur Company, and by Adams and Orvis. On the 7th of June, 1884, the commissioner filed a supplemental report. He also reported the testimony taken before him. The cases were brought to a hearing in the Circuit Court before Mr. Justice Harlan, (all orders made in them prior to that time, in the Federal court, having been made by the District Judge), and he passed on the various questions raised, in an opinion filed February 29,

1884. An interlocutory decree was entered June 11, 1884, confirming the report of the commissioner in all things, and making specific adjudications as to the validity and status of eighteen different series of receiver's certificates, and of other debts incurred by the receiver, and referring it to the same commissioner to take certain accounts, and to report the amounts due on the various outstanding bonds, and the numbers and amounts of the bonds of the sectional mortgages which had been surrendered and exchanged for Illinois Midland bonds, and what Paris and Decatur bonds remained outstanding, which had not been exchanged for Illinois Midland bonds, and the amount due from one to the other of the three sectional roads, making proper allowance for the use by them respectively of rolling-stock or terminal facilities belonging to the others, and for moneys paid by one for expenses or debts properly payable by another; and to report a proper distribution of the liens or obligations on or of the different roads, to pay any of the receiver's certificates or indebtedness; and as to which road should pay for terminal facilities, and what indebtedness the receivers had incurred therefor, and for rent of rolling-stock, motive power, and other matters; and to take and report all other testimony offered by any party, pertinent to the issues. The commissioner was also directed to take an account of all the indebtedness of the receivership, and of all claims of employés which accrued within six months before the first appointment of a receiver, and of all claims for rights of way or lands used for railroad purposes, not paid for, and of all bonded indebtedness of the four corporations, properly classified; and to report as to all contested claims, with the testimony thereon.

The commissioner made his report on the 15th of January, 1885, accompanied by the additional testimony he had taken. Freidenberg and other holders of Paris and Decatur bonds filed exceptions to it, as did Waring Brothers and certain judgment creditors of the Paris and Decatur Company and of the Illinois Midland Company.

The case was heard in the Circuit Court by Mr. Justice Harlan, and on the 3d of June, 1885, a final decree was en-

tered disposing of the questions litigated, and providing for a sale of the mortgaged property and the distribution of the proceeds. Freidenberg appealed to this court from specified parts of the decree of June 11, 1884, and from specified parts of the decree of June 3, 1885, as representing holders of Paris and Decatur bonds, but this appeal was not perfected, and in place of it, Simon Borg, Leo Speyer, and Samuel Lichtenstadter were admitted as parties to the consolidated causes, as holders of Paris and Decatur bonds, and by leave took and perfected an appeal from specified parts of both decrees. Waring Brothers and the Union Trust Company have taken separate appeals from the last decree; and Stoughton J. Fletcher and Francis M. Churchman, partners as S. A. Fletcher and Company, have appealed, as holders of receiver's certificates, from that decree.

It will be proper to first consider the question of the receiver's certificates.

The final decree declares that the lien of the Paris and Decatur bonds is subject to certain receiver's certificates of the 8th, 12th, 14th, 16th, 17th and 18th series, which are to have priority in payment to the Paris and Decatur bonds, out of the proceeds of sale of the Paris and Decatur road, and which amount, with interest to January 15, 1885, to $200,408.87.

There are six certificates of $5000 each, of the 8th series, bearing ten per cent. interest. They were issued under an order made October 9, 1876, which states that the court finds that the entire line from Peoria to Terre Haute is in great need of immediate repair, and in an unsafe condition to be operated, and that the line between Paris and Decatur is in a worse condition than any of said line, and requires an immediate outlay, for iron, ties, and other materials, ballasting and labor, to put it in a safe condition, of $34,076, and authorizes the receiver to borrow $34,360, to be expended in repairing the Paris and Decatur road, and to issue receiver's certificates therefor in sums of $5000 each, bearing ten per cent. interest, and declares that the certificates "shall be a first lien on the right of way, iron, ties, bridges and entire railway property on said portion of the line between Paris and Decatur." The

commissioner finds that the moneys were expended in accordance with the order.

There is one certificate of the 12th series, for $32,475.20, with ten per cent. interest, issued under two orders, to borrow money to pay off tax liens, the orders declaring that it should be a lien on the Paris and Decatur line superior to the mortgage and to all prior certificates. It was taken at par. When it was issued the legal rate of interest was eight per cent., ten per cent. having been the legal rate at the time of the first order, and having been the rate specified in that order, and the authority conferred by the first order being made part of the second. The commissioner states that the only dispute was as to the rate of interest; that the money was advanced under the first order, made July 26, 1878, before the issue of the cirtificate, and at a time when the legal rate of interest was ten per cent.; that that order authorized the sale of the certificate at ninety cents on the dollar; that the mortgagees and bondholders waive any plea of usury, and the corporation itself could not plead usury; and that that defence was made only by the trustee for the holders of surrendered bonds and by judgment creditors. The commissioner reported it as his opinion that the certificate should have effect, as to its amount and lien and rate of interest, as authorized, and according to its purport. The Circuit Court confirmed this view.

There is one certificate of the 14th series, for $4376 and eight per cent. interest, issued under the before-named order of October 9, 1876, and a subsequent order made January 29, 1881, for money to repair the Paris and Decatur road, being for the balance of money authorized by the first order, the second order declaring the like lien as the first order.

There is one certificate of the 16th series, for $9505 and eight per cent. interest, and three certificates of the 17th series, two of them for $10,000 each, and one for $5495, all with eight per cent. interest, issued under an order made June 29, 1881, which set forth that it was necessary to the protection of the railroad property that an outlay should be made forthwith for betterments; and authorized the receiver to expend in betterments on the line between Paris and Decatur, $35,000, and to

issue certificates to procure money for that purpose, and sell them at not less than ninety cents on the dollar, the same to be a special charge on the line and railroad property between Paris and Decatur, superior to all liens and debts, except receiver's debts before declared by order of court to be special charges or liens on that portion of the railroad. The commissioner states that these certificates were sold, some at four and some at six per cent. discount; and that the holders of the certificates, when they bought them, had no connection with the case or with the parties.

There are four certificates of the 18th series, three of them for $10,000 each, and one for $8,288.98, all at eight per cent interest, issued under another order made June 29, 1881, which set forth that the receiver had expended on the Illinois Midland road, for side tracks and other betterments, $80,037.98, of which $42,664.98 had been expended on the line between Paris and Decatur; that of the $80,037.98, $63,037.98 had been paid out of the earnings of the line, of which $38,288.98 was expended on the line between Paris and Decatur; that the earnings of the whole line had not been sufficient to meet the usual expenses of operation and the ordinary repairs of the permanent way; and that the receiver had incurred unpaid debts to a larger amount than $63,037.98, in the usual operation of the line and in ordinary repairs of the permanent way. The order approved and confirmed the appropriation of the $63,037.98 out of the earnings in payment for betterments; declared that that sum was a special charge and lien on the several portions of the line in proportion to the amounts expended on the respective portions; and authorized the receiver to issue certificates to the amount of $38,288.98, at eight per cent. interest, as representing so much of the $63,037.98 as was expended for betterments on the line between Paris and Decatur, the same to be a special charge and lien on the line and railroad property between Paris and Decatur, superior to all liens and debts except receiver's debts before declared by order of court to be special charges and liens on that portion of the railway; and the certificates to be sold at not less than ninety cents on the dollar. The certificates were sold at a discount within that permitted.

Simon Borg and others appeal because of the priority awarded to the above-named sixteen receiver's certificates.

When the order of October 9, 1876, was made, under which the six certificates of the 8th series were issued, neither the trustee nor any of the bondholders of the Paris and Decatur Company were parties to the suit. But before any other order was made under which any of the sixteen certificates referred to were issued, the Union Trust Company had become a party to the Hervey suit as trustee in the Paris and Decatur mortgage, and the default in the payment of the interest on the Paris and Decatur bonds had occurred by January 1, 1876.

The certificates of the 8th and 14th series were issued for necessary repairs; that of the 12th to pay tax liens; those of the 16th and 17th for betterments; and those of the 18th to replace earnings diverted from paying for operating expenses and ordinary repairs, to pay for betterments, while debts to a larger amount had been incurred for the operating expenses and ordinary repairs.

In regard to the certificates issued for necessary repairs there can be no doubt, either on authority or on principle. In *Wallace* v. *Loomis*, 97 U. S. 146, on the filing of a bill by the trustees of the first mortgage on a railroad, to foreclose it, the court appointed receivers, "with power to put the road and property in repair, and to complete any uncompleted portions thereof, and to procure rolling-stock, and to manage and operate the road to the best advantage, so as to prevent the property from further deteriorating and to save and preserve it for the benefit and interest of the first mortgage bondholders and all others having an interest therein;" and with power, also, for those purposes, to raise money, by loan, to an amount limited in the order, by issuing certificates "which should be a first lien on the property." The final decree declared that the moneys raised by loan, or advanced by the receivers and expended on the road pursuant to the order, were a lien paramount to the first mortgage, and should be paid out of the proceeds of sale before the first mortgage bonds were paid. A holder of second mortgage bonds objected to such priority. On that subject, this court said, by Mr. Justice Bradley: "The

power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund." It is true that the second mortgage trustees in that case were parties to the suit when the order was made, and had due notice of the application, and made no objection. As to that the court said, that the bondholders were represented by their trustees and must be regarded as bound by their acts, at least so far as concerned " the power of the court to act, in making the order, and so far as the interest of third persons acting upon the faith of it might be affected." pp. 162–3. It also said that, when the appellant became a party, he suggested no objection to the terms of the order appointing the receivers, and that there was no just exception to the order or the decree.

Property subject to liens and claims and debts, of various characters and ranks, which is brought within the cognizance of a court of equity for administration, and conversion into money, and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but if perishable, it must be sold, by way of preservation. A railroad, and its appurtenances, is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the

corporation which constructed it were given not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations, must necessarily be held to do so in the view, that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent, nor on prior notice. Consent is desirable, but is seldom practicable, where the debts exceed the value of the property. Though prior notice to persons interested, by notifying them as parties, first requiring them to be made parties if they are not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice. A full opportunity, as in this case, to be heard, on evidence, as to the propriety of the expenditures and of making them a first lien, is judicially equivalent. The receiver, and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court, in regard to the loans. The court always retains control of the matter, its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments.

The principle laid down in *Wallace* v. *Loomis*, was applied in *Miltenberger* v. *Logansport Railway Co.*, 106 U. S. 286, 311, 312. In that case a bill was filed by a second mortgagee against the mortgagor, and a first mortgagee, and judgment creditors of the mortgagor, to foreclose a mortgage on a railroad. On the day the bill was filed, and without notice to the first mortgagee, a receiver was appointed, and power given him to operate and manage the road, "receive its revenues, pay its operating expenses, make repairs, and manage its entire business, and to pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and to pay into the court

all revenue over operating expenses." After that, and without notice to the first mortgagee, who had not appeared, though notified of the order appointing the receiver, and of the pendency of the suit, the court authorized the receiver to purchase engines and cars, and to adjust liens on cars, owned by the mortgagor, and to pay indebtedness not exceeding $10,000, to other connecting lines of road, in settlement of ticket and freight accounts and balances, and for materials and repairs, which had accrued in part more than ninety days before the order appointing the receiver was made, and to construct five miles of new road, and a bridge. The petition for the order stated the necessity for the rolling-stock and for the adjustment of the liens; that the payment of the connecting lines was indispensable to the business of the road, and it would suffer great detriment unless that was provided for; and that the new road and the bridge would come under the mortgages, and their construction would be to the advantage of the bondholders. After the first mortgagee had appeared and answered, an order was made, but not on prior notice to it, authorizing the receiver to issue certificates to pay for rolling-stock he had bought under orders of the court, and to pay debts incurred for building the five miles of road and the bridge, under those orders, and to pay debts incurred for taxes, and rights of way, and back pay and supplies in operating the road, the certificates to be payable out of income, and, if not so paid, to be provided for by the court in its final order. Claims thus arising were afterwards allowed, to be paid out of the proceeds of sale, before the mortgage bonds. This court upheld such priority, as to the debts for the purchase of rolling-stock, and for the adjustment of liens, and for the construction of the five miles of road and the bridge, and for the amount due connecting lines, some of which was incurred more than ninety days before the receiver was appointed. On the latter branch of the subject it said: "It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of cer-

tain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of nonpayment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking by Mr. Justice Woods, in *Barton* v. *Barbour*, 104 U. S. 126."

In allowing the certificates of the 8th and 14th series, for necessary repairs, with priority, the master acted, and we think properly, on the authority of the cases of *Wallace* v. *Loomis* and *Miltenberger* v. *Logansport Railway Co.*

In this connection it is objected that in those cases the suits were foreclosure suits brought by trustees under mortgages, and that a different rule should obtain in a case where the trustees or the bondholders do not come into court initially, asking the aid of equity in the appointment of a receiver. It is said that the Hervey suit was not such a suit. But the co-

plaintiffs with Hervey were judgment creditors of the Paris and Decatur Company, with executions returned unsatisfied. The bill set out the precarious condition of all the property held and used by the Illinois Midland Company, and the necessity for a receiver in the interest of all the creditors of all four of the corporations, to prevent the levy of executions on such property; and it prayed for a judicial ascertainment and marshalling of all the debts of all the corporations, and their payment and adjustment as the respective rights and interests of the creditors might appear, and for general relief. The plaintiffs set forth that they represented a majority of the stock in all the corporations. This bill was quite sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties before adjudging the merits.

In regard to the fact that neither the Paris and Decatur bondholders nor their trustee were parties to the suit when the order of October 9, 1876, was made, the commissioner took the view, which the Circuit Court confirmed, that while they ought to be heard before the order was made conclusive against them, yet, as the objections to the merits of the order would not have been availing if made before it was entered, and the money had been actually and faithfully applied, under the order of the court, to the improvement of the mortgaged property, no equitable reason appeared why the bondholders should keep the benefits and escape the burden.

The certificate of the 14th series was issued not only under the order of October 9, 1876, but under that of January 29, 1881. The Union Trust Company was admitted, on its own petition, to be a party defendant in the Hervey suit in September, 1877. That petition stated that the interest on the Paris and Decatur bonds had been in default since July 1, 1875. The order of January 29, 1881, was made by the Federal court. The Union Trust Company had removed the Hervey suit into the Federal court in April, 1878, and had filed in that court a foreclosure bill on the Paris and Decatur mortgage as early as December, 1876, and another such bill in February, 1878. The interest on the Paris and Decatur bonds had been in default,

as the latter bill alleged, since January 1, 1876, and the receiver was in open possession of the entire line of road, and running it, and exercising the powers which the orders of the courts had conferred upon him. Under these circumstances, the Paris and Decatur trustee and its bondholders in court, through it, can be heard to make no other objections to the orders except such as arise as to the merits of the expenditures made under them. The view of the commissioner and the Circuit Court was, that the bondholders should have such rights and equities as they could have properly claimed as parties *ab initio*, and that this view should apply against them as well as for them. In this we concur.

The principles properly applicable to this branch of the case were well expressed by Mr. Justice Harlan in his opinion of February 29, 1884, as follows: "Those who take receiver's certificates must be deemed to have taken them subject to the rights of parties who have prior liens upon the property, and who have not, but should have been, brought before the court. While the court, under some circumstances, and for some purposes, and in advance of the prior lien-holders being made parties, may have jurisdiction to charge the property with the amount of receiver's certificates issued by its authority, it cannot, without giving such parties their day in court, deprive them of their priority of lien. When such prior lien-holders are brought before the court, they become entitled, upon the plainest principles of justice and equity, to contest the necessity, validity, effect, and amount of all such certificates, as fully as if such questions were then, for the first time, presented for determination. If it appears that they ought not to have been made a charge upon the property, superior to the lien created by the mortgages, then the contract rights of the prior lien-holders must be protected. On the other hand, if it appears that the court did what ought to have been done, even had the trustee and the bondholders been before it when the certificates were authorized to be issued, the property should not be relieved from the charge made upon it, in good faith, for its protection and preservation. Of these rules or principles the parties who inaugurated this litigation cannot justly complain.

They were not ignorant of the fact that there were existing mortgages upon this property, and that fact should have been brought to the attention of the court at the very outset. Nor have the bondholders any ground of complaint if the court charges upon the property such expenditures as now appear to have been rightfully made in the interest of all concerned in its management, while in the hands of a receiver. As to receiver's certificates issued, with the sanction of the court, after the trustees became parties, the purchasers and holders should be accorded such rights as, by the settled principles of equity, are accorded to those who deal with judicial tribunals having jurisdiction in the premises."

The propriety of the allowance of the certificate of the 12th series for tax liens needs no argument, and we think the interest, as allowed, was proper.

As to the $35,000 of certificates of the 16th and 17th series, issued to pay for betterments, the present holders, who bought them directly from the receiver, had no connection with the case or with the parties. A question was made before the commissioner that the receiver did not faithfully apply the money as directed by the court. He held, and the Circuit Court sustained him, that these purchasers were not bound to see to the application of the proceeds, citing the decision to that effect by Mr. Justice Woods, in *Stanton* v. *Alabama & Chattanooga Railroad Co.*, 2 Woods, 506. In this view we concur.

It was also contended before the commissioner, that all that the holders of these certificates were equitably entitled to was the money they paid, and without interest, and not the face of the certificates and interest. The view taken by the commissioner and confirmed by the Circuit Court, was that, as the certificates were issued for debts contracted by the court, when it had jurisdiction of the parties and of the subject matter, to persons who in good faith invested their money for the benefit of the property in the possession of the court, the certificates should be paid according to their tenor, as authorized. We concur in these views. It may be added that, as the order of June 29, 1881, authorized the certificates to be sold at not

more than ten per cent. discount, it must be presumed that the parties taking the certificates relied on the promise to pay their face, and would not otherwise have trusted the receiver or the fund. The court which made that order thought the limit of discount a reasonable one, and the certificates were sold within that limit.

In regard to what the order calls "betterments," it appears from the petition of the receiver, on which the order was made, that the $35,000 were to be expended for ties, rails, new turntable and foundations, bridges and fences, on the existing line of road, and not for any new extent of road. An affidavit annexed to the petition, made by the roadmaster of the Illinois Midland Company, states that, in order to place the railway in a suitable condition for the safe transportation of business, the expenditure contemplated was absolutely necessary. The commissioner finds that the money was expended in substantial compliance with the order of the court, and that the improvements made by the receiver no more than made up for the deterioration of the road, especially in view of its imperfect construction and inferior material from the beginning. This finding was approved by the Circuit Court.

As to the certificates of the 18th series issued to replace earnings diverted from paying for operating expenses and ordinary repairs, to pay for betterments, while debts to a large amount had been incurred for the operating expenses and ordinary repairs, it appears by the petition of the receiver and the affidavit of the roadmaster annexed to it, on which the order of June 29, 1881, under which the certificates were issued, was made, that the expenditures for new side tracks and betterments so paid for out of earnings consisted principally of expenditures for road-bed, bridges, iron and ties, which were in a worn out and insufficient condition.

The commissioner and the Circuit Court rested the allowance of these certificates on what was said by this court in the case of *Fosdick* v. *Schall*, 99 U. S. 235, 253, 254, which views were applied in *Burnham* v. *Bowen*, 111 U. S. 776, to the effect that, when the current income of a railroad in the hands of a receiver is diverted to the improvement of the property by the

receiver, and debts for operating expenses are not paid, provision should be made, in foreclosing a mortgage on the road, to pay such debts out of the proceeds of the sale of the property. See, also, *Union Trust Co.* v. *Souther*, 107 U. S. 591.

The general principles hereinbefore stated, on which the receiver's certificates referred to are allowed, are those sanctioned in *Meyer* v. *Johnston*, 53 Ala. 237, and *Hoover* v. *Montclair & Greenwood Lake Railway Co.*, 2 Stewart (29 N. J. Eq.), 4.

The strenuous contention on the part of the Paris and Decatur bondholders is, that a court of chancery had no power, by a receiver, and, without their consent, to create, on the *corpus* of the property, any lien taking priority over the mortgage lien. But these bondholders were represented by their trustee, the Union Trust Company. It filed a bill in the Federal court as early as December, 1876, to foreclose the Paris and Decatur mortgage, and it was made a party, on its own petition, to the suit in the State court, in September, 1877. The Paris and Decatur mortgage provided, that, in case of default for six months in paying interest on the bonds, (and such default occurred at latest on January 1, 1876, and the six months expired July 1, 1876, more than three months before any order was made on which any of the certificates were issued), all the bonds should become due and the lien might be enforced, and the trustee might enter on the property, and operate it till sold, and make all needful repairs and replacements, and such useful alterations, additions, and improvements to the road as might be necessary for its proper working, and pay for them out of the income; and, also, that, in case of a default so continuing, the trustee might foreclose the mortgage by legal proceedings or sell the property by public auction, and should, in case of such sale, deduct from the proceeds all expenses incurred in operating, managing, or maintaining the road, or in managing its business, and thereafter apply the proceeds to pay the bonds. In the face of these provisions of the mortgage under which the bonds are held, and of the facts before recited as to the negligence of the trustee all the while the property was in the hands of the court, it does not at all comport with the principles of equity for the bondholders now to insist that the want of

affirmative consent by them or their trustee could paralyze the arm of the court in the discharge of its duty. The want of that aid which it was the duty of the trustee and the bondholders to give to the court in discharging its responsible functions, with the road openly in charge of the receiver and being run by him, and his acts plain to view, and the interest on the bonds in arrear, cannot be urged to a court of equity as a ground for denying its power to do what was thought by it best for the interests of all concerned, including even those who thus wilfully stood aloof.

The appellants Borg and others also complain of provisions in the final decree, giving priority over the Paris and Decatur bonds to just and equitable proportions of the following items: (1) amount of wages due employés of receivers Dole, Rees and Genis, as shown by schedules J and K of the report of the commissioner, the total amount being $76,820.90; (2) the indebtedness due from the receivership to railroad companies, as shown by schedule L of the report, amounting to $84,615.21; (3) the general indebtedness of the receivership, as shown by schedule M of the report, under the head of supplies, amounting to $67,787.76, and under the head of "damages," amounting to $5871.04, and forty-four items under the head of "miscellaneous," amounting to $32,937.49; (4) seven claims theretofore allowed and ordered to be paid by the court, amounting to $1493.18; (5) four claims on intervening petitions, allowed at $11,642.29; (6) amount of wages due employés of the Illinois Midland Company within six months immediately preceding the appointment of the first receiver, as shown by schedule H of the report; such equitable proportions of the receiver's indebtedness and of the six months' labor claims to be ascertained in the manner provided by the decree.

As to items (1) (2) (3) (4) and (5), while it is admitted that these debts were incurred for the ordinary expenses of the receivers in operating the road, it is contended that they are entitled to priority only out of the income of the road, and not out of the proceeds of the property itself. Of course, such items are payable out of income, if any, before the *corpus* is resorted to, but that may be resorted to when the items are proper ones to be

allowed for operating expenses, after scrutiny and opportunity for those opposing to be heard. This view is in accordance with the principles above laid down and the authorities above cited.

It is contended, however, that, in the order of September 11, 1875, appointing Dole receiver, while authority was given to him to carry on the business of the road, and to make repairs and additions essential to its interests and safety, it was provided, that, out of the moneys he should receive from its operation, he should pay for the expenses of operation; that he was not authorized by that order to contract any debt which the receipts of the road would not pay; that the terms of the order were such as to exclude the payment of any of the expenses embraced in the six items above named out of any fund other than the receipts from the operation of the road; and that the orders appointing Rees and Genis were equally limited. But we think this view is not correct. The terms of these orders do not impair or exclude the ample authority which the court would otherwise have, and otherwise has, to order the claims in question to be paid out of the property itself, with priority.

The claims embraced in the six items have been carefully scrutinized and reported on favorably by the commissioner, and allowed by the Circuit Court, within and in accordance with the principles above laid down, and we think that all of them, including the "six months' labor claims" were properly allowed.

The appellants Borg and others also complain that the final decree declares that the just and equitable proportion of the floating indebtedness of the receivership, and of the six months' labor claims, so made liens prior to the bonds, shall be borne by and imposed upon the three several railroad properties, on the basis of the relative lengths of the roads, being for the Paris and Decatur 67 miles, the Peoria, Atlanta and Decatur 60½, and the Paris and Terre Haute 13½. It is urged that, in the total amount of debt to be thus apportioned among the several roads, there are included debts which, as against the Paris and Decatur bondholders, belong distinctively to the

other two roads, and should be charged exclusively on them. This view is based on these allegations: that the Peoria, Atlanta and Decatur road was never finished at either end, and always paid rent for access to Peoria at one end and to Decatur at the other; that the Paris and Terre Haute road uses the track of another road to reach Terre Haute and its terminal facilities there, and does not own one-half in value of the track between Paris and Terre Haute; and that the Paris and Decatur road uses only two miles of another road at Decatur, and has good eastern connections at Paris. In this view, it is insisted that each road should pay its own terminal charges, and the cost of reaching its own charter points. The terminal expenses and track rentals of the two roads, other than the Paris and Decatur, were always charged by the receivers against the combined Illinois Midland road. The view taken by the commissioner and the Circuit Court was, that the receiver took the roads as he found them, each incomplete, and no one reaching any important point, and was obliged to continue the leasing arrangements of the Illinois Midland Company, so as to have a continuous line from Peoria to Terre Haute, which he operated as an entirety. The commissioner stated his conclusions thus: "In the operation of the road, no separate accounts of receipts or disbursements for each section, nor of the amount of business contributed by each section, nor of the extent of the use of each road, in the transaction of the various items of business taken at the several stations, were kept; nor indeed has it been possible to keep such accounts. The Paris and Decatur road received its share of the benefits accruing from the use of the leased lines; the exact relative proportion of benefits to each sectional road it is impossible to ascertain. The operating expenses have been incurred in the management of a single undertaking for the common benefit of all parties in interest. The use of the several leased tracks was necessary for that common undertaking. Without the use of the leased tracks the road could not have entered either of its terminal points, nor the city of Decatur, which was equally essential. Neither of the sectional roads enters any one of the three main points on the line. Indeed, without the leased lines

the operation of the road, or either of the sections, would have been impracticable. And it seems to me that the rentals for the use of the leased lines were incurred as much for the common benefit as were the expenses for employés and supplies along the line. If the management of the road had been so profitable as to have left a net income to apply on the mortgage debt, the Paris and Decatur bondholders would have been entitled to their proportionate share of the income derived from the use of the leased lines; they could scarcely have expected that without contributing to the payment for the use of those lines." These views apply equally to the terminal facilities furnished by the leasing roads.

In opposition to these considerations it is urged that, while they may properly apply among the companies which were parties to the sales and purchases, they do not apply to the holders of unsurrendered and unexchanged Paris and Decatur bonds, on the ground that they had nothing to do with the conduct of a joint enterprise, and could derive no benefit therefrom; and that they denied, in the pleadings of their trustee, and now deny, the validity of the sales, and did not acquiesce in any act of union of the roads.

An argument is made that there was no affirmative legislative authority for the purchase and sale of the Paris and Decatur road. This question was considered by the Circuit Court in its opinion, and it said that, while the question was by no means free from difficulty, it was inclined to think that the warrant for the purchase was found in the charter of the purchasing company; and that, as the effect of the arrangement was to establish a continuous line from Peoria *viâ* Decatur to Terre Haute, to be operated under a common management, and as there was nothing in the charters of the selling companies expressly forbidding the arrangements they made with the purchasing company, and as what was done was fully executed, and its validity had never been questioned in a direct proceeding by the State or by those interested in the selling companies, it was not disposed to make the rights of the parties in this litigation depend upon the inquiry whether the contracts were technically valid or not. Its conclusion was

stated thus: "In *Thomas* v. *Railroad Co.*, 101 U. S. 71, the court said that 'there can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred;' further, 'that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it;' still further, 'that contracts which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction.' I am the more readily inclined to act upon the view indicated, because, as said by Judge Drummond, in *Dimpfel* v. *Ohio & Mississippi Railway Co.*, 9 Bissell, 129, 'both by the legislation of the State and by the construction of the same by its highest court, great encouragement has been given to the union of lines of railroad for the purpose of having them operated under some general management; the result of which has been the consolidation of many lines of road which were originally separate and distinct, but which are now operated under a uniform system.' Those who were parties to the arrangement in question, those who acquiesced in it, and those who failed in due time, by some proper proceeding, to question its validity, should be held to be estopped to raise any such question in these causes. The litigation must, therefore, be conducted to a conclusion upon the basis that the sale and transfer by the Paris and Decatur Railroad Company and the Paris and Terre Haute Railroad Company to the Peoria, Atlanta and Decatur Railroad Company is not to be here questioned." Independently of this, it is entirely sufficient to rest our conclusion on the principle that nonaction on the part of the Paris and Decatur bondholders and their trustee, which allowed the court and the receivers to go on during the entire litigation, contracting debts in respect to the whole line operated as a unit, and administering the property as one, under circumstances where, as shown, it was and is impossible to separate the interests as to

expenditures and benefits, in respect to the matters now questioned, and where important rights have accrued on the faith of the unity of the interests, amounts to such acquiescence as should operate as an estoppel. The interlocutory decree contains a clause in accordance with the foregoing conclusion, and, for the reasons above stated, we think it is right.

It is further contended, on behalf of Borg and others, that all of the receiver's debt should be borne primarily by the Peoria, Atlanta and Decatur Company, in exoneration of the Paris and Decatur mortgage, on the ground that, by the terms of the conveyance from the Paris and Decatur Company to the purchasing company, the latter assumed "all the bonded and floating indebtedness" of the selling company. It is contended that, both from the contract and by general principles, the purchasing company is bound to bear alone all expenses that will impair the security of the Paris and Decatur mortgage, and especially the expenses of running the road as a public servitude; and that the court and the receivers are bound by the same limitation. The idea underlying this view is, that the receiver appointed by the court is merely the agent of the purchasing company, and his management of the purchased road is merely a continuation of the management of the purchasing company. The view taken by the commissioner, and confirmed by the Circuit Court, was, that the receiver, as an executive officer of the court, was entrusted with all the properties committed to his charge, to use and preserve them, under the direction of the court, for the benefit of all parties in interest; that the receiver sustained the same relation to the bondholders of each of the constituent companies; that, as the property of each of them has been used and preserved for the benefit of its bondholders, it is equitable that each property should contribute its just proportion towards defraying the necessary expenses; that, as the Peoria, Atlanta and Decatur mortgage was executed more than two years before the purchase of the Paris and Decatur road, and as the obligation of operating the latter road, assumed by the purchasing company, was an ordinary liability and an unsecured obligation, the equities of the Peoria, Atlanta and Decatur

bondholders require that the expenses of operating the purchased road, whether before or after the appointment of a receiver, should not take precedence, out of the *corpus* of the property of the purchasing company, over its bonds, issued and negotiated before the transfer, to the exoneration of the bonds of the purchased road; and that it is more equitable that the expenses of the receivership, incurred under the direction of the court for the benefit of one road as well as the other, should be borne by each proportionally. We think these views are correct, and that it is right to measure the proportions according to the lengths of the roads.

Borg and others complain of the following part of the final decree: "That Waring Brothers hold nine hundred and ninety-four (994) bonds of the Paris and Decatur Railroad Company, from which the first five coupons have been detached, the numbers of which bonds are given in 'Schedule F—Exchanged Paris and Decatur bonds,' attached to said special commissioner's last mentioned report," (filed January 15, 1885); "that there is now due on said 994 bonds the principal sum of $497,000, with interest thereon as provided in said bonds and the coupons thereto attached, the principal and interest to this date amounting to the sum of $859,589.13; and that said Waring Brothers are entitled to the full benefit and advantage of said 994 bonds, the same as if said bonds had not been exchanged for those of the Illinois Midland Railway Company, and as if there had been no cancellation or attempted cancellation of the same; and it is ordered by the court, that, upon the surrender into court, for cancellation, by said Waring Brothers, of bonds of the Illinois Midland Company to an amount equal to the said 994 bonds of the Paris and Decatur Railroad Company, then the said 994 bonds of the Paris and Decatur Railroad Company shall be held, and are hereby declared to be, in full force and unsatisfied, in the hands of said Waring Brothers, the same and with like effect as the other said valid outstanding bonds of the said Paris and Decatur Railroad Company, any exchange or cancellation thereof to the contrary notwithstanding; and the special commissioner hereinafter appointed is directed to hold for cancellation such

Illinois Midland Railway bonds, when so surrendered, and to report the fact of such surrender, and holding for cancellation, to the court." The report of the commissioner shows that each of the 994 bonds has the word "cancelled" stamped thereon, and each has a hole punched through the signature of the president of the company.

The argument on the part of Waring Brothers, to sustain the above provisions of the decree in regard to the 994 bonds, is, that the Illinois Midland bonds, amounting to $4,175,000, were intended to be largely used in retiring, by exchange, the bonds of the three sectional roads, amounting to $2,780,000; that, in the agreements made between Hervey and Grant Brothers & Co., and between Hervey and Waring Brothers, and between Waring Brothers and Grant Brothers & Co., in regard to the issuing of Illinois Midland bonds, and the exchange of the bonds of the sectional roads for them, the underlying contract was that the three sectional companies should be legally consolidated, so as to make the new Illinois Midland mortgage to be issued a first lien on the entire property; that the three parties above named owned, among them, all but a few of the Peoria, Atlanta and Decatur bonds, and all of the Paris and Terre Haute bonds, and a large portion of the Paris and Decatur bonds; that the agreement was, as understood by all parties, that the sectional bonds should be exchanged for the new Illinois Midland bonds, dollar for dollar, and that, as to such of the Paris and Decatur bonds as should not be retired by exchange, an equal amount of the new Illinois Midland bonds should be destroyed; that, under this arrangement, Grant Brothers & Co. and Waring Brothers would surrender their sectional bonds, secured by sectional first mortgages, and accept in lieu thereof Illinois Midland bonds, secured by what would be a first mortgage on the three roads, subject to the unexchanged Paris and Decatur bonds; that the written contracts on the subject stipulated that the three railroads should be "consolidated into one company under the name of the Illinois Midland Railroad Company;" that the purchases and fusion which took place were not a consolidation, within the meaning of the contracts; and that what was contracted for

was to be not merely a consolidation of the properties of the three companies, so that all those properties should pass to the ownership of one of the companies, but a consolidation of the companies themselves, they to be so united as to become one company and one artificial body.

We are unable to concur in this view, and are of opinion that what was done was a substantial compliance with the contracts. What Hervey did in procuring the sales of the roads, and the change of the name of the purchasing company, and in making the new mortgage and bonds, was done with the concurrence of Grant Brothers & Co. and Waring Brothers. The exchanges made of the Paris and Decatur bonds for the Midland bonds were not isolated transactions, but followed as parts of one transaction, by which the roads were united and the new bonds created and exchanged. The transaction contemplated by the contracts was fully performed, and the Paris and Decatur bonds, which Waring Brothers surrendered, were exchanged and surrendered specifically for cancellation. In the contract of July 4, 1874, between Waring Brothers and Grant Brothers & Co., it was provided that 907 Paris and Decatur bonds held by Waring Brothers should be exchanged for 907 of the new bonds of the Illinois Midland Company, and cancelled. The evidence and the written contracts show that it was contemplated by the parties, including Waring Brothers, that such of the Paris and Decatur bonds as should not be surrendered and exchanged should retain their precedence over the Illinois Midland bonds, and their priority of lien on the Paris and Decatur property. In the contract between Hervey and Grant Brothers & Co., of July 4, 1874, it was agreed that the latter should retain in their hands Illinois Midland bonds equal in amount to any Paris and Decatur bonds which should be outstanding, and should cancel and return to Hervey all Paris and Decatur bonds which should be exchanged by their holders for Illinois Midland bonds, and that if, after July 1, 1876, there should be any outstanding unexchanged Paris and Decatur bonds, Grant Brothers & Co., should cancel and return to Hervey an amount of Illinois Midland bonds equal to the amount of the then outstanding unex-

changed Paris and Decatur bonds. In the schedule to the agreement of July 4, 1874, between Grant Brothers & Co. and Waring Brothers, it was stated that the Illinois Midland bonds were to be issued "subject and in subordination only to such bonds already issued by the Paris and Decatur Railroad Company as for the time being shall be existing and be preferentially charged on the portion of the undertaking which shall have been constituted with or represent the undertaking of the said last mentioned railway company." The president of the Union Trust Company was advised of these agreements, in December, 1874. Waring Brothers surrendered to Grant Brothers & Co. 887 Paris and Decatur bonds and took from them this receipt:

"London, *February* 17, 1875.

"Received from Messrs. Waring Brothers, 885 bonds of Paris and Decatur Railroad Co., as per attached list, in exchange for a like number of Illinois Midland bonds, in fulfilment of first clause of our agreement of July 4th, 1874, the difference between 885 bonds and 907 bonds mentioned in agreement having been drawn and cancelled between date of agreement and the present time, which 885 bonds of Paris and Decatur Railroad Co. are to be cancelled forthwith, in accordance with said agreement.

Grant Brothers & Co."

In the agreement made as late as May 4, 1877, between Grant Brothers & Co. and Waring Brothers, it was agreed that the former should use their best exertions "to obtain the exchange of the outstanding Paris and Decatur bonds which have not yet been exchanged for Illinois Midland bonds, so as to complete the amalgamation."

The exchange and surrender of the 885 bonds was a completed transaction. No surrender of any of the Paris and Decatur bonds by any one was made dependent on the surrender of any others of them or of the whole. Each person who surrendered gave up his lien under the Paris and Decatur mortgage, and took one under the Illinois Midland mortgage, as it was, and took the risk of its value. He left those who did not surrender to hold under the Paris and Decatur mortgage.

There was no contingency and no reservation on the part of those surrendering. The surrender was for cancellation and was cancellation. The Illinois Midland mortgage and bonds were and are valid. All parties got what they contracted for.

In regard to the other 109 Paris and Decatur bonds (to make up the 994 exchanged bonds now presented by Waring Brothers, as holders), each of them is stamped with the word "cancelled," and each has a hole punched through the signature of the president of the company. In 1872, Waring Brothers purchased from Grant Brothers & Co. 928 Paris and Decatur bonds. July 4, 1874, they still held 907 of them. February 17, 1875, they had only 885. Afterwards Genis, acting for them and for Grant Brothers & Co., brought with him from London to the United States all the Paris and Decatur bonds which had been surrendered by any one and cancelled, receiving them from the custody of Grant Brothers & Co. These bonds included not only the 885, but undoubtedly the 22 others mentioned in the receipt, and 87 more necessary to make up the 994. All of the 109 bonds being marked cancelled, and the evidence as to the entire 994 being what it is, it must be held that the 109, as well as the 885, were exchanged, surrendered and cancelled, and that the decree is erroneous and must be reversed in regard to all of the 994.

The decree provides that the special commissioner, charged with its execution as to a sale, shall first offer the three railroad properties for sale each separately, and four locomotive engines (on which there is a specific lien) separately, and all other property acquired by the receivers otherwise than from said railroad companies separately, and, after having so offered said properties, shall then offer the whole of them for sale *en masse;* and, if the highest bid received by him for the entire properties shall exceed the aggregate amount of the several highest bids for them when offered separately, then the whole shall be struck off and sold as an entirety to the person making the bid, and the proceeds be divided into five parts, in proportion to the amounts bid separately, on the five constituent parts, and distributed to the lienholders and bondholders in the

same manner as if the five constituent parts had been sold separately.

Borg and others object to that provision, and claim that the holders of the unexchanged Paris and Decatur bonds are entitled to have a separate sale of the property covered by the Paris and Decatur mortgage. We have considered the views urged in opposition to the above clause, but are of opinion that under it, taken in connection with all the other provisions of the decree, the rights of the Paris and Decatur bondholders are sufficiently secured and that they have substantially the benefit of a separate sale. No one of all parties can get less by the sale in gross.

The appeal of the Union Trust Company does not cover any thing not embraced in the appeal of Borg and others.

The appeal of Waring Brothers is next to be considered. They object that certain claims of theirs under the head of "Miscellaneous" in schedule M to the commissioner's report, part of the receiver's indebtedness, are by the decree declared to be subordinate to the mortgages and bonds of the three sectional roads, namely:

"$30,322.09. Claim assigned by Terre Haute and Indianapolis Railroad Company.
$14,140.67. Terminal facilities at west end; assigned by Toledo, Peoria and Warsaw Railroad Company.
$54,900. Loan account; allowed by order of court, June 11, 1884.
$32,000. Loan account; allowed by order of court, June 11, 1884.
$29,064.84. Rees' notes; allowed by order of court, June 11, 1884."

As to the $30,322.09, Waring Brothers bought the claim in August, 1877, from the Terre Haute and Indianapolis Company. The receivership owed that amount to that company for rent of track, materials supplied and traffic balances. The $14,140.67 was a claim bought by Waring Brothers, in September, 1877, from the receiver of the Toledo, Peoria and War-

saw Company. It was for rent of track, stores supplied and labor performed. As to both of these items, the debts were contracted by the receiver, and fall within the principle under which claims of like character are allowed priority.

As to the items of $54,900 and $32,000, "Loan Account," the commissioner, in his first report, made this statement: "The Loan Account. Receiver Genis borrowed of the First National Bank of Terre Haute the sum of $57,400 for the current expenses of the road, upon which he paid $2500, leaving a balance due the bank of $54,900. He had also a running loan account with McKeen & Co., another banking-house in Terre Haute, for moneys borrowed for the use of the road, upon which there is a balance due the bank of $32,000. These moneys were borrowed by the receiver as such, but the greater part thereof was further secured by the personal obligations of Mr. Genis or Waring Brothers. The transactions are, therefore, characterized by Mr. Freidenberg's counsel, as the personal accounts of those parties, and not the accounts of the receiver as such. But, even if it were true that these moneys were those of Mr. Genis individually, yet, if it were further true that Mr. Genis was authorized to make the expenditures for the protection, reparation or safety of the trust estate, and if he advanced his own moneys for that purpose, he could, I think, on principle, have a lien on the trust estate for moneys so advanced. *New* v. *Nicoll*, 73 N. Y. 131. But there appears to have been no express authority from the court to borrow these moneys. While a receiver entrusted with the operation of a railroad must necessarily be allowed a certain discretion as to outlays of money made in good faith in the ordinary course of business, and to a certain extent the details of the business must be left to his discretion, yet transactions of such magnitude as the loans in question are, I think, unwarrantable without the previous authority of the court; and the conduct of the receiver in this respect ought not to be sanctioned, and certainly cannot be permitted to become a precedent. At the same time, the evidence appears to show that the sums so borrowed were applied directly to pay the expenses of the receivership, repairs, supplies, pay-rolls, or to replace moneys which had been so applied.

Mr. Genis' testimony is very specific on these points. He says that, after applying the income of the road towards expenses, (repairs, supplies, pay-rolls,) and, when he could not longer postpone payment of balance, he had to borrow. While reprehending this unauthorized action, yet as the money was applied for repairs on the property and expenses of administering the trust, and as the transaction was thus beneficial to the parties in interest, and as no bad faith appears to be imputed to the lenders, it seems to me that the rejection of these claims, as against the lenders, would be harsh and inequitable. And, as Waring Brothers, upon whose credit, in part at least, these sums were advanced, have since paid the same to the original lenders, and taken an assignment of the claims, I see no reason why they are not likewise entitled to payment." In the opinion on this report the Circuit Court said that it approved the conclusions of the commissioner as to "Loan Account." In the interlocutory decree of June 11, 1884, is this clause: "And the court approves the findings and conclusions of the said special commissioner under the head of 'The Loan Account,' in said report, and finds that the receiver borrowed of the First National Bank of Terre Haute, Ind., and of McKeen & Co., bankers, certain sums of money, which he applied directly to pay the necessary expenses of the execution of his trust herein, and that there are balances of $54,900 and $32,000, respectively, due on account of such loans; and the court orders, adjudges and decrees that the holders of said claims are entitled to priority of payment out of the trust estate, before payment of bonds." But, by the final decree, the items of $54,900 and $32,000 are declared to be subordinate to the mortgage bonds, while allowed as indebtedness contracted by the receivers. We are of opinion that these two claims ought not to be allowed priority. The debts were contracted without the previous authority of the court. The amounts were large; and we cannot sanction the action of the receiver in borrowing sums of money so large in amount, without the previous authority of the court, even though the purposes to which the moneys were applied were such as is shown.

As to the item of $29,064.84, it consists of eight notes given by receiver Rees, in May and December, 1878, as shown by

Exhibit X to the first report of the commissioner, in regard to which the commissioner said, in that report, under the head of "Accounts of Waring Brothers:" "The acceptances or notes of Dole and Rees, Exhibit X, aggregating $29,064.84, are contested upon the ground that those receivers had no power to contract the debts. Mr. Genis' explanation of the item appears on page 140 of the abstract. Seven of the eight notes appear to have been given for legitimate and necessary purposes, such as rent of railroad track, repairing of engine, purchase of stationary engine, money advanced for general expenses, etc., etc. The several amounts were small, and, I think, within the discretion of the receiver to contract. It would be very trying on the court, as well as receiver, if the latter, in operating a railroad, were compelled to obtain the sanction of the court for all sums as small as these. The last item, of $7000, is more vigorously contested. An account of the transaction is given by Mr. Genis, (Abstract, 192). Waring Brothers were desirous that Rees should resign, and Genis, on their behalf, acceded to his demand for the payment of a forfeiture provided in Rees' private contract of employment with Waring Brothers, as a condition precedent to his resignation; and thus he ended his agency and his receivership at the same time. The payment of the forfeiture was made out of Waring Brothers' own funds, and there is no claim that it is a charge against the trust fund. On the day Rees resigned, he further insisted that Waring Brothers should advance moneys with which to pay a certain claim before he resigned. This was a debt of $7000 to a bank. It was a debt of the receivership, upon which he was also personally liable. On page 141, abstract, speaking of this item, Mr. Genis says: 'The last item, $7000, is cash given Mr. Rees, as receiver, and passed into the general funds, as the books will show.' It is broadly charged that this transaction was bribery, and that the bribe is now asked to be repaid out of the trust funds. Undoubtedly the debt paid was a debt of the receivership, the trust fund got the benefit of the payment, and the only benefit Rees received was his release as surety upon a debt of the receivership. Waring Brothers' money was loaned to the receiver, and was used by him to pay a debt for which the receivership was

primarily liable; and the fact that such payment was demanded by the retiring receiver, does not make it any the less a present debt against the receivership." In its opinion on that report the Circuit Court said that it approved the commissioner's conclusions as to "Accounts of Waring Brothers;" and, in the decree of June 11, 1884, it stated that "the court approves the findings and conclusions of said special commissioner under the head of 'Accounts of Waring Brothers,'" but the question of the priority of the item of $29,064.84, over the bonds appears to have been reserved by that decree. In the final report of the commissioner, under the head of "Relative equities of receiver's floating indebtedness and the mortgage bonds," after discussing the subject at length, he said: "I am, therefore, of opinion that all just indebtedness contracted by the receivers in the execution of their trust and in the operation of the road, including claims for labor and supplies, liabilities incurred in sustaining necessary business relations with other railroad companies, liabilities as a common carrier, damages to persons and property in operating the roads, obligations to shippers properly incurred in due course of business, and other claims, if any, of like character, and coming within the same principle, are entitled to priority in payment over bonds." But in the final decree, the item of $29,064.84 is not given such priority. We are of opinion that this item cannot be allowed priority, for the reason that the borrowing of the money for which the notes were given was not sanctioned in advance by the court. Though made up of amounts not, perhaps, large in themselves, the aggregate cannot be called small; and there never could be any difficulty in obtaining an order of the court, if one were proper, to borrow money to a specified total amount, for specific purposes. In any event, the item of $7000 could not be allowed priority, as the purposes for which that sum was used were not sufficiently shown.

Waring Brothers also object because the final decree orders that the "rents due Waring Brothers, for use of rolling-stock, as shown by Schedules U and W of" the final "report of the special commissioner," and "the sum of $21,099.43 due Waring Brothers for extraordinary depreciation of rolling-stock," be subordinated to the mortgage bonds of the three sectional

roads respectively. The net amount due for the above rents, as stated in those schedules, with interest to January 15, 1885, is $325,354.35, and that amount is allowed as a debt by the commissioner. The court did not allow it priority, and we see no sufficient ground for reversing the decision. The same conclusion is reached as to the item for $21,099.43.

Waring Brothers also object because the court did not, in the final decree, specifically allow ten claims of theirs, amounting to $67,488.81, set forth under the head of "Right of way claims and outstanding titles," in Schedule I to the second report of the commissioner, and give them priority to the mortgage bonds, and because that decree remitted the holders of those claims to such suits as they might "properly bring in any court of competent jurisdiction against the company alleged to be liable thereon, or against the purchaser or purchasers" at the sale to be made under the decree. We see no error in the decree in this respect; nor in its failure to allow interest on the items of $4500, $9100 and $17,001.47; nor in its failure to allow more to Waring Brothers for right of way, land, buildings and mechanics' liens, or to make any different provision from that made in regard to the use of any claims by them in payment of the railroad property, if they should purchase it; nor in its failure to give precedence over the mortgage bonds to the claims of Waring Brothers, called "six months' supply claims."

We come now to the appeal of S. A. Fletcher & Co. They are the holders of the three certificates of the 17th series, and the four certificates of the 18th series, before mentioned, and allowed with priority, and of seven other receiver's certificates named in Schedule N to the commissioner's second report, and allowed with priority, seven of the entire fourteen having been issued under one of the two orders before mentioned, each dated June 29, 1881, and the other seven under the other of those two orders. The Circuit Court, in its final decree, reserved for future determination all questions of the relative priorities and equities among those who were given liens prior to the mortgage bonds, in case the respective properties should not sell for amounts in excess respectively of the liens to which precedence was given over the mortgage

debts. S. A. Fletcher & Co. appeal from that part of the decree, and insist that the decree ought to have found that the receiver's certificates held by them were liens of the force, character and effect, and to the extent, provided by the two orders of June 29, 1881, according to the purport of the certificates, and entitled to priority of payment over all bonds and debts, and all receiver's debts and certificates, except the receiver's certificates specially excepted in those orders. By each of the orders of June 29, 1881, each certificate to be issued under it was declared to be a special charge and lien on the line and property in respect of which it should be issued, superior in lien to all mortgage bonds and debts of the company, and receiver's debts, except such receiver's debts as had theretofore been declared by order of court to be special charges and liens on such line and property. We are of opinion that (with the exception of debts for taxes and receiver's certificates issued to borrow money to pay taxes, or to discharge tax liens) there should be no priority or preference among the debts and claims, whether receiver's certificates or other debts, which are allowed precedence over the mortgage bonds of any road, but that all should stand alike, notwithstanding any orders heretofore made, and that the decree should so provide.

It results that the decrees are reversed so far as they allow to Waring Brothers the benefit of the 994 *Paris and Decatur bonds as unexchanged and uncancelled bonds, and so far as they deny priority over the Paris and Decatur bonds to the items of* $30,322.09 *and* $14,140.67, *and so far as they fail to provide that there shall be no priority or preference (with the exception above stated) among the debts and claims, whether receiver's certificates or other debts, which are allowed precedence over the mortgage bonds of any road; and the causes are remanded to the Circuit Court, with a direction to make those modifications in the decrees; and in all other respects the decrees are affirmed. No costs are allowed in this court for or against any party, and the expense of printing the record is to be borne equally by Borg and others and Waring Brothers.*

FERGUSON *v.* ARTHUR.

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

Argued March 24, 1886.—Decided April 5, 1886.

Under § 2504, Schedule M. of the Revised Statutes (p. 480, 2d ed.), "Henry's Calcined Magnesia," imported in glass bottles, is liable to a duty of 50 per cent. *ad valorem*, as being a medicinal preparation, recommended to the public as a proprietary medicine, and not to a duty of 12 cents per pound, as calcined magnesia, under the same section and schedule (p. 477).

The case is stated in the opinion of the court.

Mr. Edwin B. Smith for plaintiff in error, cited *Arthur* v. *Davies*, 96 U. S. 135; *Arthur* v. *Stephani*, 96 U. S. 126; *Reiche* v. *Smythe*, 13 Wall. 162; *Movius* v. *Arthur*, 95 U. S. 144; *Arthur* v. *Rheims*, 96 U. S. 143; *Arthur* v. *Lahey*, 96 U. S. 112; *Arthur* v. *Zimmerman*, 96 U. S. 124; *Barber* v. *Schell*, 107 U. S. 617; *Marvell* v. *Merritt*, 116 U. S. 11; *Fisk* v. *Arthur*, 103 U. S. 431; *Solomon* v. *Arthur*, 102 U. S. 208; *Vietor* v. *Arthur*, 104 U. S. 498; *Newman* v. *Arthur*, 109 U. S. 132; *Drew* v. *Grinnell*, 115 U. S. 477; *Smith* v. *Field*, 105 U. S. 52; *Astor* v. *Merritt*, 111 U. S. 202; *Railroad Co.* v. *Fraloff*, 100 U. S. 24; *Arthur* v. *Morgan*, 112 U. S. 495; *Schmidt* v. *Badger*, 107 U. S. 85; *Merritt* v. *Stephani*, 108 U. S. 106; *Merritt* v. *Park*, 108 U. S. 109; *Trade Mark Cases*, 100 U. S. 82; *Manufacturing Co.* v. *Trainer*, 101 U. S. 51.

Mr. Assistant Attorney-General Maury for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action brought by Walton Ferguson, in the Supreme Court of the State of New York, and removed into the Circuit Court of the United States for the Southern District of New York, against the collector of the Port of New York, to

recover moneys paid under protest, in January, 1876, as duties on an importation of "Henry's Calcined Magnesia," made by said Ferguson, doing business as J. & S. Ferguson. The collector exacted on the merchandise a duty of 50 per cent. *ad valorem*, under the following provision of the Revised Statutes, § 2504, Schedule M. p. 480. 2d ed.:

"Proprietary medicines: Pills, powders, tinctures, troches or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils, or other medicinal preparations or compositions, recommended to the public as proprietary medicines, or prepared according to some private formula or secret art as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body: fifty per centum ad valorem."

The plaintiff contended that the article was dutiable at 12 cents per pound, under this provision of the same section and Schedule (p. 477): "Magnesia, carbonate: six cents per pound; calcined, twelve cents per pound."

At the trial there was a verdict for the defendant, and he had judgment, and the plaintiff has brought a writ of error.

The bill of exceptions contains the following statements:

"The merchandise in question was Henry's calcined magnesia, prepared by Thomas and William Henry, manufacturing chemists, of Manchester, England, and put up in ounce bottles; in the glass of each bottle was blown the words 'Henry's Calcined Magnesia, Manchester;' and over one end of each bottle was pasted a stamp, of which the following is a copy:

"It also appeared in evidence that, accompanying each bottle thereof, was a wrapper; that upon said wrapper was a circular; that of the said labels the following are copies:

'Henry's Calcined Magnesia.
'Price 2*s* 9*d*. Stamp included.

'*Caution.*

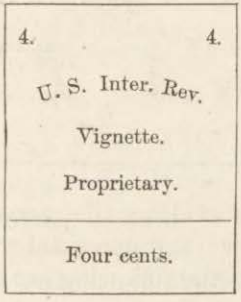
'The purchasers of this article are requested to observe that the words Thos. and William Henry, Manchester, are engraved on the government stamp pasted over the cork of each bottle. This is the only effectual security against the counterfeited imitations which are sold in bottles similarly moulded, under their names. Trade-mark, 'Henry's Calcined Magnesia.'

'*Caution.*

'Messrs. Thos. & Wm. Henry, of Manchester, have received frequent complaints that their calcined magnesia is counterfeited in the United States, and having been furnished with specimens of spurious and very inferior imitations there vended, in bottles similarly moulded, and with forged stamps and bills of direction, beg leave to caution the consumers of their magnesia in America to purchase it only of persons whose character is such as to preclude their selling a spurious article knowing it to be such.

'Druggists and storekeepers are informed that Messrs. J. and S. Ferguson, (late Ogden, Ferguson & Co.,) merchants, of New York, are the sole wholesale agents authorized by Messrs. Henry in the United States, and that the article may be constantly had of them genuine and on the best terms. Trade-mark, Henry's Calcined Magnesia.'

"That upon the first of the aforesaid labels was pasted a stamp; that the following is a copy thereof:



Opinion of the Court.

"That the following is a copy of the aforesaid circular:

'Trade Mark:
'Henry's Calcined Magnesia.
'Genuine Calcined Magnesia.
'Prepared by
'Thomas and William Henry,
'Manufacturing
'Chemists,
'East St. and St. Peters, Manchester,

'And sold wholesale by them, and in London by Bayley & Company, Cockspur St.; Barclay & Sons, Farmington St.; Butler & Crispe, 4 Cheapside; Edwards, 157 Queen Victoria street; F. Newberry & Sons, 37 Newgate street; J. Sanger & Sons, 150 & 252 Oxford street; Sutton (late Diccy & Co.), 10 Bow Church Yard, and Savory & Moore, 143 New Bond street, in bottles at 2*s.* 9*d.*, or with ground stoppers at 4*s.* 6*d.*, stamps included, (the names of the preparers being engraved upon each government stamp, pasted over the cork or stopper of each bottle, which in British dominions, where the forgery of the stamp is highly penal, is the best security against counterfeits,) and retail by at least one agent in every country town.'"

The circular went on to set forth the beneficial use of calcined magnesia in certain specified diseases, and in complaints of children; and the dose required for children and for adults; and wherein calcined magnesia is superior to common or uncalcined magnesia alba; and then proceeded: "In consequence of improvements which they have made in the manufacture of calcined magnesia, Messrs. Henry are enabled to offer to the public their preparation of this medicine, which has already been honored with the approbation of some of the first chemists and physicians of the age, with increased confidence in its superior quality. The calcined magnesia prepared by them will be found to be perfectly deprived of carbonic acid, free from taste, smell, or other disagreeable property, and without roughness or grittiness to the touch or the palate."

The bill of exceptions further says: "Plaintiff's testimony proved that all calcined magnesia is a well-known medicinal

preparation of magnesia, made from sulphate of magnesia, bicarbonate of soda, and calcined by heat. A formula for the preparation is contained in the dispensatories, and first-class chemists frequently prepare the article for their own use. The article comes in bulk and is sold at $2.50 per pound. Henry's calcined magnesia is universally known by that name, and has a character of its own, distinct from ordinary calcined magnesia, though it is used for the same purposes. It has been prepared by the same family, a firm of manufacturing chemists in Manchester, England, for the last one hundred years, and has a peculiar value in the market. It sells in this country, at wholesale, by the dozen, ounce bottles, for $8.50, and for twenty-seven shillings in England, whereas Husband's preparation, the American preparation of the highest repute, sells at $3.00 or $3.50 per dozen. Henry's preparation has a peculiar reputation on account of the nicety with which it is prepared. Whether it is prepared according to the formula given in the dispensatory no witness knew. There was no dispute, upon the above facts, in regard to the history of Henry's magnesia and its peculiar value and reputation, and the form and style and representations under which it has been and is presented to the public."

At the close of the evidence on both sides, the defendant moved the court to direct a verdict for him upon the ground that the plaintiff had failed to show that his merchandise was not "a proprietary medicine or medicinal preparation," within the meaning of the above provision, under which the duty was exacted. Before a ruling was made on that motion, the plaintiff requested the court to submit "the question of fact" to the jury, on the ground that there was a substantial question of fact which was in dispute. The court denied the plaintiff's request, and he excepted. The court then directed the jury to find a verdict for the defendant, on the ground that there was no material question of fact in dispute, and to such ruling the plaintiff excepted. The jury thereupon rendered a verdict for the defendant.

That the article in question is a medicinal preparation, there can be no doubt. The circular sets forth its virtues as a remedy in disease, and calls it a "medicine."

Is it recommended to the public as a proprietary medicine? "Proprietary" is defined thus—in the Imperial Dictionary: "belonging to ownership; as, proprietary rights"—in Webster: "belonging, or pertaining, to a proprietor;" "proprietor" being defined, "one who has the legal right or exclusive title to anything, whether in possession or not; an owner"—in Worcester: "relating to a certain owner or proprietor."

It is quite plain, we think, that Thomas and William Henry recommended their calcined magnesia to the public as a medicine in which they had a proprietary right, as owning all that there was of good will and business reputation appurtenant to the article resulting from its name and from what they stated about its manufacture. They prepared it and put it up in glass bottles, in each of which was blown the words "Henry's Calcined Magnesia, Manchester." Over one end of each bottle was pasted an English revenue stamp, with their name on it. They announced a property in the trade-mark, "Henry's Calcined Magnesia." They called it "their calcined magnesia." They announced J. & S. Ferguson as their sole wholesale agents in the United States. They recommended the article as of superior quality, because of improvements which they had made in its manufacture, and stated, as a result of those improvements, that the article had no carbonic acid, no taste, smell, or other disagreeable property, and no roughness or grittiness to the touch or palate. To complete this proprietary character, they put on each bottle a four cent United States internal revenue proprietary stamp. Although it appeared at the trial, that all calcined magnesia "is a well-known medicinal preparation of magnesia, made from sulphate of magnesia, bicarbonate of soda, and calcined by heat," and that a formula for the preparation was contained in the dispensatories, it did not appear that Henry's preparation was made according to that formula, while it did appear that it was universally known by the name of "Henry's Calcined Magnesia," and had a character of its own, distinct from ordinary calcined magnesia, though used for the same purposes, and that it had been prepared by the same family at Manchester for 100 years, and had a peculiar reputation on account of the nicety with which it

was prepared, and a peculiar value in the market, shown by the price it commanded.

We cannot doubt that this was an article recommended to the public as a proprietary medicine, within the statute. It may fall within that clause, without being prepared according to some private formula or secret art, as a remedy for disease. The statute is in the alternative.

A reference to the internal revenue law, Schedule A to § 3419 Rev. Stat., p. 678, 2d. ed., shows the sense in which Congress used the word "proprietary." It imposed internal revenue taxes on medicinal preparations, where the person making or preparing them (1) had or claimed a private formula or secret or art; (2) had or claimed an exclusive right or title to the making or preparing them; (3) made or sold them under a patent; (4) recommended them to the public as proprietary medicines, or as remedies for disease. Thus a medicinal preparation might be proprietary, without being made by a private formula, or under an exclusive right claimed to the making or preparing it, or under a patent. These internal revenue provisions had their inception in the act of July 1, 1862, ch. 119, 12 Stat. 484, while both of the customs provisions above cited are first found in the act of July 14, 1862, ch. 163, 12 Stat. 548, 549. The word "proprietary," as applied to a medicinal preparation, in the revenue laws, had its origin then.

The plaintiff contends that, because a duty of so much a pound is laid on calcined magnesia by that specific name, this Henry's calcined magnesia, imported in bottles and sold by the bottle by that name, cannot be dutiable under the general designation of a proprietary medicine. But this article is not, and does not purport to be, the calcined magnesia dutiable at 12 cents a pound. By the mode of manufacture used, the carbonic acid is eliminated, the taste and smell are destroyed, other disagreeable qualities are removed, and all grittiness is got rid of. It "has a character of its own, distinct from ordinary calcined magnesia," as the bill of exceptions states, which must arise from the special mode of manufacture. The "ordinary calcined magnesia" is that sold in bulk and by the pound, and dutiable at 12 cents a pound. It was undoubtedly

to reach just such medicinal preparations as this—the monopoly of a particular person, commanding a price due to a special mode of manufacture, sold in bottles, having a name attached identifying the manufacturer as the proprietor of all that imparted the special merit and produced the special price—that the special revenue tax was laid.

The duty by the pound on calcined magnesia, and the *ad valorem* duty on proprietary medicines, starting together, as they did, in the act of July 14, 1862, and continued in the same language in the Revised Statutes, and reproduced in the act of March 3, 1883, ch. 121 (22 Stat. 493, 494), with the duty on calcined magnesia put at 10 cents per pound, and the word "proprietary" extended to all proprietary articles, and not confined to proprietary medicines, the principle of the cases cited for the plaintiff does not apply.

In *Homer* v. *The Collector*, 1 Wall. 486, "almonds" had been dutiable *eo nomine* almost immemorially, and an *ad valorem* duty was imposed on them, as "almonds," in the act of 1846, and it was held that, under the act of 1857, they were not subject to a less duty, as "fruits, green, ripe and dried."

In *Movius* v. *Arthur*, 95 U. S. 144, "patent leather" was dutiable by that name, in the acts of 1861 and 1862. The act of 1872 imposed a less duty on "skins dressed and finished, of all kinds." It was held that the old duty on patent leather continued, because, though it was a finished skin, something was done to it after it could be called a finished skin to make patent leather of it. In the case at bar, Henry's article is not the ordinary calcined magnesia, dutiable by the pound, but something is done to that ordinary calcined magnesia by the Henrys which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine, although the base of it is magnesia, calcined.

In *Arthur* v. *Stephani*, 96 U. S. 125, "confectionery" was, by the act of 1864, dutiable at 50 cents a pound, and by the act of 1872 a duty of 5 cents a pound was laid on "chocolate." It was held that an article which was simply chocolate was dutiable as "chocolate" and not as "confectionery."

A like case is that of *Arthur* v. *Rheims*, 96 U. S. 143, where

"artificial flowers," an article made of cotton, being dutiable by that name in the act of 1864, it was held that they were not dutiable at a less rate, by the imposition of a less duty on manufactures of cotton, in the act of 1872.

There was no question of fact for the jury, and it was proper for the court to direct a verdict for the defendant. *Improvement Co.* v. *Munson*, 14 Wall. 442; *Pleasants* v. *Fant*, 22 Wall. 116; *Herbert* v. *Butler*, 97 U. S. 319; *Bowditch* v. *Boston*, 101 U. S. 16; *Griggs* v. *Houston*, 104 U. S. 553; *Randall* v. *Baltimore & Ohio Railroad Co.*, 109 U. S. 478; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227; *Baylis* v. *Travellers' Ins. Co.*, 113 U. S. 316; *Schofield* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 114 U. S. 615.

Judgment affirmed.

DINGLEY & Another *v.* OLER & Another.

OLER & Another *v.* DINGLEY & Another.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

Argued March 8, 9, 1886.—Decided April 5, 1886.

D, a dealer in ice, finding himself late in the season of 1879 in possession of a large quantity, which threatened to become a total loss, pressed O, another dealer, to buy a part of it. O declined to purchase, but offered to take a cargo and "return the same to you next year from our houses." D accepted O's offer, and delivered the cargo of ice to him that season. Early in July of the season of 1880 D verbally requested O to deliver the ice. On the 7th of July O wrote to D: "It is not just or equitable for you to expect us to give you ice now worth $5.00 per ton when we have letters of yours offering the ice that we got at fifty cents per ton. We must therefore decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered it to other parties here, or give you ice when the market reaches that point." D answered by letter, dated July 10th, that he had sold the ice in advance in expectation of its delivery to him, and it did not seem to him right that O should ask for a postponement in the delivery. To this O answered on the 15th of July by letter, in which, after restating facts which made the demand in his opinion inequitable, he

Statement of Facts.

said : " We cannot therefore comply with your request to deliver the ice claimed, and respectfully submit that you ought not to ask this of us in view of the facts stated herein and in ours of the 7th." " We will be glad to hear from you in reply, but will be more pleased to have a personal interview, and venture to suggest that you come here for the purpose." No reply was made to this suggestion, either personally or by letter, and this suit was commenced six days later. *Held :*

1. That the contract gave O the option, during the whole shipping season of 1880, of delivering ice to D in return for the cargo received in 1879, he giving D reasonable notice of the time of delivery when fixed, and an opportunity to prepare for receiving and taking it away from O's houses.
2. That O's answers of the 7th and 15th July were not intended by him to be, and were not a final refusal to perform the contract on his part ; and that at the time of the commencement of the action there had been no breach of the contract ; and therefore,
3. That it was unnecessary to discuss or decide whether an absolute refusal by O, in the middle of the shipping season of 1880, to perform his contract at all would have conferred upon D a right of action for a breach before the expiration of the contract period for performance.

This was an action of assumpsit brought by Dingley Brothers in the Superior Court of the County of Kennebec, in Maine, against W. M. Oler & Co., of Baltimore, to recover damages for the alleged breach of an agreement, whereby, it was averred, the defendants undertook and promised, in consideration of $3245\frac{25}{100}$ tons of ice delivered to them by the plaintiffs in 1879, to return and deliver to the plaintiffs the same quantity of ice from the defendants' ice-houses in the year 1880.

The case was removed by the defendants into the Circuit Court of the United States for the District of Maine, when the cause was put at issue by a plea of *non assumpsit*, and was submitted to the court by the parties, the intervention of a jury having been duly waived.

The court made a special finding of the facts, and, in pursuance of the conclusions of law based thereon, rendered judgment in favor of the plaintiffs for the sum of $7335.35.

Exceptions were taken by each party to rulings of the court, on which errors are assigned, the cause being brought here for review on writs of error sued out by the respective parties.

The court found, as matter of fact, that late in the season of 1879, the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of, and which threatened to be a

total loss, pressed the defendants to buy some or all of it. Both parties were dealers in ice, cutting it upon the Kennebec River and shipping it thence during the season, that is, while the river was open.

The offers of the plaintiffs were rejected, but the defendants, by their letter of 6th September, 1879, made a counter offer to take a cargo and "return the same to you next year from our houses." The plaintiffs, by their letter of September, 1879, accepted this offer and several cargoes were delivered upon the same terms; the total delivery was $3245\frac{25}{100}$ tons.

In July, 1880, one of the plaintiffs spoke to one of the defendants about delivering the ice, and he replied that he did not know about that, delivering ice when it was worth five dollars a ton, which they had taken when it was worth fifty cents a ton, but he promised to write an answer. July 7, 1880, the defendants wrote, repeating their objections, and saying, among other things, "we must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered other parties here (that is, fifty cents), or give you ice when the market reaches that point."

The plaintiffs, 10th July, 1880, wrote that they had a right to the ice, and had sold it in expectation of its delivery, to which the defendants answered 15th July, 1880, reciting the circumstances of the case and the hardship of such a demand, and again denying the obligation. The letter contained this sentence: "We cannot, therefore, comply with your request to deliver you the ice claimed, and respectfully submit that you ought not to ask this of us," &c., asking for a reply or a personal interview. Neither appears to have been given, and this action was commenced July 21, 1880. The court further found that ice was worth five dollars a ton in July, 1880, and fell later in the season to two dollars a ton.

Thereupon the court held, as matter of law, that there was a contract executed by the plaintiffs, and to be executed by the defendants, who were bound to deliver $3245\frac{25}{100}$ tons of ice from their houses on the Kennebec River during the year of 1880; that the year meant the shipping season; and that the

defendants had the whole season, if they chose to demand it, in which to make delivery, and that the letters of July 7th and 15th from the defendants to the plaintiffs contained an unequivocal refusal to deliver any ice during the season; that the defendants having unqualifiedly refused to ship the ice, this action could be maintained, though brought before the close of the season, but that the damages were not to be reckoned by the price of ice in July; that what the plaintiffs lost was $3245\frac{25}{100}$ tons of ice some time during the season; that the price of ice went down after July to two dollars a ton, and the measure of damages must be reckoned at this rate, with interest from the date of the writ.

To these conclusions of law the plaintiffs below excepted, contending that the right to fix the time for delivery under the contract had vested in them, that it was properly exercised by their demand in July, 1880, that the refusal to deliver at that time constituted the breach of the contract by the defendants, and fixed the damages at $5 per ton, the market value of the ice on that day.

The defendants below excepted, contending on their part that the letters of July 7th and 15th did not constitute an unequivocal refusal to deliver any ice during the season, amounting to a renunciation, and, in that sense, a breach of the contract; and that the action was prematurely brought, the right of action, if any, not accruing until after the expiration of the period within which, by the terms of the contract, they had the option to deliver.

The letter of July 7, 1880, from the defendants to the plaintiffs was as follows:

"BALTIMORE, MD., *7th July*, 1880.

Messrs. Dingley Bros., Gardiner, Me.

DEAR SIRS: As per promise of our W. M. O., we write you concerning the ice we got from you last fall. We have before us the whole of the correspondence on that head, and note throughout the same that you promise to stand between us and any loss. We quote from yours of September 9, 1879, on this head, as follows:

'In fact, we do not propose for you to become losers on account of extending us this accommodation.'

Our W. H. O. does not remember your having spoken to him while at Gardiner about your intention of selling the ice, and was very much surprised when informed that you had done so.

We are very sorry indeed that this question should have arisen between us, who have been on such friendly terms hitherto, but we feel that it is not just or equitable for you (in consideration of the ice being used by us only upon your earnest solicitation, and upon your representation that you would lose the whole unless we assisted you by taking some) to expect us to give you ice now worth $5.00 per ton when we have letters of yours offering the ice that we got at fifty cents per ton. We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point. Again expressing our sincere regret that any complication should arise between us, and assuring you of our innocence in the matter, we are,

Yours truly, W. M. Oler & Co."

The letter was answered by Dingley Bros. on July 10, as follows:

"Gardiner, *July* 10, 1880.

Messrs. W. M. Oler & Co., Baltimore.

Dear Sirs: Yours of 7th is in hand, and we must say the conclusion you have come to greatly astonishes us.

Our sole object in making this exchange, no one knows better than yourselves, was to tide us over to such a time during this season as the ice could be marketed at some reasonable figure, and in confirmation of this we refer you to your proposition, made under date of September 6th, viz.:

'It would, of course, be more convenient for us to ship this cargo from our own houses; but remembering past favors, we feel inclined to assist you in your present difficulty, and will load this cargo from your house, should our terms be agreeable to you.

'We, of course, do not entertain the idea of buying, having a superabundance on hand, but will take this cargo and return same to you next year from our houses.'

Upon this we have acted, and in the utmost good faith made sale of the ice; and now, after all of this, and having refused to buy it yourselves, for you to ask a postponement in the delivery, seems to us hardly right.

Now, whatever the final settlement of this matter is to be, we want you to fill our order; otherwise, we cannot tell what the result might be.

It is not in our minds to do otherwise than right with any one, and certainly with yourselves; and it is our great desire not to get complicated with the third party in that matter, and assure you that your regrets cannot exceed ours that there should have arisen any difference of opinion concerning this affair, and certain it is that neither of us can afford to do wrong by the other in it; and hoping you will take a more favorable view upon further reflection, we remain,

Truly yours, DINGLEY BROS."

The defendants' letter of July 15th was in reply to this, and was as follows:

"BALTIMORE, MD., 15*th July*, 1880.

Messrs. Dingley Bros., Gardiner, Me.

GENTLEMEN: Yours of 10th duly received, and in reply would state that our desire to do right is quite as sincere and earnest as your own, and that we regret our inability to see the matter referred to in the same form in which you state it. The case, briefly stated, appears to us thus, as we think the correspondence of last year will show: being very much troubled with the quantity of ice left on your hands by an unfortunate contract with the Messrs. Barker, you repeatedly urged and importuned us to help you out, and promised us if we would do so that no loss should result to us from the transaction. Under these assurances we at length agreed, purely for your accommodation and relief, to take one cargo, and later, under the same influences, took more. Now you ask us,

at a time when we are pressed by our sales and by short supply, threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair, and certainly does not comport or agree in any way with your agreement to protect us from loss by means of the favor we were intending to do you. We are reluctant to have a disagreement or difference of opinion with old friends, but regard it our duty to protect our own interests, always, however, with a proper regard to the dictates of right. We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the facts stated herein and in ours of the 7th.

You do not reply to our arguments, but simply ask us to surrender our well-formed opinion.

Can you reasonably ask us to do this?

Is not your usually clear and equitable judgment clouded by the manifest considerations of self-interest pressing upon you?

We beg you to consider anew all the circumstances of the transaction and your assurances to us as inducements to make it with you, and cannot doubt that you will be led thereby to admit that your request is not reasonable. We will be glad to hear from you in reply, but would be more pleased to have a personal interview, and venture to suggest that you come here for the purpose. Our business is now more active and confining than ever before. We are deprived of the services of W. Geo., and therefore cannot come to see you.

With regards, we are,

Yours truly, W. M. Oler & Co."

To this no answer was returned, and the present suit was brought six days after its date.

Mr. Orville Dewey Baker for Dingley and another. *Mr. Leslie C. Cornish* was with him on the brief.

This contract can be construed in three ways: 1. That the Olers had the whole shipping season of 1880 in which to return the ice and the right to elect the delivery time during that

season. 2. That the Dingleys had the right to elect the time of delivery during the season. 3. That the rights were reciprocal and either party had the right to elect any reasonable time during the season.

If we adopt the theory that the defendants had the right to elect the delivery time during the whole season, then it is contended that they did elect. The plaintiffs demanded the ice; the defendants refused to deliver, and based the refusal solely on their intention to repudiate *in toto*, making no objection on the ground of their right to elect. This is equivalent to an election. An election once made is binding, and the promise is henceforth single to perform the alternative chosen, according to the maxim, *Quod semel placuit in electionibus, amplius displicere non potest. Brown* v. *Royal Ins. Co.*, 1 E. & E. 853; *Ward* v. *Day*, 4 B. & S. 337, 352; *Gath* v. *Lees*, 3 H. & C. 558; *Borrowman* v. *Free*, 4 Q. B. D. 500, 504, 506; *Rugg* v. *Wier*, 16 C. B. N. S. 471. Leake on Contracts, ed. 1878, 679; Co. Litt. 146 a.; 2 Wharton on Contracts, 623; Comyn's Digest, Election, C. 2; 2 Addison on Contracts, Abbott's Ed. 1188. *Houck* v. *Muller*, 7 Q. B. Div. 92, is a late and strong case for the plaintiff. Defendant sold to plaintiff 2000 tons pig iron to be delivered to plaintiff f. o. b. at defendants' wharf. "Delivery November, 1879 or equally over Nov. Dec. and January next at 6 d. per ton extra." Letters of both parties showed and Bramwell and Bagallay, L. JJ. agreed that vendee had election to take whole in November *or* equally in each of the three months.

Defendants are estopped to deny or recall their assent, plaintiffs having acted upon it by beginning suit. An election is final when the other party has acted on it and changed his position for the worse. *Borrowman* v. *Free*, above cited. And an expressed intention never to perform the contract, if made *before the contract time* for performance, though not of itself a breach and withdrawable till the other party has acted on it, becomes irrevocable by the other party's merely *bringing suit* on it. *La Société* v. *Milders*, 49 Law Times N. S. 55. See also *Mountjoy* v. *Metzger*, 12 Am. Law Reg. N. S. 442; *Swain* v. *Seamens*, 9 Wall. 254, 274.

If it is assumed that either party had the right to elect the

time of delivery during the whole season of 1880, for which there is authority in Maine (see *Bradstreet* v. *Rich*, 72 Maine, 233; *S. C.*, 74 Maine, 303); then the calling of plaintiffs for the ice in July, and the tender of vessels, and the defendants' refusal constituted a breach of the contract.

But we contend that plaintiffs had the right to elect the delivery time. They were the moving party under the contract; the one to do the first act. (1.) By the legal construction of this contract the defendants were not to fetch the borrowed ice back to the plaintiffs, but the plaintiffs were to go and get it at the houses of the defendants, and that was the place of delivery. It was a contract for articles in bulk and cumbersome. With such cumbersome property when no place of delivery is specified they are held to be deliverable only at the place where stored or manufactured. Benjamin on Sales, Perkins' Ed. § 682; Ib. Corbin's Ed., note 23, § 896; *Smith* v. *Gillett*, 50 Ill. 290; *Ragland* v. *Wood*, 71 Ala. 145. (2). Plaintiffs were the "moving agent" because they, and not the defendants, were to furnish vessels. (*a.*) Because in the absence of express agreement a *Mutuum*, like a *Commodatum*, is gratuitous, and hence the lender merely permits the borrower to come and get so much ice at the borrower's charge, and the lender is to retake at his own charge. Neither is to be at any expense in the first instance, but each agrees simply to appropriate so much ice in his own houses to the other's use, if he chooses to come and get it. Any other construction would impose burdens on the party giving the accommodation in the first instance. Story on Bailments, § 219. (*b.*) Because the place of delivery being, as we have seen, the defendants' ice houses, the getting of the ice is necessarily and as matter of law, at plaintiffs' charge. And they must first name the vessel and give notice of their readiness to receive the ice. Until this is done, there is no duty on the vendor to deliver. *Walton* v. *Black*, 5 Houston (Del.), 149; *Roberts* v. *Beatty*, 2 Penn. 63. This contract, like every other, must be construed with reference to the situation and intention of the parties at the time it was made, their own practical construction of it afterwards, and the peculiar nature of the ice business, and when so construed, it is plain that both parties

must always have contemplated that the election for 1880 was with the plaintiffs. The subsequent acts and conduct of the parties show that this was their intention and the construction which they put on the contract; and this intention will prevail, even though in the absence of such evidence the law would construe the contract otherwise.

If either the second or the third construction here suggested is adopted, the case becomes a simple contract by defendants to do a thing on a day certain, a demand and refusal on that day, a consequent breach and damage, and the action is sustainable.

If the first construction be adopted the cases sustain that the action is still well brought. The evidence and findings show an unqualified refusal on defendants' part to perform. Even where the demand is *before* the contract time for performance has begun, a *distinct and unequivocal* refusal to perform at all, may be treated as a breach and action be brought at once. On this point we submit that the array of authority is overwhelming. It comes from the highest courts in England, the highest courts in five of the States in this country, the United States Circuit Court in Virginia and Pennsylvania, incidentally from the United States Supreme Court, and unqualifiedly from five of the most reliable text books: Leake, Chitty, and Parsons on Contracts; Benjamin on Sales, and Sedgwick on Damages.

(1.) It has been frequently held in the case of an executory contract that if the promisor has by *any positive act* rendered himself unable to perform his part, it not only serves to dispense with the performance of any conditions precedent on the part of the promisee before bringing his action, but also is itself a breach of the contract. *Short* v. *Stone*, 8 Ad. & El. 358; *Lovelock* v. *Franklyn*, 8 Ad. & El. 371; *Ford* v. *Tiley*, 6 B. & C. 325; *Heard* v. *Bowers*, 23 Pick. 455; *Kenerson* v. *Henry*, 101 Mass. 152. Leake on Contracts, ed. 1867, 460; Benjamin on Sales, § 567.

(2.) When one party to an executory contract absolutely refuses to perform his contract, and before the time arrives for performance distinctly and unqualifiedly communicates that refusal to the other party, that other party can, if

he choose, treat that refusal as a breach and commence an action at once therefor. The English cases to support this proposition are (chronologically arranged) *Philpotts* v. *Evans*, 5 M. & W. 475 [1841]; *Cort* v. *Ambergate & Nottingham Railway Co.*, 17 Q. B. 127 [1851]; *Hochster* v. *De la Tour*, 2 El. & Bl. 678 [1853]; *Danube & Black Sea Railway Co.* v. *Xenos*, 11 C. B. N. S. 152 [1861]; *Frost* v. *Knight*, L. R. 5 Ex. 322 [1870]; *S. C.*, L. R. 7 Ex. 111. In this country many States have accepted and affirmed the doctrine of *Hochster* v. *De la Tour*. See *Crabtree* v. *Messersmith*, 19Iowa, 179 [1865]; *Holloway* v. *Griffith*, 32 Iowa, 409 [1871]; *Fox* v. *Kitton*, 19 Ill. 519 [1858]; *Chamber of Commerce* v. *Sollitt*, 43 Ill. 519 [1866]; *Mountjoy* v. *Metzger*, 12 Am. Law. Reg. 442 [1873 Penn.]; *Dugan* v. *Anderson*, 36 Maryland, 567 [1872]; *Burtis* v. *Thompson*, 42 N. Y. 246 [1870]; *Howard* v. *Daly*, 61 N. Y. 362 [1875]; *Hancock* v. *New York Life Insurance Co.*, 13 Am. Law Reg. N. S. 103 [C. Ct. U. S. Virginia, 1874]; *Ex parte Pollard*, 2 Lowell, 411; *Smoot's Case*, 15 Wall. 36.

(3.) Such, then, we find to be the law in the case of a bilateral contract—that is, a contract where both parties are bound, and where the consideration of each promise is the promise of the other party. But the principle applies with much more reason in the case of a unilateral contract—as is the one at bar—one party having already performed the consideration, and the other being alone bound.

Mr. Bernard Carter for Oler & Co.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

We agree in opinion with the Circuit Court that, according to the terms of the contract, the defendants had the option of delivering the ice contracted for at any time during the whole shipping season of 1880, giving to the plaintiffs reasonable notice of the time when fixed, and an opportunity to prepare for receiving and taking it away from the defendants' houses. The language of the contract was that the defendants were to "return the same (the ice) to you next year from our houses."

Next year, it is not denied, means the shipping season of 1880, during which navigation was open, and in time for the plaintiffs, on notice, to obtain vessels, send them to the ice houses for loading, and get out of the river before it was closed to navigation. The defendants were to deliver, and although that, under the circumstances, required nothing on their part but to be ready for the plaintiffs to receive and load on their vessels, that state of readiness might depend upon other engagements of the defendants in respect to ice in the same houses, so that they had the right under the terms of the contract to consult their convenience as to the particular day when they would furnish to the plaintiffs the ice for shipment. The first and principal act to be done under the contract was to be done by the defendants, that is, the delivery, and the words of the agreement are fully satisfied when that is done at any reasonable time within the season of 1880. And this confers upon the defendants, bound to make the delivery, the choice of the time within the period permitted by the contract. *Wheeler* v. *New Brunswick & Canada Railroad Co.*, 115 U. S. 29.

We differ, however, from the opinion of the Circuit Court that the defendants are to be considered, from the language of their letters above set out, as having renounced the contract by a refusal to perform, within the meaning of the rule which, it is assumed, in such a case, confers upon the plaintiffs a right of action before the expiration of the contract period for performance. We do not so construe the correspondence between the parties. In the letter of July 7th, the defendants say: "We must, therefore, decline to ship the ice for you this season, and claim, as our right, to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point." Although in this extract they decline to ship the ice that season, it is accompanied with the expression of an alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, we think, as a final

and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs. For, in their answer of July 10th, they repeat their demand for delivery immediately, speak of the letter of the 7th instant as asking "for a postponement of the delivery," urge them "to fill our order," and close with "hoping you (the defendants) will take a more favorable view upon further reflection," &c. Here, certainly, was a *locus penitentiæ* conceded to the defendants by the plaintiffs themselves, and a request for further consideration, based upon a renewed demand, instead of abiding by and standing upon the previous one.

Accordingly, on July 15th, the defendants replied to the demand for an immediate delivery to meet the exigency of the plaintiffs' sale of the same ice to others, and the letter is evidently and expressly confined to an answer to the particular demand for a delivery at that time. They accordingly say: "Now you ask us at a time when we are pressed by our sales and by short supply threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair," &c. "We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein and in ours of the 7th." This, we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning.

The view taken by the Circuit Court of the correspondence and conduct of the parties, and which we hold to be erroneous, brought the case within the rule laid down by the English courts in *Hochster* v. *De la Tour*, 2 El. & Bl. 678; *Frost* v. *Knight*, L. R. 7 Ex. 111; *Danube & Black Sea Railway Co.* v. *Xenos*, 11 C. B. N. S. 152, and which, in *Roper* v. *Johnson*,

L. R. 8 C. P. 167, 178, was called a novel doctrine, followed by the courts of several of the States, *Crabtree* v. *Messersmith*, 19 Iowa, 179; *Holloway* v. *Griffith*, 32 Iowa, 409; *Fox* v. *Kitton*, 19 Ill. 519; *Chamber of Commerce* v. *Sollitt*, 43 Ill. 519; *Dugan* v. *Anderson*, 36 Maryland, 567; *Burtis* v. *Thompson*, 42 N. Y. 246, but disputed and denied by the Supreme Judicial Court of Massachusetts in *Daniels* v. *Newton*, 114 Mass. 530, and never applied in this court. Accordingly, the right to maintain the present action was justified upon the principle supposed to be established by those cases.

The construction we place upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs; for, upon that construction, this case does not come within the operation of the rule invoked.

In *Smoot's Case*, 15 Wall. 36, this court quoted with approval the qualifications stated by Benjamin on Sales, 1st ed. 424, 2d ed. § 568, that "a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end."

We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in *Avery* v. *Bowden*, 5 El. & Bl. 714; *S. C.*, 6 El. & Bl. 953; which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of *Johnstone* v. *Milling*, in the Court of Appeal, 16 Q. B. D. 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that that does not by itself amount to a breach of the contract unless so acted upon and adopted by the other party.

The present action was prematurely brought before there had been a breach of the contract, even in this sense, by the

defendants, for what they said on July 15th amounted merely to a refusal to comply with the particular demand then made for an immediate delivery.

The judgment is accordingly reversed upon the writ of error sued out by the defendants below, and the cause remanded, with instructions to take further proceedings therein according to law; and upon the writ of error of plaintiffs below judgment will be given that they take nothing by their writ of error.

TURPIN & Another *v.* BURGESS, Collector.

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

Argued March 18, 1886.—Decided April 5, 1886.

The exportation stamp required to be affixed to every package of tobacco intended for exportation, before its removal from the factory, again declared constitutional, and the decision in *Pace* v. *Burgess*, 92 U. S. 372, reaffirmed.

An excise laid on tobacco, before its removal from the factory, is not a duty on "exports," or "on articles exported," within the prohibition of the Constitution, even though the tobacco be intended for exportation. The case of *Coe* v. *Errol*, 116 U. S. 517, cited and applied.

The case is stated in the opinion of the court.

Mr. Charles S. Stringfellow for plaintiffs in error.

Mr. Solicitor General for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This suit was brought to recover from the Internal Revenue collector of the third district of Virginia the amount paid by the plaintiffs from 1869 to 1872, inclusive, for stamps affixed to certain cases of tobacco manufactured by them and intended for exportation. The sum paid for the stamps was twenty-five

cents each. The ground of action relied on by the plaintiffs is, that the tax was unconstitutional, being, as contended, repugnant to that clause of the Constitution which declares that "no tax or duty shall be laid on articles exported from any State." The stamps were required to be affixed by the act of July 20, 1868, 15 Stat. 157. By this act an excise tax of 32 cents per pound was imposed on all manufactured tobacco, except smoking tobacco, on which the tax was 16 cents per pound. This tax was required to be paid by purchasing stamps to be affixed to the packages before the tobacco was allowed to be removed from the manufactory; but tobacco intended for exportation was relieved from the payment of this tax by affixing to each package or box, of whatever size, before removal from the factory, a twenty-five cent stamp, engraved to indicate the intent to export the same. After being thus stamped, and giving bond according to the regulations of the Treasury Department, such tobacco might be removed to any export bonded warehouse at some port of entry, and there kept in bond until actually exported. In 1872 the price of the stamp was reduced to 10 cents; and the act was incorporated in this form in section 3385 of the Revised Statutes.

We had occasion to examine the very question raised in this case in *Pace* v. *Burgess*, reported in 92 U. S. 372, and were unanimously of opinion that the act requiring the exportation stamp complained of, was a valid and constitutional act. The reasons for that decision were given at length in the report of that case, and we see no occasion to modify the views then expressed. The finding of facts (so called), made by the court in the present case by consent of the parties (who waived a jury), does not change the character of the question. Every fact now found was assumed, or virtually involved, in the former case. But since that decision Congress has abolished all charge for the exportation stamp, by an act passed August 8, 1882, entitled "An Act to repeal so much of section 3385 of the Revised Statutes as imposes an export tax on tobacco." It is argued that the language of this title is a concession by Congress that the charge for the stamp was an export tax. This argument admits of several answers. The act was obtained in

the interest of the tobacco manufacturers, and was probably proposed by them, or by their counsel, and the expression referred to may have escaped the attention of the members. But, if it was intentionally used, it would only be the opinion of one Congress opposed to that of another; for, of course, it cannot be supposed that the Congress which passed the law regarded it as imposing a tax on exports. Besides, an expression of opinion on the part of Congress, however much to be respected, is not binding on us. The counsel for the plaintiff in this case asks us to declare the law unconstitutional, and thereby to declare that the Congress which passed it was mistaken in its opinion.

With the action of Congress in abolishing the charge for the stamp we have nothing to do. That is a matter of pure legislative discretion, and has no bearing on the question.

We are referred to certain expressions in the opinion of the Court of Appeals of Virginia in the case of *Burwell* v. *Burgess*, 32 Gratt. 472, indicating that if it were an original question that court would find it difficult to hold that the money paid for the stamps was not a tax. Whilst entertaining a high respect for the opinions of that eminent court, we cannot surrender our own views on a question which it is our peculiar duty to decide.

There is another view of this subject, however, independent of the considerations which governed our former decision, which is equally decisive of this case. We have lately decided, in *Coe* v. *Errol*, 116 U. S. 517, that goods intended for exportation to another State are liable to taxation as part of the general mass of property of the State of their origin until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose, provided they are taxed in the usual way in which such property is taxed, and not taxed by reason or because of such exportation, or intended exportation, and that the carrying of them to and depositing them at a depot for the purpose of transportation is no part of that transportation. Now the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In

the one case the words are, "No tax or duty shall be laid on articles exported from any State." Art. 1, sec. 9, par. 5. In the other they are, "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports." Art. 1, sec. 10, par. 2. The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. How can the officers of the United States, or of the State, know that goods apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot for a moment be contended. It would not be true, and would lead to the greatest frauds.

It is true, as was conceded in *Coe* v. *Errol*, that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign countries; yet the decision in that case was based on the postulate that when such imposts or duties are laid on imports or exports from one State to another it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress. So that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in the other.

In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer. Had the same excise which was laid upon all other tobacco manufactured by the plaintiffs been laid on the tobacco in question, they could not have complained. But it was not. A special indulgence was granted to them (in com-

mon with others), in reference to the particular tobacco which they declared it to be their intention to export. With regard to that, in order to identify it, and to protect the government from fraudulent practices, all that was required of the plaintiffs was to affix a 25 cent stamp of a peculiar design to each package, no matter how much it might contain, and enter into bond either to export it according to the declared intention, or to pay the regular tax, if it should not be exported. In this view of the case, the plaintiffs not only had no ground of complaint, but they were really the objects of favorable treatment on the part of the government, which, on the slight and easy conditions referred to, accepted their declared intention to export the tobacco in question, before it was commenced to be exported, or put in the way of exportation.

On both grounds we are satisfied that the plaintiffs are without any cause of action, and the judgment of the Circuit Court is

Affirmed.

MAHOMET *v.* QUACKENBUSH.

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

Submitted March 8, 1886.—Decided April 5, 1886.

The requirement of the Constitution of Illinois that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title," is satisfied if the law has but one general object, and that object is expressed in the title and the body of the act is germane to the title.

A statute of Illinois which was entitled "An Act to amend the articles of association of the Danville et cet. Railroad Company, and to extend the powers of and confer a charter upon the same," and which, in the body of the act, authorized incorporated townships along the route to subscribe to its capital stock on an assenting vote of a majority of the legal voters, and further legalized assents of voters of certain townships given at meetings held previous to the passage of the act, complied with the requirement of the Constitution of that State that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title."

Opinion of the Court.

Anderson v. *Santa Anna*, 116 U. S. 356, affirmed.
Schuyler County v. *Rock Island & Alton Railroad Co.*, 25 Ill. 182; and *O'Leary* v. *Cook County*, 28 Ill. 543, approved and applied.
Welch v. *Post*, 99 Ill. 474, questioned.

The case is stated in the opinion of the court.

Mr. John McNulta and *Mr. R. A. Lemon* for plaintiff in error.

Mr. T. C. Mather for defendant in error.

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

The facts of this case are identical with those of *Anderson* v. *Santa Anna*, 116 U. S. 356, except that here the bonds were issued by one township on the line of the Danville, Urbana, Bloomington and Pekin Railroad, and there by another. The bonds in the two cases are the same in form and the statutory authority for their issue the same. All questions actually decided in the other case are concluded in this, but one point is made now that was not presented then, and it arises on these facts:

Art. 3, § 23 of the Illinois Constitution of 1848, which was in force when the statutes on which the case depends were passed, contained this provision:

"And no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title."

The act of 1867, under which the bonds were issued, was a private or local law with the following title:

"An Act to amend the articles of association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same."

The parts of the act pertinent to the present enquiry are §§ 1, 12, and 13. These are as follows:

"§ 1. *Be it enacted by the people of the State of Illinois represented in the General Assembly*, That the said corporation is hereby created a body politic and corporate under the name and style of 'The Danville, Urbana, Bloomington and Pekin

Railroad Company,' &c. And the said company is authorized and empowered to locate, construct and complete a railroad, extending from the city of Pekin, in Tazewell County, Illinois, through or as near as practicable to the towns of Tremont, Mackinawtown, Concord, Bloomington, Leroy, Mount Pleasant, Mahomet, Champaign City, Urbana and St. Joseph to the east boundary of the State of Illinois," &c.

"§ 12. To further aid in the construction of said road by said company, any incorporated town or township in counties acting under the township organization law, along the route of said road, may subscribe to the capital stock of said company in any sum not exceeding two hundred and fifty thousand dollars.

"§ 13. No such subscription shall be made until the question has been submitted to the legal voters of such incorporation, town, or township in which the subscription is proposed to be made; and the clerk of each of said towns or townships is hereby required, upon the presentation of a petition signed by at least ten citizens, who are legal voters and tax-payers of such town or township for which he is clerk, and in which petition the amount proposed to be subscribed shall be stated, to post up notices in at least three public places in each town or township, which notice shall be posted not less than thirty days before the day of holding such election, notifying the legal voters of such town or township to meet at the usual place of holding elections in such town or township, or some other convenient place named in such notice, for the purpose of voting for or against such subscription: *Provided*, that where elections may have already been held, and a majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then, and in that case, no other election need be had, and the amount so voted for shall be subscribed as in this act provided. And such elections are hereby declared to be legal and valid, as though this act had been in force at the time thereof, and all the provisions hereof had been complied with."

The point now made is that the statute, so far as it undertakes to authorize municipalities to subscribe to the capital stock

of the corporation, is unconstitutional, because it embraces two distinct subjects, one the incorporation of the railroad company, and the other an enlargement of the corporate powers of municipal corporations, the first of which alone is expressed in the title. This objection, it seems to us, is fully disposed of by the case of the *Supervisors of Schuyler County* v. *Rock Island & Alton Railroad Company*, 25 Ill. 181, 183, decided by the Supreme Court of Illinois in 1860. There the title was "An Act to incorporate the Rock Island & Alton Railroad Company," and the act, besides incorporating the company, authorized counties to subscribe to the stock. As to this the court said, speaking through Chief Justice Caton: "We think the title of this act sufficient to embrace the whole of the law, and that it is a compliance with the constitutional requirement. All the provisions of the act are appropriately designed to carry out the object of the corporation. If it was proper to authorize subscriptions to the stock, it was certainly proper to enable individuals or counties to subscribe and specify the terms and conditions on which they might subscribe, and the mode of making the subscription."

In States where constitutional provisions like that now under consideration have been decided to be mandatory, and not directory only, it has generally been held that the requirement is satisfied if the law has but one general object, and that is clearly expressed in the title. It is enough if the body of the act is germane to the title. This is certainly the well established rule in Illinois, where, as was said by Mr. Justice Breese, dissenting in *O'Leary* v. *County of Cook*, 28 Ill. 534, decided in 1862, the "court has leaned rather in favor of the validity of private acts, when the subjects of the acts are multifarious." In that case a provision in a law entitled "An Act to amend an act entitled 'An Act to incorporate the North Western University,'" which prohibited "the sale of spirituous liquors within four miles of the university, under a special penalty to be recovered by the County of Cook," was held by a majority of the court not to be repugnant to this provision of the Constitution, and it was said, "The object of the charter was to create an institution for the education of young men, and it was

competent for the legislature to embrace within it everything which was designed to facilitate that object. Every provision which was intended to promote the well being of the institution, or its students, was within the proper subject matter of that law." p. 538. As early as 1853 it was decided in *Belleville, &c., Railroad Company* v. *Gregory*, 15 Ill. 20, 29, that in "An Act to incorporate the Belleville and Illinoistown Railroad Company," authority could be given the company "to extend and unite with any other railroad in this State." So, too, in *Firemen's Benevolent Association* v. *Lounsbury*, 21 Ill. 511, it was held, in 1859, that, in a law entitled "An Act to incorporate the Firemen's Benevolent Association and for other purposes," it was competent to provide that the agents of all foreign insurance companies doing business in Chicago should pay the association two dollars on every hundred dollars of premiums received by them during a year, the court simply remarking on this branch of the case, "We think the sixth section germane to the objects of the bill and embraced properly in the same subject, the whole of which is sufficiently expressed in the title." p. 515. The same general principle has been fully recognized and enforced in *Neifing* v. *Town of Pontiac*, 56 Ill. 172; *The People* v. *Wright*, 70 Ill. 388, 396; *The People* v. *Brislin*, 80 Ill. 423, where it was said, p. 433, "this court has gone very far to uphold statutes supposed to be within this objection;" "the body of the act in question is germane to the title of the bill;" *Guild, Jr.*, v. *City of Chicago*, 82 Ill. 472; and *Fuller* v. *The People*, 92 Ill. 182, 185. This court also decided to the same effect in *Jonesboro City* v. *Cairo & St. Louis Railroad Co.*, 110 U. S. 192, 199, as to a similar provision in the Illinois Constitution of 1870.

It is further insisted, however, that if this law is good, so far as the general authority to subscribe is concerned, it is bad to the extent that it seeks to give effect to the elections which were unauthorized at the time they were held, and we are referred to the cases of *Village of Lockport* v. *Gaylord*, 61 Ill. 276, and *Middleport* v. *Ætna Life Ins. Co.*, 82 Ill. 562, in support of this position. In *Lockport* v. *Gaylord* it was decided that a provision legalizing certain appropriations theretofore made

by the president and trustees of the village and certain orders drawn by the clerk was not germane to the title of "An Act to amend the charter of the village of Lockport, passed February 12, 1853," and in *Middleport* v. *Ætna Ins. Co.*, that authority to issue bonds in liquidation of appropriations voted under a prior act was not germane to the title of "An Act to legalize certain aids heretofore voted and granted to aid in the construction" of a proposed railroad. The first of these cases was decided in 1871, and the last in 1876. In the present case, however, the provision relates only to the terms and conditions on which subscription to the stock of the railroad company might be made, which it was said in *Supervisors of Schuyler County* v. *Rock Island and Alton Railroad Co.* was germane to the general subject of a bill to incorporate a railroad company. It is nothing more nor less than a requirement of a vote of the people as authority for the subscription, with a proviso that if the vote had already been taken it need not be taken over again. This, as it seems to us, comes within both the letter and spirit of the earlier adjudications, and that these have not been overthrown by the later cases. We are aware that in *Welch* v. *Post*, 99 Ill. 471, 474, decided in 1881, the court said that "on the authority of *Middleport* v. *Ætna Insurance Co.*" it was "inclined to hold" that power could not be given to municipal corporations to subscribe to the stock of a railroad company in an act entitled substantially like that now under consideration, but as neither in this case, nor in that of *Middleport* v. *Insurance Co.*, nor in that of *Lockport* v. *Gaylord*, was any reference whatever made to the earlier decisions, which seem to be so decidedly the other way, we do not feel ourselves called upon to depart from the long-settled practice in the State, by what has yet been done towards making a change. In fact, in *Fuller* v. *The People*, before cited, which was decided eight years after the *Lockport Case*, and three years after that of *Middleport* v. *Ins. Co.*, the following quotation is made with approval from Cooley on Constitutional Limitations (1st ed.), 144, § 2: "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means neces-

sary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not only be unreasonable, but would actually render legislation impossible." And again, from *Sun Mut. Ins. Co.* v. *The Mayor*, 8 N. Y. (4 Seld.) 240, 253: "There must be but one subject, but the mode in which the subject is treated, or the reasons which influence the legislature, could not and need not be stated in the title, according to the letter and spirit of the constitution."

In *Montclair* v. *Ramsdell*, 107 U. S. 147, *Otoe County* v. *Baldwin*, 111 U. S. 1, 16, and *Ackley School District* v. *Hall*, 113 U. S. 135, we had occasion to consider the same general question, with the same result, in connection with similar provisions in the constitutions of New Jersey, Nebraska and Iowa respectively.

Finding nothing in this case to distinguish it from *Anderson* v. *Santa Anna*, the judgment is, on that authority,

Affirmed.

BRUCE & Another *v.* MANCHESTER & KEENE RAILROAD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

Submitted March 22, 1886.—Decided April 5, 1886.

The matter in dispute, on which the jurisdiction of this court depends, is the matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered; and the court is not permitted, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties.

Elgin v. *Marshall*, 106 U. S. 578, affirmed.

This was a motion to dismiss. The case is stated in the opinion of the court.

Mr. Frank W. Hackett and *Mr. J. W. Fellows* for the motion.

Mr. F. A. Brooks opposing.

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

This suit, at the time of the decree appealed from, was by Alexander Bruce, a citizen of Illinois, and William Shepard, a citizen of Massachusetts, against the Manchester and Keene Railroad, a New Hampshire corporation, to collect interest due on certain bonds of the railroad by the foreclosure of a mortgage made to trustees to secure a series of bonds amounting in the aggregate to $500,000. There were other parties, both plaintiff and defendant, when the suit was begun, but a discontinuance was entered before the decree as to all but these. The bill was filed in behalf of the complainants and all other like creditors, not citizens of New Hampshire, who might come in and contribute to the expenses, but no such creditors had come in or connected themselves with the suit in any way at the time of the decree. The railroad filed an answer, and upon final hearing the bill was dismissed. The record shows that the complainant Bruce owned bonds for $7500, on which interest was past due and unpaid to the amount of not more than $3000; and Shepard $1000 of bonds, on which not more than $400 of interest was due. After the bill was dismissed the complainants, Bruce and Shepard, took a joint appeal, which the railroad now moves to dismiss because the value of the matter in dispute does not exceed $5000.

This motion must be granted. The case comes clearly within the rule established in *Elgin* v. *Marshall*, 106 U. S. 578, in which it was decided that the matter in dispute, on which our jurisdiction depends, is "the matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered," and that we are not permitted, "for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties." Although the principal

of the bonds owned by one of the complainants exceeds $5000, the suit is brought to recover only the interest, which is less. These complainants are in no way authorized to represent the other bondholders. They sued for themselves and all others in like situation who might join with them, but no one saw fit to join. They were allowed to proceed alone, and the payment to them of their interest would have been a bar to the further prosecution of the suit. So, if a decree had been rendered in their favor without others joining in the suit, either by petition or by proof before a master, or otherwise, it would have been satisfied by the payment of the amount found due to them, and no further proceedings could thereafter be had. It is true, if such a payment should not be made, and a resort to a sale of the mortgaged property should be necessary to collect what was due to them, the other bondholders would have an interest in the proceeds and could be called in before a master for that purpose; but that would be only one of the collateral or indirect effects of the decree not to be considered in determining our jurisdiction. On the case as it stood when the bill was dismissed, the only matter directly involved was the right of Bruce and Shepard to have the mortgaged property sold to pay the several amounts due them respectively for interest on their bonds. This is all that has been denied. It follows that the matter in dispute here is less than our jurisdictional limit.

Dismissed.

EX PARTE FONDA.

ORIGINAL.

Submitted March 22, 1886.—Decided April 5, 1886.

A petition for a writ of habeas corpus alleged that the petitioner had been convicted in a Circuit Court of the State of Michigan of embezzling the funds of a National Bank, and set forth various reasons why the conviction should be held to be in contravention of the Constitution and laws of the United States; but it showed no reason why the Supreme Court of the State might not review the judgment, or why it should not be permitted to do so without interference by the courts of the United States: *Held*, That leave to file the petition should be denied.

Statement of Facts.

This was a motion for leave to file a petition for a writ of habeas corpus. The averments in the petition were as follows:

"*First.* That on the 10th day of November, 1885, your petitioner was sentenced to imprisonment in the State prison at Jackson, Michigan, by the Circuit Court of St. Joseph County in that State, for the term and period of three years and six months from and including the day aforesaid, as will appear from a copy of said sentence hereto attached.

"*Second.* That the conviction of your petitioner, upon which said sentence was based, was procured in said court on the 31st day of October, 1885, as will appear from a copy of the verdict of the jury then and there rendered, and hereto attached.

"*Third.* That your petitioner was tried on the day last aforesaid, for the commission of the several offences charged against him in and by a certain information, a copy of which is hereto attached.

"*Fourth.* Your petitioner further shows that said conviction and sentence were had and imposed upon the 3d and 4th counts of said information, exclusively, as will appear by reference to the verdict hereto attached.

"*Fifth.* That in pursuance of the execution of said sentence, your petitioner is now confined in said State prison, and is restrained of his liberty illegally, forcibly and against his will by one Hiram F. Hatch, the warden and keeper thereof.

"*Sixth.* That your petitioner was employed by the Farmers' National Bank of Constantine in the capacity of clerk, and by virtue of said employment acted as the general manager of the affairs of said bank, and had full control and the custody of its funds during the whole period covered by the dates upon which the alleged embezzlements are charged to have been committed in the information hereto attached.

"*Seventh.* Your petitioner is advised, and therefore alleges that said imprisonment, confinement and detention are unwarranted and illegal in this:

"I. Because your petitioner is convicted, sentenced and imprisoned contrary to the provisions of the Constitution of the United States and the laws of Congress.

"II. Because the acts described and charged in the third and

fourth counts of the information (being embezzlement of the funds and property of a National Bank by a clerk therein) are cognizable by the federal courts, and the jurisdiction to try your petitioner and to punish said crime is vested exclusively in said courts; the action of said State court is in violation of Article I., Section 8, Parts 5 and 17 of the Constitution of the United States; also of Section 711, Part 1, of the Revised Statutes of the United States, and Section 5209 of said statutes, which provides a punishment for the crime of which your petitioner stands convicted.

"III. Because he was held to answer for, and was convicted of an infamous crime as charged in the third and fourth counts of said information without presentment or indictment by a grand jury."

Mr. William E. Earle, *Mr. Edwin F. Conely*, and *Mr. Frank P. Guise* for the motion.

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

This motion is denied on the authority of *Ex parte Royall*, ante 241. No reason is suggested why the Supreme Court of the State may not review the judgment of the Circuit Court of the county upon the question which is raised as to the application of the statute, under which the conviction has been had, to embezzlements by the servants and clerks of national banks, nor why it should not be permitted to do so without interference by the courts of the United States. The question appears to be one which, if properly presented by the record, may be reviewed in this court after a decision by the Supreme Court adverse to the petitioner. The case as made by the motion papers is not one which, under the principles settled in *Royall's Case*, requires this court to act in advance of the orderly course of proceeding for a review of the judgment by writ of error.

Motion denied.

NEW YORK LIFE INSURANCE COMPANY *v.* FLETCHER.

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

Argued March 19, 1886.—Decided March 29, 1886.

A person applied in St. Louis to an agent of a New York Insurance Company, for insurance on his life. The agent, under general instructions, questioned him on subjects material to the risk. He made answers which, if correctly written down, and transmitted to the company, would have probably caused it to decline the risk. The agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading, and by the agent transmitted to the company, and the company thereupon assumed the risk. It was conditioned in the policy that the answers were part of it, and that no statement to the agent not thus transmitted should be binding on his principal; and a copy of the answers with these conditions conspicuously printed upon it, accompanied the policy. *Held:* That the policy was void.

Insurance Co. v. *Wilkinson*, 13 Wall. 222, and *Insurance Co.* v. *Mahone*, 21 Wall. 152, distinguished.

If an applicant for life insurance is required to answer questions relating to material facts in writing, and to subscribe his name thereto as part of the application upon which the policy is issued, it is his duty to read the answers before signing them, and it will be presumed that he did read them.

If a policy for life insurance on which premiums have been paid is void by reason of untrue representations as to material facts in the application, made without design on the part of the applicant, the only recovery which can be had on the policy after the assured's death is for the premiums paid on it.

The New York Life Insurance Company, on the 22d of December, 1877, issued at its home office in the city of New York to Chinonda S. Alford a policy of insurance upon his life for the sum of $10,000. The consideration was $263.80 paid at the time, and the promise to pay a like sum on the 22d of December each year. The company is a corporation under the laws of New York, but it also transacts business in Missouri through agents residing there, and, of course, with reference to the business done in that State, is subject to its laws. The assured was a resident of Missouri, and in December, 1877, he applied to an agent of the company there for

such a policy, and submitted to an examination. He also made certain statements and representations respecting himself, his life, and his past and present health, to which he appended a declaration, warranting their truthfulness and agreeing that they should be the basis of any contract between him and the company, and that if they, or any of them, were in any respect untrue, the policy which might be issued thereon should be void, and that all moneys paid on account of the insurance should be forfeited; and further agreeing, that, inasmuch as only the officers at the home office had authority to determine whether or not a policy should issue on any application, and as they acted only on the written statements and representations referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy, should be binding on the company or in any manner affect its rights, unless they were reduced to writing and presented at the home office in the application. The statements and representations with this declaration accompanying the application and forming a part of it, were forwarded to the home office. The policy was thereupon issued and sent to its agent at St. Louis for delivery to the assured. It recited that it was issued in consideration and upon the faith of the statements and representations contained in his application; all of which had been warranted by him to be true, and also in consideration of the cash payment and the annual premiums to be paid. It stipulated for the payment of the amount of the insurance within sixty days after due notice and satisfactory proof of his death, subject to the conditions specified therein. To the policy was annexed a copy of the application, and upon it was endorsed the following notice in red type and conspicuously printed:

"For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, an abstract of the application upon which this policy is based may be found in the third page within. If corrections are desired, when satisfactory to the company, a certificate to that effect will be issued over the signature of the president and actuary."

Statement of Facts.

The cash payment was made by the assured on the receipt of the policy, and the subsequent annual premiums were regularly paid to the agents of the company in Missouri until his death, which occurred September 24, 1880. The plaintiff was appointed his executor. Due notice and proof of his death were given to the company. Among the documents furnished was the affidavit of a witness, who testified that he had been the physician of the assured for ten years, and had attended him at one time for diabetes, and that he died of that disease. Payment of the insurance money was refused on the alleged ground of false statements and representations in the application. Thereupon the executor brought this action in a court of Missouri, and upon the petition of the company it was removed to the Circuit Court of the United States.

The petition, which is the designation given to the first pleading in an action under the system of procedure in Missouri, alleges the incorporation of the defendant under the laws of New York, and its license to do business in Missouri; the issue of the policy; the payment of the premiums; the death of the assured; the appointment of the plaintiff as executor; the giving of notice and furnishing of proof of the death and the non-payment of the insurance money; and prays for judgment for the amount with interest. The company answered, admitting its incorporation under the laws of New York, and the issue of the policy, but set up that it was executed at the home office upon the faith of the answers and statements contained in the assured's written application, which were warranted to be true; that it was stated in the application that he never had a disease of the kidneys or any serious disease, and had never been seriously ill, and had no regular medical attendant, whereas he had been afflicted with diabetes, which is a serious disease of the kidneys, and had been under medical treatment for it; that such statement was not only false but was material to the risk; that he actually died of the disease which he thus concealed; and that the policy was void by reason of these false statements.

The plaintiff replied that two agents of the company at St. Louis, who were personally acquainted with the assured and

knew his past and then physical condition, had solicited him on different occasions to take out a policy in the company; that he told each of them on those occasions that he did not believe he was insurable; that they knew he had been in bad health and had been under medical treatment for diabetes, though he thought he was then well; that they assured him that he was insurable, that the fact that he had had the disease made no difference, and that if he would take out a policy and pay the premiums required he would have no trouble; that finally, about the 18th of December, 1877, he consented to take a policy; that they then told him it would be necessary for him to answer certain questions as a matter of form; that one of them thereupon read to him certain questions from a printed blank, and as he answered them the other pretended to take down and write in the blank the substance of the answers as given, not reading over to the assured what he had written, nor consulting him about it, nor informing him what it was, but saying that what he did was a mere formality; that when he was asked with respect to his having had any disease of the kidneys he replied that his condition was well known to the agents, who were aware that he had been sick and under treatment by Doctor Brokaw for diabetes, and that the doctor's office was opposite, and they could go there and find out everything they wanted to know; that the assured had faithfully answered all the questions, but the agents inserted in the blanks false answers; that he had no reason to suppose that the answers were taken down differently from those given; that after answering all their questions he was asked to sign his name to the paper to identify him as the party for whose benefit the policy was to be issued, and for that purpose he signed the paper twice, without reading it or the written answers; that the agents did not read to him any part of the application except the questions, and did not read the clause set forth in the defendant's answer, nor call attention to the fact that his signatures were intended as an acceptance or assent to that clause; that when the policy was delivered to him he neither read it nor the copy of the application attached to it; that the agent who delivered it informed him that it was

all right, and he was insured, and he gave no further attention to the matter; that the annual premiums, as they fell due, were paid to said agent, who received them with full knowledge of all the facts; and that, therefore, the company was estopped from pretending that any of the answers as written rendered the policy void.

The company demurred to this reply, as constituting in law no cause of action and no reply to the facts set forth in the answer, but the demurrer was overruled.

On the trial it was proved by the company that the assured was a resident of St. Louis; and that Dr. Brokaw had been his regular physician for ten years, and had treated him some years before his death for diabetes, of which disease he died.

It was also proved that on the day he made application to the defendant he also applied to the Penn Mutual Life Insurance Company, of Pennsylvania, for insurance on his life, and stated that he had had diabetes in 1875, and that Dr. Brokaw was his physician. That company refused to issue a life policy, but granted a fifteen-year endowment policy at a largely increased premium.

It was also proved that diabetes is commonly known as a disease of the kidneys, though primarily a disease of nutrition and not necessarily affecting their structure in its early stages; that it is a very serious disease and of doubtful curability; that the policy was issued solely upon the written application; and that no other application, statement, or representation was received from the applicant.

The law of Missouri provides that "no misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury;" Rev. Stat., Missouri, 1879, § 5976; and that in suits brought upon life policies "no defence based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court, for the bene-

fit of the plaintiffs, the premiums received on such policies." Id. § 5977.

Under this last section the defendant tendered in court to the plaintiff $888.26, the premiums received, with interest to the date of trial; but the plaintiff declined to receive the amount in full payment.

On the part of the plaintiff a witness was allowed, against the objection of the defendant, to testify to statements, made by the assured and the agent at the time of the application, tending to establish some of the matters alleged in reply to the answer. He could not give the specific words used, but he remembered that in one part of the conversation Alford stood up, at the time he was asked as to his having had kidney disease, and pointed through the window and said: "My medical examiner has an office across the way; you can go there and find out from him. I have been afflicted in the kidneys, but he says I am well, and I feel well now." He also testified that at one time he heard the assured say to the agent: "Your company ought not to insure me; you know I have been afflicted with kidney disease;" and that the agent replied: "Just give me your application and I will see if I can get it through."

The witness was also permitted to testify that he did not think the paper was read over to the assured. He did not hear it read, nor did he remember the questions asked, except the specific one as to the kidneys, and he remembered that because the assured stood up and pointed across the street.

There was no evidence that the application was not read by the assured before he signed it, or that there was any imposition practised upon him, or that after receiving the policy he applied to correct his answers, which, as written down, are conceded to be false.

Upon the conclusion of the testimony, the defendant requested the court to charge the jury, among other things, substantially as follows.

1. That it is competent for any party, corporation, or individual, employing an agent in the negotiation of a contract, whether of insurance or otherwise, to limit his powers, pro-

vided the limitation is brought home to the knowledge of the other contracting party, otherwise the principal will be bound by the apparent as well as the actual powers of the agent; and as, in this case, the limitation was made a part of the contract between the parties, it was binding upon them.

2. That the stipulation between the parties, limiting the powers of the soliciting agent and providing that the contract should be based upon the written application, was binding upon the parties, and it was, therefore, immaterial what may have been said by or to the agent at the time of making the application, which was not reduced to writing and presented to the officers of the company at the home office in New York.

3. That whether the statements and answers contained in the application of the assured were made by him or not, yet when he afterwards received the policy, with a copy of the application attached and a memorandum endorsed thereon, calling his attention to the copy thus attached, with a request that any errors in the application be reported to the company for correction, it was his duty to report any answers incorrectly written down and thus enable the company to correct them; and that by his failure to do so he must be presumed to have accepted the policy upon the faith of the answers, and to have acquiesced and agreed that it should remain as the basis of the contract of insurance. But the court refused to give any of these instructions, and the defendant excepted. It recognized, however, in its charge, the competency of the company to limit the powers of the agent, and the binding force of the limitation if brought home to the other contracting party, and instructed the jury that there was such limitation in the present case; that the company was not bound by any representations to or by the assured, unless they were put in writing and submitted to the company; that, therefore, what was contained in the application must be regarded as constituting the basis of the contract, unless it could be avoided for fraud; that if the jury found that at the time of making the application he told the agent that he had had diabetes and referred him to his physician concerning it, and that such agent committed a fraud upon the assured by inserting false answers in the application

and by suppressing the answers actually given, and by concealing from the assured what he had written in the application, and thereby induced him to sign it without knowing what it contained, then the plaintiff was not estopped to recover. The court also charged that if the assured ascertained before the contract was consummated, that is, before the policy was delivered to him and the first premium paid, that the agent had committed a fraud upon him and upon the company, it was his duty to stop and decline to go any further with the transaction; but if he did not discover this before the policy was delivered and the first premium paid, he was not called upon afterwards to take any steps for the cancellation of the contract. To this the defendant excepted. The plaintiff obtained a verdict for the full amount of the insurance money with interest, upon which judgment was rendered.

Mr. Frederick N. Judson, with whom was *Mr. John H. Overall*, for plaintiff in error.

Mr. George D. Reynolds for defendant in error.

I. The contract of insurance in this case is a Missouri contract and to be determined by the laws of that State. (*a.*) The cause of action undoubtedly accrued in Missouri, where the death occurred. *Rippstein* v. *St. Louis Mutual Life Insurance Co.*, 57 Missouri, 86. (*b.*) As the New York Life Insurance Company could only do business in Missouri on terms prescribed by the laws of Missouri, *Paul* v. *State of Virginia*, 8 Wall. 168, when it issued policies or did business in that State, it subjected itself to the laws thereof, and its contracts of insurance, made under the license granted by the State to do business therein, are to be interpreted according to the laws of Missouri. Its policies, solicited by its agents in Missouri, are entered into and accepted by the citizens of Missouri, with a view to the local law, and are to be interpreted thereunder. *Pritchard* v. *Norton*, 106 U. S. 124; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Taylor* v. *Holmes*, 14 Fed. Rep. 505. So held uniformly by United States courts in Missouri since the passage of the act of March 23, 1874, Rev. Stat. Missouri, 1879,

§§ 5976, 5977. *White* v. *Connecticut Mutual Life Insurance Co.*, 4 Dillon, 177; *Fletcher* v. *New York Life Insurance Co.*, 13 Fed. Rep. 526. See also *Holmes* v. *Charter Oak Life Insurance Co.*, 131 Mass. 64. It follows that §§ 5976, 5977 Rev. Stat. Missouri apply to this contract, and under them it is to be noted: (1) that the doctrine of warranty as understood in insurance contracts, is done away with, and misrepresentation is not to be deemed material, unless the matter misrepresented actually contributed to the loss, which is to be determined by the jury, see § 5976; nor 2d, shall such defence be available, unless the defendant at or before the trial, tenders or returns the premiums received. See § 5977. See *White* v. *Conn. Mut. Life Ins. Co. supra.*

II. The main question presented by the case is, whether the clause in the application and in the policy, to the effect that no statements, representations or information made or given by or to the person soliciting or taking the application, or to any person, shall be binding on the company, or in any manner affect its rights, unless such statements, etc., be reduced to writing and presented to the officers of the company at the home office, in the application referred to, is such a notice to the applicant, or to the insured, of the limitation of the powers of the soliciting agent, as exempts the company from responsibility and liability on the policy, when the solicitor is proved to have fraudulently inserted wrong answers and concealed the fact that he had done so from the applicant. As to this, it is respectfully submitted, that this clause is nothing more than an attempt to make the solicitor the agent of the applicant, instead of the agent of the insurer, and that it falls within the principle of the cases of *Ins. Co.* v. *Wilkinson*, 13 Wall. 222; *Ins. Co.* v. *Mahone*, 21 Wall. 152; *New Jersey Mutual Life Ins. Co.* v. *Baker*, 94 U. S. 610. See also note to *Carpenter* v. *Washington Insurance Co.*, 2 American Lead. Cas., 5th ed., 919; Bliss on Life Ins., 2d ed., §§ 76–81; May on Insurance, 2d ed., §§ 136–144, 497–499.

III. Roselein continued, as agent of the company to receive premiums, knowing the statements in the application to be false. That estops his principal. *Wing* v. *Hawey*, 27 Eng.

Law & Eq., 140; *Ins. Co.* v. *McCain*, 96 U. S. 84; *Commercial Ins. Co.* v. *Ives*, 56 Ill. 402; *Ætna Ins. Co.* v. *McGuire*, 51 Ill. 342.

IV. Counsel for plaintiff contend that because the effect of false statements in the application is avoided, and a recovery had notwithstanding their insertion, therefore the recovery must be on a new and different contract. That this is not so, see *Ins. Co.* v. *Wilkinson*, 13 Wall, 222, and especially the brief of counsel, 226–229.

Mr. Reynolds then pointed out the distinctions between the *Mahone case supra*, *Ryan* v. *World Mut. Life Ins. Co.*, 41 Conn. 168, and *Loehner* v. *Home Mutual Ins. Co.*, 17 Missouri, 247, and contended that the latter case was no longer law in Missouri, citing *Horwitz* v. *Equity Mutual Ins. Co.*, 40 Missouri, 557; *Franklin* v. *Atlantic Fire Ins. Co.*, 42 Missouri, 456; *Combs* v. *Hannibal Savings & Ins. Co.*, 43 Missouri, 148; *Hayward* v. *National Ins. Co.*, 52 Missouri, 181.

Mr. Justice Field, after stating the case as above reported, delivered the opinion of the court.

It is conceded that the statements and representations contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the faith of them, and upon his agreement accompanying them that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the company were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that, such proof being made, the plaintiff is not estopped from recovering. But on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the com-

pany can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be cancelled and the premiums returned. As the present action is not for such a cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would he be entitled by virtue of the statute of Missouri.

But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his

application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.

In *Globe Insurance Co.* v. *Wolf*, 95 U. S. 329, the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be given to the provision, except so far as the subsequent acts of the company permitted it to be disregarded.

In *Insurance Co.* v. *Norton*, 96 U. S. 240, the policy contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts, or waive forfeitures, and this court held that the company could have insisted upon those terms had it so chosen.

In *Loehner* v. *Home Mutual Insurance Co.*, the Supreme Court of Missouri passed upon this point. 17 Missouri, 247, 256. The charter of that company provided that, if the assured failed to state in his application, which was made a part of the policy, any encumbrance that existed on the insured premises, his policy should be void. There was also endorsed on the policy a memorandum that the company would not be bound by any statement of the agent unless contained in the application. The answer to the action on the policy set up that the application did not truly state the encumbrances. A small encumbrance upon the premises was not stated, and on the trial evidence was offered that its existence was made known to the agent of the company at the time of the application, but that he refused to write it down, saying that the amount was too trifling. The evidence was excluded, and the Supreme Court sustained the ruling, holding that the objection that the encumbrance was not stated could not be obviated in that way. "Independently of the statute of the State," said the court, "which required the encumbrance to be expressed in

the policy at the peril of its being void, there was a memorandum endorsed on it which made known that the company would be bound by no statement made to the agent not contained in the application. The facts being as represented, they could not give the plaintiffs a right of action on the policy in the teeth of the statute and against the terms of the contract. If the conduct of the agent was such as is alleged, he was guilty of a gross fraud, as is shown by his setting up this defence, which would avoid the policy and give a right of action for the recovery of the premium, but could not, for the reason given, entitle the plaintiff to an action on the policy."

The present case is very different from *Insurance Co.* v. *Wilkinson*, 13 Wall. 222, and from *Insurance Co.* v. *Mahone*, 21 Wall. 152. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect insurance, "as the full and complete representative of the company in all that is said or done in making the contract," and the court held that the powers of the agent are *primâ facie* coextensive with the business entrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements.

The case of *Ryan* v. *World Mutual Life Ins. Co.*, 41 Conn. 168, is in some respects similar to the one before us. There a

policy obtained on the life of Patrick Ryan for the benefit of his wife declared that it was issued and accepted on the condition and agreement that the statements and declarations made in the application therefor, and on the faith of which it was issued, were in all respects true. The application was a part of the policy. It appeared that when the application was made, he was asked whether he had had any of the following diseases: bronchitis, consumption, spitting of blood, or any serious disease, and the answer, as written, was that he had had "none of them." To the enquiry whether, during the previous seven years, he had had any severe sickness or disease, or had employed or consulted any physician, the answer as written was "no." The authority of the agent was limited to receiving the application, forwarding it to the home office, receiving, countersigning, and delivering the policy, and collecting the premiums. The insured having died, action upon the policy was brought by his widow. On the trial she offered to prove, not that the answers were true, but that different answers were in fact given, both by her and him, and that the answers were wrongly written by the local agent of the company without the knowledge or consent of herself or her husband. The application was signed without being read. It was held that the company was not bound by the policy; that the power of the agent would not be extended to an act done by him in fraud of the company and for the benefit of the insured, especially where it was in the power of the assured by reasonable diligence, to defeat the fraudulent intent; that the signing of the application without reading it or hearing it read, was inexcusable negligence; and that a party is bound to know what he signs. After observing that the courts of the State had construed the powers of an insurance agent liberally, and held that, in writing the application and explaining interrogatories and the meaning of the terms used, he was to be regarded as the agent of the company, and, referring to the case of *Insurance Company* v. *Wilkinson*, in 13th Wallace, the court said: "But it cannot be supposed that these defendants intended to clothe this agent with authority to perpetrate a fraud upon themselves. That he deliberately intended to defraud them is

manifest. He well knew that if correct answers were given no policy would issue. Prompted by some motive he sought to obtain a policy by means of false answers. His duty required him not only to write the answers truly as given by the applicant, but also to communicate to his principal any other fact material to the risk which might come to his knowledge from any other source. His conduct in this case was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself or third persons, and against his principal, there is no agency in respect to that transaction, at least as between the agent himself, or the person for whom he is really acting, and the principal. . . . The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured, either as an accomplice or as an instrument, was essential. If she was an accomplice, then she participated in the fraud, and the case falls within the principle of *Lewis* v. *The Phœnix Mutual Life Ins. Co.*, 39 Conn. 100. If she was an instrument she was so because of her own negligence, and that is equally a bar to her right to recover. She says that she and her husband signed the application without reading it and without its being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only, in good faith, answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has the right to presume that he will do it. He has it in his power to prevent this species of fraud and the insurer has not." 41 Conn. 171, 172. With these views we fully agree.

The instruction given to the jury in the case before us is, in effect, that the assured was bound by his application if it was not avoided for fraud, and that it was so avoided by reason of the false statements contained in it, and that, therefore, the

plaintiff, as his representative, could recover. But if the application was avoided, it would seem to be a necessary consequence that the policy itself was also avoided, and his right limited to recovering the premiums paid. But such was not the conclusion of the court. It directed the jury that if the application was avoided for fraud, he could recover. It does not seem to have occurred to the court that had the answers been truthfully reported, and the fact of the assured having had diabetes within a recent period been thus disclosed, the insurance would in all probability have been refused. If the policy can stand with the application avoided, it must stand upon parol statements not communicated to the company. This, of course, cannot be seriously maintained in the face of its notice that only statements in writing forwarded to its officers would be considered. A curious result is the outcome of the instruction. If the agents committed no fraud the plaintiff cannot recover, for the answers reported are not true; but if they did commit the imputed fraud he may recover, although, upon the answers actually given, if truly reported, no policy would have issued. Such anomalous conclusions cannot be maintained.

There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided.

The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid, it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment, he was not called upon to take any steps for the cancellation of the con-

tract. In other words, the jury were told that the assured might take to himself the benefit of the fraud without responsibility for it, if he did not discover it until after it was consummated—a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctioning it.

In *American Ins. Co.* v. *Neiberger*, 74 Missouri, 167, the assured agreed with the agent of the company that the policy to be issued should contain a clause giving him a right to cancel it at the end of the year. The policy issued contained no such clause; but he retained it several months before he returned it. The court, after observing that when the application does not attempt to set forth all the provisions which the policy to be issued must contain, and the agent represents that the policy will contain certain stipulations which are not unlawful, then the policy must contain them, or the assured would not be bound to accept it. "But in such case," said the court, "it will be the duty of the insured, when he receives the policy, promptly to examine the same, and, if it does not contain the stipulations agreed upon, to at once notify the company of such fact, and of his refusal to accept said policy. The policy in this case was issued on the 25th day of January, 1875, and was not rejected by the defendant until May 10, 1875. If the policy was received by the defendant soon after the date on which it purports to have been issued, we think he waited too long to elect whether he would receive the policy without the stipulation in regard to cancellation, or refuse to accept it, because it did not contain such stipulation. After such delay he will be deemed to have accepted the policy as issued."

The case of *Richardson* v. *Maine Ins. Co.*, 46 Maine, 394, is a stronger one in illustration of this doctrine of acceptance. There an application for insurance was made to an agent of the company. He thereupon filled one containing a statement that there was no mortgage on the property to be insured, and without the knowledge of the applicant signed his name thereto. A policy was accordingly issued, which declared that it was made and accepted in reference to the appli-

cation, and that the assured, by accepting it, covenanted that the application contained a just, full, and true statement of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, and that if any fact or circumstance were not fairly represented, the policy should be void. Action having been brought upon the policy, the company denied its liability on the ground that the application had represented that there was no such mortgage, when in fact, one existed. The court held that the assured, by accepting the policy, was bound by its covenants, and that he ratified the application.

It is unnecessary to pursue the subject further. We are clear that the court below erred, both in refusing the instructions asked and in its charge to the jury in the particulars mentioned.

Its judgment must, therefore, be reversed, and the cause remanded for a new trial.

YALE LOCK MANUFACTURING COMPANY *v.* SARGENT.

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

Argued March 12, 15, 1886.—Decided April 5, 1886.

Claim 1 of reissued letters patent No. 4696, granted to James Sargent, January 2, 1872, for an "improvement in locks," on an application filed September 25, 1871, the original patent, No. 57,574, having been granted to him August 28, 1866, namely, "1. In a combination lock for safe or vault doors, a bolt, *I*, which turns on a pivot or bearing, when said bolt, *I*, is used in a lock having no ordinary sliding lock-bolt, and in connection with the separate bolt-work of the door, and so arranged as to receive the pressure of the said bolt-work without transmitting it to the wheels or other equivalent works of the lock," is not invalid, as being an unlawful expansion of claim 1 of the original patent, namely, "1. The rotating tumbler *I*, when separated and isolated in action from the permutation wheels, and so arranged that any inward pressure upon the bolt will be exerted upon the bearing of

Opinion of the Court.

said tumbler, and have no action nor effect upon the said permutation wheels, substantially as and for the purpose herein specified."

The invention covered by claim 1 of the reissue defined, and certain prior structures held not to have anticipated it.

The defendant's lock held to be an infringement of that claim.

The plaintiff granted no licenses under his patent, but sold locks made by himself containing the invention. The defendant sold infringing locks at less prices than the plaintiff, and compelled the plaintiff to lower his prices. As the turning bolt was an essential feature in each of the two locks, and the plaintiff could not sell his patented device unless in a lock, and thus made a profit on the entire lock, and was deprived of that profit by such enforced reduction of prices: *Held*, that the infringement caused the entire loss of the plaintiff, after allowing a proper sum for any other patented device contained in the defendant's lock and for any other causes which gave to the defendant an advantage in selling his lock.

Such loss on the locks sold by the plaintiff, by the reduction of price, was allowed to the plaintiff as damages, in a suit in equity for infringement, although the defendant made no profit.

The plaintiff, as legal owner of the patent, was entitled to recover the damages, although he had a partner in making and selling the locks.

As the bill alleged infringement of the reissue generally, and the answer set up that the reissue was not for the same invention as the original patent, and one of the claims of the reissue not disclaimed before this suit was brought was invalid, as an unlawful expansion of the original patent, although the claim on which a recovery was allowed was good, this court, the patent having expired, but there having been no unreasonable delay in filing a disclaimer to the invalid claim, reversed so much of the decree below as awarded costs to the plaintiff, and affirmed it in all other respects, each party to bear his own costs in this court and one half of the expense of printing the record.

This was a suit in equity to recover for infringement of a patent. The case in stated in the opinion of the court.

Mr. Frederic H. Betts for appellant.

Mr. George Ticknor Curtis, and *Mr. Edmund Wetmore* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by James Sargent against the Yale Lock Manufacturing Company, to recover for the infringement of reissued letters patent

No. 4696, granted to Sargent, January 2, 1872, for an "improvement in locks," on an application therefor filed September 25, 1871 (the original patent, No. 57,574, having been granted to him August 28, 1866).

The specification and drawings of the reissue are as follows:

"My invention consists in combining with the ordinary combination-wheels, and the other working parts of a combination lock which has no sliding lock-bolt, a bolt turning on a pivot or bearing, which is so isolated or removed from contact with the said wheels as to receive any pressure or strain which may be applied through the separate bolt-work of the safe or vault-door, and cut off the communication between the bolt-work of the door and the wheels or fence-lever of the lock, whereby the position of the slots in the wheels can be determined and the lock 'picked,' as can be done in most cases where the ordinary sliding-bolt is used without some mechanical device to prevent.

In the drawings, Figure 1 is an elevation of my improved lock, with the back plate removed; Figs. 2 and 3, an elevation and top view, respectively, of the pivoted bolt, the combination-wheels, the cam, and the lever work that connects them; Fig. 4, a perspective view of the pivoted bolt; Fig. 5, a similar view of the magnet and armatures; Fig. 6, a view showing the manner of applying the spindle and cam to a safe or vault door.

A, represents the plate of a safe door, and *B*, the case of the lock which is applied thereto. *C*, *C*, *C*, are the combination-wheels, and *D*, the operating spindle. The spindle passes through a hollow stud, *a*, of the case, and has screwed upon its inner end the cam *E*, as shown most clearly in Fig. 6. The wheels themselves rest on the stud *a*. *I*, is the bolt, turning on a pivot or bearing, *q*. Its location is such as to rest closely in the rear of the stem, *t*, of the heavy bolt-work of the door, and to hold it out when in one position, but to allow it to retract, to free the bolt-work, when in the other position, said bolt, *I*, turning on its pivot or bearing to allow this to be done. *H* is a sliding-bar, which gives motion to the bolt as it is thrown forward or backward, being connected together by cog-teeth *p r*. The bar slides on studs, *n n*, by which it keeps

its horizontal position. *G* is a lever pivoted at *f*, to bar *H*, and serving to throw the latter back. It has a hook, *b*, Fig. 2, which engages with the bit, *d*, of the cam, to draw the bar back. The forward motion is given by the cam striking the end *o*, of the bar *H*. *L* is a magnet of the form shown in Fig. 5, which is suspended on a pivot, *i*. Its open end rests between armatures *h k*, which are separated by a brass pendant, *l*. The armature *h* is attached to the end of lever *G*. When the magnet is in contact with the lower armature, *h*, the dog, *g*, will be held away from the wheels; but when raised and brought in contact with the upper armature, *k*, the lever is released and the dog is then allowed to fall into the notches of the wheels, to release the bolt. The magnet is raised by a roller, *c*, of the cam, which strikes a bearing, *m*, of the magnet.

In general principle the magnet is the same as that covered by the patent of Sargent and Covert, May 2, 1865; but the construction and arrangement of the magnet and armatures are much simpler and more effective, and constitute one feature of my present invention.

An important feature in my invention is the employment of the bolt *I*, turning on a pivot or bearing, instead of the sliding-bolt heretofore in use. It is isolated, so to speak, from the combination-wheels and the other main working parts of the lock, and, therefore, any strain which is brought to bear upon it by the heavy bolt-work will be expended on the bolt itself, and not upon the wheels. In the old form of lock the sliding-bolt extends back so as to connect with or come near to the wheels, and any strain thereon is liable to disarrange the lock works.

Another important advantage of the isolation of the bolt is that it increases the difficulty of 'picking,' by being removed from all contact with the wheels. A common mode of picking ordinary locks is to force the bolt back, so as to get a contact with it and the edges of the wheels, by which their position is ascertained. In my lock this cannot occur, as the bolt simply turns on its bearing or pivot, and no back action can bring it or the lever work against the wheels.

The bolt may not only be of the circular form shown in the

drawings, but of a segmental form, which will serve the same purpose.

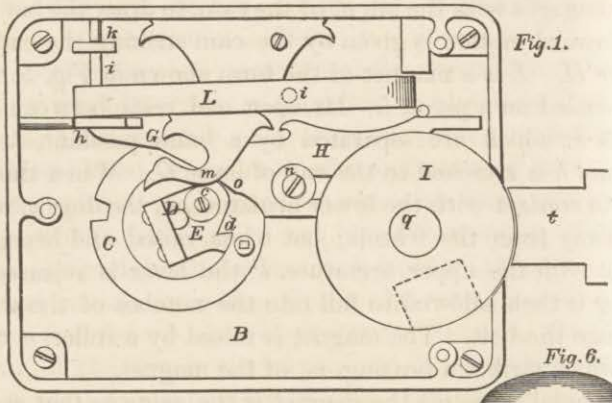


Fig. 1.

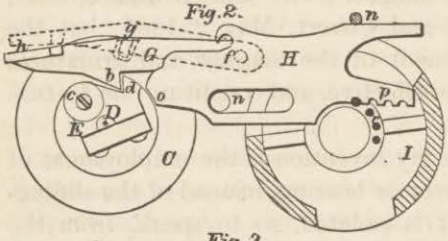


Fig. 2.

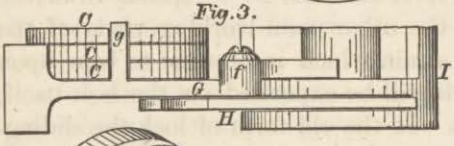


Fig. 3.

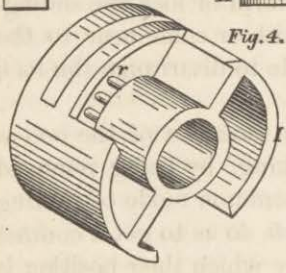


Fig. 4.

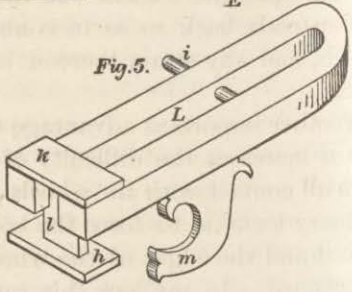


Fig. 5.

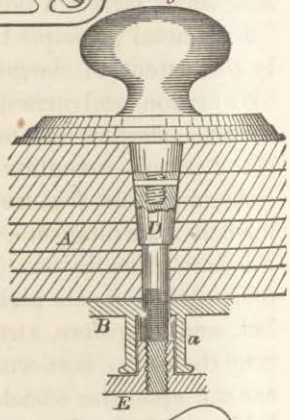


Fig. 6.

I am aware that the combination-wheels themselves have been made with notches, and so arranged that the ordinary sliding-bolt which rests against their edges may fall back and

within the notches, when they are all set. Such is not the equivalent of my invention, as my express purpose is to avoid all contact of the bolt with the edges of the wheels."

The claims of the reissue, five in number, are as follows, but only claim one is alleged to have been infringed:

"1. In a combination lock for safe or vault doors, a bolt, *I*, which turns on a pivot or bearing, when said bolt, *I*, is used in a lock having no ordinary sliding lock-bolt, and in connection with the separate bolt-work of the door, and so arranged as to receive the pressure of the said bolt-work without transmitting it to the wheels or other equivalent works of the lock.

2. In a combination lock for safe and vault doors, I claim the combination of the bolt *I*, bar *H*, and cog-connection *p r*, when said bolt, *I*, turns on a pivot or bearing, and receives the pressure of the bolt-work situated outside the lock-works, and intervenes between the bolt-work and the wheels.

3. I claim, in combination with the bolt *I*, the bar *H* and lever *G*, arranged and operating as herein set forth.

4. I claim, in combination with the vibrating magnet, *L*, the armatures *h k* and pendant *l*, arranged as herein described.

5. I claim the combination and arrangement of the wheels *C C*, cam *E*, lever *G*, bar *H*, and bolt *I*, as herein described."

The defences set up were want of novelty, non-infringement, and invalidity of the reissue. After a hearing on pleadings and proofs, an interlocutory decree was entered finding the reissued patent to be valid and to have been infringed, and awarding a perpetual injunction and an account of profits and damages. The master reported $7771 damages in favor of the plaintiff. The defendant excepted to the report, but the exceptions were overruled by the court and a final decree was entered for the plaintiff, for $7771 damages and $650.17 costs. The defendant has appealed to this court.

It is contended that the first claim of the reissue is void for unlawful expansion, after unreasonable delay in applying for the reissue.

The original patent had three claims, as follows:

"1. The rotating-tumbler *I*, when separated and isolated in action from the permutation-wheels, and so arranged that any

inward pressure upon the bolt will be exerted on the bearing of said tumbler, and have no action nor effect upon the said permutation wheels, substantially as and for the purpose herein specified.

2. In combination with the turning-tumbler *I*, the cog-bar *II* and lever *G*, arranged and operating as herein set forth.

3. The combination and arrangement of the combination-wheels *C*, cam-disk *E*, pivoted lever *G*, cog-bar *II*, and turning tumbler *I*, the whole operating as herein specified."

Claim 3 of the reissue is substantially the same as claim 2 of the original, and claim 5 of the reissue is substantially the same as claim 3 of the original, while claims 2 and 4 of the reissue are new claims.

The defendant directs attention to these facts: When Sargent applied originally for his patent, on February 6, 1866, he asked for claim 1 in this form: "The turning-bolt *I*, resting on its bearing *q*, in combination with the mechanism of a combination lock, in such manner as to practically isolate or disconnect it from the main operating parts, substantially as set forth." Claim 1 having been rejected on the 24th of March, 1866, Sargent, on the 29th of June, 1866, changed the claim to the form it has in the original patent as issued, and his attorneys at the same time, in a letter to the Patent Office, explained the new form of claim thus: "The substance of the first substituted claim consists essentially in providing a rotating tumbler in connection with the bearing on which it rests and the stem of the bolt-work which rests against it, when said tumbler is isolated or disconnected from the combination-wheels, so that any inward motion of the bolt against this tumbler will expend its force against the bearing on which the tumbler turns and rests, and will not reach or affect the permutation-wheels." The attorneys also said: "In Mr. Sargent's device it will be observed that the combination or permutation-wheels are on a different bearing, and located at a distance from the revolving tumbler *I*, and never in contact therewith, so that the two are practically isolated from each other, and there is no connection between them except through the lever *II*, which is not within the reach or influence of the pick-lock." And the specification

of the original patent contained this language: "The principal advantage of this tumbler consists in its isolation, so to speak, from the combination-wheels and the main working parts. It rests alone on its bearing *q*, the only part connected being the cog-bar *H*. In ordinary locks the sliding-bolt extends back in direct connection with the main working mechanism, and by its constant action and the strain that comes upon it frequently disarranges those parts. This is especially true when the stem or projection *t* of the heavy bolt of the safe-door rests against the sliding bolt. In this case, when force is applied to the bolt, the wrenching strain upon the bolt and mechanism is very great. In my lock it will be seen that this difficulty is obviated, for any strain that comes upon the circular tumbler, either from the stem *t* or any other source, is simply expended upon the strong bearing *q*, and does not reach back to the combination-wheels or any part of the working mechanism. This is of the utmost importance."

It is urged that emphasis was thus laid on the fact that the turning-bolt or tumbler was mounted on a different bearing from the permutation-wheels, and that it was that arrangement which prevented pressure on it from reaching back to the permutation-wheels; that the original claim, in speaking of the rotating tumbler as "separated and isolated in action from the permutation-wheels," meant that it was mounted on its own separate bearing, and did not allow of its being mounted in any other way; that the specification of the reissue does not say that the tumbler *I* "rests alone on its bearing, *q*;" that the limitation thus contained in claim 1 of the original patent is not found in claim 1 of the reissue; and that thereby an unlawful expansion was made, the application for the reissue having been filed more than five years after the original patent was granted.

But we think the reissue is not fairly open to this objection. The tumbler in the one claim and the bolt in the other are the same instrument. The words "rotating-tumbler *I*," in the original claim, refer to the tumbler described as resting on a bearing "around which it turns." The claim of the reissue, in saying that the bolt *I* "turns on a pivot or bearing," expresses

the same idea. The words in the claim of the reissue, "when said bolt *I* is used in a lock having no ordinary sliding lock-bolt, and in connection with the separate bolt-work of the door, and so arranged as to receive the pressure of the said bolt-work without transmitting it to the wheels or other equivalent works of the lock," are justified by these words in the original claim, "and so arranged that any inward pressure upon the bolt will be exerted on the bearing of said tumbler, and have no action or effect upon the said permutation-wheels." The word "bolt" in the claim of the original meant what in the claim of the reissue is called "the separate bolt-work of the door," because what is called in the former "the rotating-tumbler *I*," is called in the latter "a bolt, *I*, which turns on a pivot or bearing." The proviso in the claim of the reissue that the bolt *I* is to be "used in a lock having no ordinary sliding lock-bolt" does not expand the claim, but, if anything, restricts it. The statement, in the claim of the reissue, that the bolt *I* is so arranged as to receive the pressure of the separate bolt-work of the door without transmitting it to the wheels, is justified by the statement in the original claim, that the rotating tumbler *I* is so arranged that any inward pressure upon the bolt will be exerted on the bearing of the tumbler, and have no action or effect on the permutation-wheels.

The words in the original claim, "when separated and isolated in action from the permutation-wheels," applied to the rotating tumbler, do not indicate that the mounting of the tumbler alone on its bearing is required, but mean no more than that the tumbler shall be separated and isolated in action from the wheels; and the words of the claim of the reissue have no broader meaning in that regard. If the rotating tumbler or bolt is thus isolated in action from the wheels, the arrangement referred to in both claims is reached. The patentee set forth, as he was bound to do, the method he used, and which he thought advisable; but any method of mounting the revolving bolt which effects the isolation referred to is within either claim. The words "or other equivalent works of the lock" have no expanding force.

The invention of Sargent consists in combining with the

ordinary combination-wheels, and the other working parts of a combination lock which has no sliding lock-bolt, a bolt turning on a pivot or bearing, which is so isolated or removed from contact with the said wheels, as to receive any pressure or strain which may be applied through the separate bolt-work of a safe door, and cut off the communication between the bolt-work of the door and the wheels or fence-lever of the lock, so that the position of the slots in the wheels cannot be determined, for picking the lock, as in the use of the ordinary sliding lock-bolt, which extends back so as to connect with the wheels. The turning-bolt is an incomplete cylinder, or one in which parts of the periphery are cut away. An extended part of the bolt-work of the door bears against a part of the complete periphery of the turning-bolt, in such manner that the turning-bolt receives all pressure and does not allow it to reach the combination-wheels. The ordinary sliding lock-bolt is, therefore, dispensed with.

Three alleged anticipating devices are set up—defendant's Exhibit A, defendant's Exhibits C and D, and defendant's Exhibit E.

Exhibit A has in the lock-casing a sliding-bolt, and, also, what is alleged to be a turning-bolt. But the latter is only the well-known swivelling-dog, long used to prevent the retraction of sliding-bolts, and so arranged as to be swivelled by a spring when the combination-wheels are gated. As a consequence, the stump or fence bears on the wheels not only with the pressure of its own weight but with the added force of the spring. Any swivelling force applied to the dog causes the stump to bear on the peripheries of the wheels, and the picking of the lock is facilitated. The dog prevents the retraction of the sliding-bolt. In Sargent's patent the lever which carries the stump is so constructed that no turning of the revolving-bolt can bring the lever-work against the wheels. The Sargent revolving-bolt must be acted upon by the user, while the swivelling-dog in Exhibit A is an automatic latch. In Sargent's structure the revolving-bolt, the lever which carries the stump, and the wheels, are sufficient to prevent the retraction of the bolt-work, while in Exhibit A the sliding-bolt, the swivelling-dog, the stump-lever and the wheels are all of them necessary.

The drawings Exhibits C and D show the Linus Yale lock, which is also illustrated by a lock mechanism. It is a revolving lock which permits and prevents the retraction of the bolt-work of the door, and there is no sliding-bolt. But there are no permutation wheels, or revolving-tumblers, nor any oscillating or sliding tumblers, but the ancient device of pins is used to prevent the revolution of the bolt, the pins entering into holes in the bolt; and a cross strain can be brought upon the pins, making the picking of the lock comparatively easy. Moreover, the bolt is not isolated from the pins, as it is from the wheels in Sargent's lock, but parts of the pins are in sockets in the bolt. The pins are thus in immediate connection with the bolt, while Sargent interposes lever-work between the bolt and the wheels, to effect the isolation of the bolt.

In the Butterworth padlock, Exhibit E, there is a revolving-bolt combined with the wheel-tumblers by means of a lever, but there is no "separate bolt-work of the door," which is one element of the claim in Sargent's reissue. Of this padlock the plaintiff's expert, Mr. Henry B. Renwick, says: "The padlock has the ordinary hasp attached to the case, and the bolt acts to prevent this hasp from being drawn away from the axis upon which the bolt revolves, and not to prevent bolt-works from being forced towards that same axis. The hasp is a contrivance which must be used with two staples, or one staple and a slotted bar, all of which must be outside of the door. Whereas, on the contrary, bolt-works must be inside of the door, and shoot into sockets in the jambs, it being clear that the hasp could not be used in place of bolt-works, or bolt-works in place of a hasp, even if the former were located outside of the door. I do not think that this lock would even suggest the idea of the combination referred to in the first claim of the Sargent reissue. In order to make the lock fit to be used in combination with bolt-works, even after such idea had been suggested, it would be necessary: First. To provide the lock-case with means of securing it to the door. Second. To elongate the spindle and so contrive it and the dial-plate that they could be separated from the wheel-tumblers and put together again, with the door between them. Third. To alter the direction of the slot in the

case through which the hasp enters, so that the tail of the bolt-works could press upon the revolving-bolt in the line of a radius thereof. If the tail of bolt-works were introduced into the present slot, any hammering of the bolt-works by the handle upon the periphery of the revolving-bolt would tend to turn the revolving-bolt upon its axis, and thus cause the stump to be pressed upon the wheel-tumblers in such a manner as to facilitate picking, this result being due to the fact that the line of direction through the slot is not in line of the radius to the bolt, but in line of a sector thereof; further, the revolving-bolt in a padlock, owing to its being necessary that it should enter a slot in the hasp, is weakest at the very point where it should be strongest, if it were to be used in connection with bolt-work; and any good constructor would alter the revolving-bolt of the padlock, so that it would be strongest where it is now weakest, in case it was desired to use a revolving-bolt in combination with bolt works." It is a marked feature of Sargent's lock that the direction of the pressure of the bolt-work of the door on the revolving-bolt is in the line of a radius of that bolt, so that the pressure has no tendency to revolve the bolt. This feature is not found in the Butterworth padlock.

We are of opinion that, as against anything found in the old structures, there was patentable novelty in what Sargent did and what he claimed.

As to the question of infringement, the defendant's lock, Cole No. 2, has in it a bolt which turns on a pivot, and is substantially identical with the like bolt in Sargent's patent. It prevents and permits the retraction of the bolt-work of the door in the same manner as Sargent's bolt. There is no sliding-bolt. The turning-bolt is arranged to serve as a stop to two sets of bolt-works, instead of one; but in respect to one set, there is the same mode of operation in both locks. As the claim of Sargent's reissue does not require that the bearing of the rotating-bolt should be distinct from the bearing of the wheels, the fact that in Cole No. 2 the bearing of the turning-bolt is on the stud on which the wheels turn, makes no difference in principle, because the action of the bolt is as wholly separated and isolated from the wheels in the one lock as in the other, and in

each the strain from the bolt-work is expended on the turning-bolt and not on the wheels. So, too, the fact that in Sargent's patent the fence-lever is connected with the turning-bolt by a rack on the end of the lever engaging with cog-teeth on the bolt, while in Cole No. 2 the end of the lever is pivoted directly to the turning-bolt, does not affect the identity of the arrangement as part of the combination covered by claim 1 of the reissue. The defendant's lock must be held to infringe that claim.

On the question of damages, the defendant contends that there was no sufficient or legal proof that the plaintiff suffered the damages reported and adjudged, or any other damages. The action of the master, the character of the exceptions to his report, and the view taken by the Circuit Court, are fully shown by its opinion, reported in 17 Blatchford, 244, which was as follows:

"The master reports that there is no basis, from the proofs adduced before him, to find what profits have been made by the defendant by the use of the 'turning-bolt' (the infringing device) in the locks made and sold by it; and that, therefore, on the testimony before him he cannot find what profits, if any, are due from the defendant for the use of the 'turning-bolt.'

"The patent on which this suit is brought is a reissue granted January 2, 1872. The master reports that, after that time, and in 1873, in consequence of the defendant's offering and selling to the plaintiff's principal customers and to the trade generally, locks containing the infringing device, at a less price than the plaintiff was obtaining, a reduction of prices was enforced on the plaintiff, such reduction being, in round numbers, $1 on each No. 5 lock and $2 on each No. 3 lock. Exception one of the defendant is to such finding and report, and alleges that the master should have reported that no such reduction was enforced, and that there was no proof of the amount of any reduction caused by the defendant's infringement, and that there was no method of computing such reduction, even if it actually existed.

"The master also reports, that it is in evidence, that, during

the period covered by the accounting, the plaintiff could have manufactured, in addition to the locks he did manufacture, and without materially increasing his manufacturing facilities, all the locks manufactured and sold by the defendant. Exception two of the defendant is to such finding and report, and alleges that the master should have reported that no such additional manufacture by the plaintiff was possible, or that it was impossible without a very great extension of his facilities.

"The master also reports, that it is in evidence, that, during the period covered by the accounting, the plaintiff would have made sales to many of the persons who were induced to purchase from the defendant, at his own established prices, had not the defendant offered its locks at lower prices. Exception three of the defendant is to that part of the report, and alleges that the master should have found and reported that no such sales would have been made, or that, even if made, they would not have been at the plaintiff's own established prices.

"The master also reports, that the plaintiff has suffered damage in respect to the matters to which exceptions two and three relate. Exception four of the defendant is to that part of the report, and alleges that the master should have found and reported no damage whatever from the competition of the defendant.

"The master further reports, that the locks sold by the defendant contained, in addition to the 'turning-bolt,' a device patented by the Rosner patent, for which infringement a claim is made against the defendant in another suit; that, as to the proportion of the reduction of prices above set forth, which should be allowed to the device claimed under the Rosner patent, it is claimed by the plaintiff, and nowhere effectually disputed by the defendant, 'that, in computing the profits on these locks, one-third belonged to and was charged by him to the Rosner patent;' and that, admitting this proportion, and allowing, in addition thereto, for any superior external attractions of the defendant's locks, and for the number of combinations which they had over those of the plaintiff, and for the shape of the case of the lock, and for the commercial success of the defendant in effecting sales, where the plaintiff would

have failed, the master is of opinion that the plaintiff is entitled to recover from the defendant, as damages, one-half of the amount of the reduction in prices caused by the defendant since January 2, 1872; that is, on 1009 No. 3 locks, $1 per lock, being $1009, and on 13,524 No. 5 locks, at 50c. per lock, $6762, being a total of $7771. Exception five of the defendant excepts to the finding and report that the plaintiff is entitled to recover from the defendant, as damages, one-half of the amount of the reduction in prices caused by the defendant since January 2, 1872, and alleges that the master should have reported 'no reduction in prices, or no proof of such,' caused by any infringement by the defendant since said date, and 'hence no damages' to the plaintiff, 'and, consequently, no method of calculating them.' Exception six of the defendant excepts to the report for that the master erred in making the apportionment of the alleged reduction in the plaintiff's prices, charging one-half thereof to the alleged infringement of the 'turning-bolt' patent, and alleges that no basis existed, in the proof or in law, for such or for any apportionment, or for any award of damages. Exception seven of the defendant excepts to the report for that the master erred in assessing damages which are not the damages suffered by the plaintiff, but are those suffered by the firm of Sargent & Greenleaf, and alleges that the master should have reported that the damage, if any, found to have been suffered by said firm, is not the damage of the plaintiff, who is only one member of said firm, but that the plaintiff's damage is merely a portion thereof. Exception eight of the defendant excepts to the report for that the master erred in finding and reporting, as damages, the sum mentioned in his report, or any damages whatsoever, and in not reporting that there was no proof of any actual damage suffered by the plaintiff from the alleged infringement.

"The defendant contends that the competition of the defendant was not the sole cause of the reduction of the plaintiff's prices, and that the proportionate effect of the defendant's competition is not attempted to be estimated or ascertained by the proofs. It alleges that the defendant is not responsible for the reduction made in 1873; that there were many other causes

which contributed to this reduction; and that the lowering of prices was caused principally by the competition of other fire-proof safe lock-makers, and, notably, the New Britain Lock Co., by the fact that safe-makers were making and threatening to make their own safe locks, and by the general lowering of the prices of material and labor and the depression of business.

"Reduction of prices, and consequent loss of profits, enforced by infringing competition, is a proper ground for awarding damages. The only question is as to the character and sufficiency of the evidence, in the particular case. I think that, on the whole evidence, the reduction of prices by the plaintiff, after January 2d, 1872, on safe locks containing his invention, is shown to have been directly and solely caused by the defendant's infringement.

"The master, in his report, allows damages only for the reduction of prices on the locks sold by the plaintiff, that is, 1009 No. 3 locks and 13,524 No. 5 locks. Although the master states that the plaintiff suffered damage in losing the sale of locks sold by the defendant, he awards no damages for that cause. He confines his award to the loss on the locks which the plaintiff sold.

"The defendant also contends, that the plaintiff is not entitled to recover from the defendant, as damages, the entire amount of the reduction enforced by the defendant's competition, but only the damages occasioned by the effect of the presence of the infringement; that the burden of proof is on the plaintiff to fix the value of, and to separate the effect of, the infringing devices; that he failed to do so by any proper proof; and that no basis was afforded to the master on which such damages could be computed. But, as the master allowed damages only for the reduction of prices on the locks sold by the plaintiff, and as the essential feature of those locks was the 'turning-bolt' device, and as an essential feature of the infringing locks was the infringing 'turning-bolt' device in them, and as the plaintiff could not sell his 'turning-bolt' device unless it was embodied in a lock, and as he was thereby enabled to make his profit on the entire lock, and as he was deprived, by the acts of

the defendant in selling at low prices locks containing the patented 'turning-bolt' device, of the profit he would otherwise have made on the locks which he actually sold containing the 'turning-bolt' device, it seems plain that the defendant's infringement must be held to have caused the entire loss of the plaintiff by the reduction of prices, after allowing a proper sum for any other patented device contained in the defendant's locks and for any other causes which gave to the defendant an advantage in selling its locks. This is the basis on which the master proceeded, and it seems to me, on a consideration of the evidence, that the master has made all proper allowances and has arrived at a correct conclusion in fixing, as damages, one-half of the amount of reduction in prices.

"The plaintiff, as the owner of the patent, is entitled to recover the damages in this case. He may be accountable to his copartner for a part of them, but the copartner could not sue on the patent, for such damages or any part of them."

This is a case where the patentee granted no licenses, and had no established license fee, but supplied the demand for his lock himself, and was able to supply that demand. The market for the lock was limited to safe-makers. No one but a safe-maker wanted or would buy such a lock. The master was unable to determine, from the proofs, what profits, if any, the defendant had made from the use of the turning-bolt. He disallowed all items of damage from the loss to the plaintiff of the sale of infringing locks sold by the defendant, and confined his award to the enforced reduction of price on the locks which the plaintiff sold, caused by the infringement. That this is a proper item of damages, if proved, is clear. It is a pecuniary injury caused by the infringement, and is the subject of an award of damages, although the defendant may have made no profits and the plaintiff may have had no established license fee. As the plaintiff, at the time of the infringement, availed himself of his exclusive right by keeping his patent a monopoly, and granting no licenses, the difference between his pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred, is to be measured, so far as his own sales of locks are concerned, by the dif-

ference between the money he would have realized from such sales if the infringement had not interfered with such monopoly, and the money he did realize from such sales. If such difference can be ascertained by proper and satisfactory evidence, it is a proper measure of damages. The damages to be recovered, Rev. Stat. §§ 4919 and 4921, are "actual damages;" and they may properly include such losses to the plaintiff as were allowed in this case. *McComb* v. *Brodie*, 1 Woods, 153, 161; *Philp* v. *Nock*, 17 Wall. 460, 462.

The turning-bolt was the essential feature of the Sargent lock. The defendant adopted Sargent's arrangement, and then reduced the price of the lock, forcing Sargent to do the same, in order to hold his trade. The evidence shows that the reduction of prices by Sargent was solely due to the defendant's infringement. The only competitor with Sargent in the use of his turning-bolt arrangement, during the period covered by the accounting, was the defendant.

We think the master made proper allowances for all other causes which could have affected the plaintiff's prices; that the proper deduction was made for the use of the Rosner device in the defendant's lock; and that the damages awarded are no greater than the testimony warranted.

The decision that the plaintiff, as owner of the patent, was entitled to recover the damages, was correct.

The bill alleges infringement of the reissue generally and especially of the first claim. The answer alleges that the reissue is not for the same invention as the original patent. The defendant contends that this is true as to claims 2 and 4 of the reissue, and that, as no disclaimer of those claims was entered at the Patent Office before this suit was brought, the recovery in this case should have been without costs, under the provisions of §§ 4917 and 4922 of the Revised Statutes, and the decision in *Gage* v. *Herring*, 107 U. S. 640, 648. That case holds that the invalidity of a new claim in a reissue does not impair the validity of a claim in it which is only a repetition and separate statement of a claim in the original patent. It also holds that a reissued patent is within the letter and the spirit of the provisions of §§ 4917 and 4922; and that, where a

defendant has infringed such a re-stated valid claim of a reissue, the plaintiff, on filing a disclaimer of the new and invalid claims of the reissue, may have a decree, without costs, for the infringement of such valid claim, where there has been no unreasonable delay in entering the disclaimer.

There can be no doubt that claim 4 of the reissue was invalid, as an unlawful expansion of the original patent, on an application for the reissue filed more than five years after the original patent was granted. But the patent has expired, and, therefore, no disclaimer can now be filed. There was no unreasonable delay in filing a disclaimer, as the validity of claim 4 was sanctioned by the Commissioner of Patents in granting the reissue, and this suit was commenced in July, 1872, and the claim was not held invalid by the Circuit Court (both the interlocutory and final decrees having been entered before the decisions of this court, at October Term, 1881, on the subject of reissued patents were made). The result, therefore, is, that

The decree below must be reversed as to the award of costs, and affirmed in all other respects, with interest until paid, at the same rate per annum that decrees bear in the courts of the State of New York, and the case be remanded to the Circuit Court, with a direction to modify the decree accordingly. Each party will bear his own costs in this court and one-half of the expense of printing the record. Silsby v. *Foote*, 20 How. 378, 387.

YALE LOCK MANUFACTURING COMPANY *v.* GREENLEAF.

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

Argued March 16, 1886.—Decided March 29, 1886.

The scope of letters patent must be limited to the invention covered by the claim; the claim may be illustrated, but it cannot be enlarged by language used in other parts of the specification.

Opinion of the Court.

The change made by George Rosner in the devices used in previous combinations for the purposes described in his application for a patent in September, 1860, were such as would occur to an unskilled mechanic, and were not inventions within the meaning of the patent laws.

The first claim in the patent 30092, September 18, 1860, Reissue 4488, July 25, 1871, granted to George Rosner, was anticipated by the application and specification of D. H. Rickards filed March 13, 1852, and by locks manufactured by Evans & Watson in 1853.

This was a bill in equity brought by the appellee, Halbert S. Greenleaf, to restrain the infringement by the appellant, the Yale Lock Manufacturing Company, of the first and fourth claims of the reissued letters patent granted to George Rosner, July 25, 1871, for an "improvement in permutation locks." The original patent bore date September 18, 1860.

The defence was that the alleged invention and substantial and material parts thereof claimed as new, were, prior to any invention thereof by said George Rosner, known and publicly used by divers persons in this country, and that among such persons were D. H. Rickards, of Boston, and the firm of Evans & Watson, of Philadelphia.

The Circuit Court decided that the patent was valid, and that the defendant had infringed, and, upon the report of a master of the damages sustained by the plaintiff, rendered a decree in his favor for $2968.50. The present appeal brings that decree under review.

Mr. Frederic H. Betts for appellant.

Mr. George Ticknor Curtis and *Mr. Edmund Wetmore* for appellee.

Mr. Justice Woods delivered the opinion of the court.

It is conceded that the damages for which the court rendered its decree were allowed for the infringement of the first claim only of the Rosner patent, which, therefore, is alone to be considered upon this appeal.

The invention covered by this claim was described as follows in the specification:

"This invention consists in combining with a set of permu-

tation wheels or tumblers, constructed each of a rim and center, an arrangement of bolts or equivalent devices, which fasten and unfasten said rims and centers by the use of a key inserted through holes in the cams in the wheels, by which said bolts or equivalent devices are operated, the effect being to enable the relative position of the rims and centers to be changed so as to make a new combination, by moving the driving pins to different positions relatively to the slots in the wheels. It further consists in the arrangement of parts as hereinafter described.

* * * * *

"Prior to my invention, in order to change the combination, where a single set of wheels only was used, made up each of a center hub and rim, the wheels had to be removed from the lock and adjusted by hand and then replaced.

"I obviate this difficulty by the following arrangement: Opposite the center or hub *q* of each wheel, and located in the outer rim, I place a locking device or bolt, *r*, which, when forced in against the said center or hub, holds the same firmly in place with the outer rim; but, when thrown out, disengages said parts and allows the centers to turn free while the rims remain stationary. Against the locking device or bolt *r* rests a cam or eccentric, *s*. Through each or all of these cams, and also through the back plate of the lock, is inserted a key *P*, Fig. 6, by turning which it will be seen that said locking or fastening device may be forced in or drawn out at pleasure. When the key is inserted and the fastening device thrown back, it will be seen that the rims of the wheels are held stationary by the key, while the centers may be turned to any different position by the spindle, thus setting the lock to a new combination.

* * * * *

"The novelty in the first part of my invention consists in the combination of the fastening devices *r* with the wheels, constructed of three parts each, an outer rim and a center or hub composed of two parts, secured together so that by inserting the key the parts composing the wheels may be loosened and the outer rims held stationary, while the centers or hubs are turned to a different position by the action of the spindle, to rearrange the combination, and then the parts locked in place

again, and all accomplished without removing the wheels themselves from the lock. In all prior locks with a single set of wheels (each wheel made up of a rim and center hub), so far as I am aware, the wheels had to be removed from the lock and the combination changed by hand.

* * * * *

"What I claim, and desire to secure by letters-patent, is—

"1. In a permutation lock, in combination with a set of wheels consisting each of an outer ring or rim and a central disc or hub, a set of fastening devices or bolts, *r r*, which is made to fasten or unfasten said parts composing the wheels, by the insertion of a key through each or all of the wheels, whereby the combination of the lock may be changed, substantially as herein specified."

The testimony showed that on the 13th of March, 1852, the D. H. Rickards named in the answer of the defendant, filed in the Patent Office an application for a patent for an improvement in locks, which was either rejected or withdrawn, and that locks made substantially in accordance with the description contained in Rickards' specification were manufactured and sold by Evans & Watson, safe-makers, of Philadelphia as early as the year 1853. A copy of the application of Rickards is found in the record, and one of the locks made by Evans & Watson in 1853 was produced as an exhibit upon the trial in this court.

A comparison of the specification and model of the plaintiff's patent with the application of Rickards and the lock made by Evans & Watson shows that the device of Rickards and the lock of Evans & Watson were an anticipation of the invention covered by the first claim of the plaintiff's patent.

It is clear from the statement in the specification of Rosner's patent that he believed that prior to his invention it was necessary, in order to change the combination in a permutation lock, to remove the wheels from the lock-case and adjust them by hand and then replace them.

But Rosner was in error in making this statement. The evidence shows that what Rosner thought had never been done before had been done by means of the device of Rickards, em-

bodied in the lock of Evans & Watson, which is substantially the same contrivance as that covered by the first claim of Rosner's patent.

The Rickards device embraces a set of wheels consisting of an outer rim or hub and a set of fastening devices or bolts, so constructed as to engage and disengage with a set of cogs on the central hub. When the bolts are in place the outer rim and the central hub are firmly fastened together; when withdrawn the hub may be made to revolve without moving the rim. The bolts are withdrawn by means of a key. Each of the wheels has an opening in it for the passage of the key by which the bolts are moved; these openings in the wheels are placed opposite each other and also opposite a key-hole in the lock-case, so that the key may be passed from the exterior of the lock-case through all the wheels, and thus withdraw the bolts which fasten the rims to the hubs of the wheels, thereby permitting the hubs to be moved and a change to be made in the combination of the lock. When the change is made the key is withdrawn and the bolts are forced back into their places by springs. By this means the combination of the lock is changed without removing the wheels from the lock case, or even opening the case.

The only difference between the Rosner device and that of Rickards, which the plaintiff's counsel have been able to point out, is thus stated: in the Rosner contrivance the key, in addition to locking and unlocking the fastening devices, performs, when in the lock, the function of holding the outer rims in place while the combination of the lock is changed by moving the hubs. It is insisted that this key is adapted to perform this office by the fact that it fits snugly the series of holes in the rims of the wheels through which it passes, and thereby prevents any motion of the rims.

The Rickards device has a key-hole in the lock-case which the key neatly fits. But the holes in the rims of the wheels through which the key passes are irregular apertures, not fitted to the shape or size of the key, so that they allow some motion to the rims of the wheels.

We think this difference between the two locks does not give

validity to the Rosner patent, for two reasons: First, because the shape and size of the key-hole is not mentioned in the claim of the Rosner patent, as one of the elements of the combination. The scope of letters-patent must be limited to the invention covered by the claim, and while the claim may be illustrated it cannot be enlarged by language used in other parts of the specification. *Keystone Bridge Co.* v. *Phœnix Iron Co.*, 95 U. S. 274; *Railroad Co.* v. *Mellon*, 104 U. S. 112. Secondly, if it were found to be necessary to hold the rims of the wheels rigidly immovable while the combination of the lock was being changed, the idea of changing the irregular aperture in the wheels through which the key in the Rickards device was thrust to one of the shape and size of the key would occur to the rudest and most unskilled mechanic. The suggestion of such a change could not be called invention, and ought not to be dignified by letters-patent. *Atlantic Works* v. *Brady*, 107 U. S. 192; *Slawson* v. *Grand Street Railroad Co.*, 107 U. S. 649; *Phillips* v. *Detroit*, 111 U. S. 604.

We are of opinion, therefore, that the first claim of the plaintiff's patent was anticipated by the application and specification of Rickards and by the locks manufactured by Evans & Watson, and that it is, therefore, void. It follows that

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

DIMOCK *v.* REVERE COPPER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Argued March 22, 1886.—Decided April 5, 1886.

A discharge in bankruptcy is no bar to an action on a judgment recovered against the bankrupt after his discharge in a suit, commenced before the bankruptcy, pending when the discharge was granted, and founded upon a debt provable against him in bankruptcy.

This case came here by a writ of error to the Supreme Court of New York, having been decided in the Court of Appeals,

and the record remitted to the Supreme Court that judgment might be finally entered there.

The action was brought in that court on a judgment in favor of the Revere Copper Company, plaintiff, against Anthony W. Dimock, rendered in the Superior Court of the Commonwealth of Massachusetts, for the county of Suffolk, on the 1st day of April, 1875.

The defendant, Dimock, pleaded, in bar of this action, a discharge in bankruptcy, by the District Court of the United States for the District of Massachusetts, rendered on the 26th day of March, 1875, five days before judgment in the State court.

The case being submitted to the New York Supreme Court in special term, without a jury, that court found the following facts and conclusions of law thereon:

"*As Findings of Fact.*

"First. That the plaintiff is, and at the times hereinafter mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts.

"Second. That on or about the 13th day of January, 1874, the Revere Copper Company of Boston, Massachusetts, the plaintiff herein, commenced an action in the Superior Court of the Commonwealth of Massachusetts, within and for the county of Suffolk, a court of general jurisdiction, against Anthony W. Dimock, the defendant herein, by the issue of a writ of attachment against the goods, estate, and body of the said defendant, and which said writ was duly served on said defendant, and the summons to appear in said action was duly served upon him personally, and that the said defendant thereafter duly appeared in said action by attorney; that the cause of action was an endorsement of said Dimock of two promissory notes made in the city of New York to the order of plaintiff by the Atlantic Mail Steamship Company, and dated December 19, 1872.

"Third. That on or about June 23, 1874, the said defendant, Anthony W. Dimock, filed a petition in bankruptcy, and was duly adjudicated a bankrupt, in the District Court of the United States for the District of Massachusetts, and that such pro-

ceedings were thereafter had that, on or about March 26, 1875, the said Dimock was discharged from all debts and claims provable against his estate, and which existed on the 23d day of June, 1874.

"Fourth. That such proceedings were had in the aforesaid action in the Superior Court of the Commonwealth of Massachusetts that on or about April 1st, 1875, the plaintiff duly recovered judgment in said action against the defendant for the sum of three thousand five hundred and ninety-five $\frac{15}{100}$ dollars ($3595.15), and that said judgment was upon that day duly entered.

"Fifth. That no part of said judgment has been paid, and the whole thereof is now due and payable to the plaintiff."

"*As Conclusions of Law.*

"I. That the said proceedings in bankruptcy are no bar to the present action, and constitute no defence herein.

"II. That the plaintiff should have judgment against the defendant for the sum of three thousand five hundred and ninety-five $\frac{15}{100}$ dollars ($3595.15), with interest from April 1st, 1875, amounting to one thousand one hundred and forty-two $\frac{96}{100}$ dollars ($1142.96), making in all four thousand seven hundred and thirty-eight $\frac{11}{100}$ dollars ($4738.11), together with the costs of this action, to be taxed, and an allowance, in addition to costs, amounting to the sum of seventy-five dollars."

The judgment rendered on these findings was reversed by the Supreme Court in general term, and that judgment was in turn reversed by the Court of Appeals, which restored the judgment of the special term. 90 N. Y. 33.

Mr. George Putnam Smith for plaintiff in error.

I. It is immaterial that the form of the debt was changed after the institution of the proceedings in bankruptcy. The debt remained the same. When the essential rights of the parties are influenced by the nature of the original contract, the court will look into the judgment to ascertain what that original cause was. *Betts* v. *Bagley*, 12 Pick. 572; *Clark* v. *Rowling*, 3 N. Y. (3 Comst.) 216. In New York a judgment is not a new debt, but merely a form of an old debt. *Wyman* v. *Mitchell*,

1 Cowen, 316; *Clark* v. *Rowling*, above cited. If during pendency of proceedings in bankruptcy, a provable claim is transformed into a judgment, it is nevertheless extinguished by a subsequent discharge in bankruptcy. *Monroe* v. *Upton*, 50 N. Y. 593; *Ocean Bank* v. *Olcott*, 46 N. Y. 12, 22; *Dewey* v. *Moyer*, 72 N. Y. 70, 75. The same doctrine prevails in many of the States, while in Maine, Massachusetts, New Hampshire, Missouri and other States, a judgment is regarded as a new debt, and therefore, if recovered after a petition in bankruptcy, it would not be affected by a subsequent discharge. But as it is the established law of New York that a judgment on a provable claim is barred by a subsequent discharge in bankruptcy, Mr. Dimock, when sued in that State upon the Massachusetts judgment, was entitled to the benefit thereof. If, therefore, the judgment had been entered before, instead of five days after the plaintiff in error obtained his discharge in bankruptcy, no action could have been brought in New York upon that judgment to which the discharge would not have been a complete defence.

II. The fact that this claim was transformed into a judgment after the discharge was granted does not take it out of the operation of the rule stated in Point I. It is true that the judgment was obtained after the discharge; but it was on a default taken some time prior to it, and at the time it was taken the defaulted defendant was in no position to interpose the plea of discharge in bankruptcy. There were no laches on the part of the bankrupt, as only five days had elapsed after the discharge, when the judgment was entered. The adjudication took place when the default was entered. The default was a confession by Dimock of all the material and traversable allegations in the declaration, the denial of which would have called for proof. *Huntress* v. *Effingham*, 17 N. H. 584; *Bates* v. *Loomis*, 5 Wend. 134. The question of the effect of the discharge in bankruptcy was not then one of those questions. *Jarvis* v. *Blanchard*, 6 Mass. 4; *Huntress* v. *Effingham*, above cited. All the decisions holding that a discharge in bankruptcy to be effectual must be pleaded in the suit pending on the original claim will be found to be either, 1. Rendered

in States wherein the law is that a judgment is a new debt and not merely a new form of an old debt; or, 2. Rendered in suits which arose under the Bankruptcy Acts of 1811 or 1841. Now there is a vitally important difference between the effect of a discharge in bankruptcy under the acts of 1811 and 1841 and that of one obtained under the act of 1867. Under the act of 1867, "the certificate of discharge shall be conclusive evidence in favor of the bankrupt of the fact and regularity of such discharge." A discharge granted under this act cannot be impeached in a State court. *Ocean Bank* v. *Olcott*, 46 N. Y. 12. Under the acts of 1811 and 1841 the discharge could be impeached in a State court and this was the reason why it was held that its merit must be determined in the action brought on the original claim and that it could not be used in bar of a suit on a judgment. *Alcott* v. *Avery*, 1 Barb. Ch. 347; *Cable* v. *Cooper*, 15 Johns. 152, 155.

III. By Rev. Stat. § 5119 (Bankruptcy Act of 1867) a discharge is made a bar to all suits upon a provable claim. Under this act therefore two courses were open to a bankrupt against whom a suit was brought upon such a claim during the pendency of the bankruptcy proceedings. 1. He might under section 5106 enjoin the prosecution of the suit until he obtained his discharge and then plead this discharge in bar of the pending suit. 2. He might defend the action on the merits or allow it to go by default. In the latter event the "provable claim" would ripen into a judgment which conclusively settled against the bankrupt all the issues involved therein, and which would be collectable by execution or any other method that did not require a suit. But if suit was brought to collect the judgment then under section 5119 the bankrupt could plead his discharge in bar of that suit. This is precisely what the plaintiff in error did. The discharge was a complete bar to the suit on the judgment. *Anderson* v. *Anderson*, 65 Georgia, 518; *Braman* v. *Snider*, 21 Fed. Rep. 871; *Clark* v. *Rowling*, above cited.

Mr. David Willcox for defendant in error.

Opinion of the Court.

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

The only question considered at all these trials was whether the discharge of the defendant in the bankruptcy proceeding is, under the facts found by the court, a bar to the present action; and, as the decision by the New York court against the plaintiff in error as to the effect of that order of discharge is to refuse to him a right claimed under the laws of the United States, this court has jurisdiction to review the decision.

The Superior Court of Massachusetts had jurisdiction of the suit of the Copper Company against Dimock, both as regards the subject-matter and the parties. This jurisdiction was rendered complete by service of process and by the appearance of the defendant. All this was before the beginning of the bankruptcy proceeding. Nothing was done to oust this jurisdiction, and the case accordingly proceeded in due order to the rendition of the judgment which is the foundation of this action. It is not argued that this judgment was void, or that the court was ousted of its jurisdiction by anything done in the bankruptcy court. No such argument could be sustained if it were made. In the case of *Eyster* v. *Gaff*, 91 U. S. 521, which was very similar to this on the point now before the court, it was said: "The court in that case had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding according to the law which governed such a suit to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might affect the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of the parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void." The court then goes on to show, that, if the assignee had brought his right, acquired *pendente lite*, to the notice of the court, it would have been protected. *Hill* v. *Harding*, 107 U. S. 631.

So here, if Dimock had brought his discharge to the attention of the Superior Court at any time before judgment, it would have been received as a bar to the action, and, under proper circumstances, even after judgment, it might be made the foundation for setting it aside and admitting the defence. *Ray* v. *Wight*, 119 Mass. 426; *Page* v. *Cole*, 123 Mass. 93; *Golden* v. *Blaskopf*, 126 Mass. 523. Nothing of the kind was attempted. The question before the Massachusetts court for decision, at the moment it rendered its judgment, was, whether Dimock was *then* indebted to the Copper Company. Of Dimock and of this question it had complete jurisdiction, and it was bound to decide it on the evidence before it. Its decision was, therefore, conclusive, as much so as any judgment where the jurisdiction is complete. It concluded Mr. Dimock from ever denying that he was so indebted on that day, wherever that judgment was produced as evidence of the debt. If he had the means at that time to prove that the debt had been paid, released, or otherwise satisfied, and did not show it to the court, he cannot be permitted to do it in this suit; and the fact that the evidence that he did not then owe the debt was the discharge in bankruptcy, made five days before, does not differ from a payment and receipt in full or a release for a valuable consideration. *Cromwell* v. *Sac County*, 94 U. S. 351; also, *Claflin* v. *Houseman*, 93 U. S. 130, 134. A still stronger case of the validity of judgments of a State court, in their relation to bankruptcy proceedings, had *pendente lite*, is that of *Davis* v. *Friedlander*, 104 U. S. 570.

In the case of *Thatcher* v. *Rockwell*, 105 U. S. 467, 469, the Chief Justice, after alluding to these and other cases, says: They "establish the doctrine that, under the late bankrupt law, the validity of a pending suit, or of the judgment or decree thereon, was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not he was equally bound with any other party acquiring an interest *pendente lite*."

It is said, however, that, though the defendant had his discharge before the judgment in the State court was rendered, and might have successfully pleaded it in bar of that action and

did not do so, the judgment now sued on is the same debt, and was one of the debts from which, by the terms of the bankrupt law, he was discharged under the order of the bankruptcy court, and to any attempt to enforce that judgment the discharge may be shown as a valid defence. That is to say, that the failure of the defendant to plead it when it was properly pleadable, when, if he ever intended to rely on it as a defence, he was bound to set it up. works him no prejudice, because, though he has a dozen judgments rendered against him for this debt after he has received his discharge, he may at any time set it up as a defence when these judgments are sought to be enforced. Upon the same principle, if he had appeared in the State court and pleaded his discharge in bar, and it had been overruled as a sufficient bar, he could, nevertheless, in this action on that judgment, renew the defence.

But, in such case, his remedy would not lie in renewing the struggle in a new suit on such judgment, but in bringing the first judgment for review before this court where his right under the discharge would have been enforced then, as he seeks to do it now, after submitting to that judgment without resistance and without complaint.

We are of opinion that, having in his hands a good defence at the time judgment was rendered against him, namely, the order of discharge, and having failed to present it to a court which had jurisdiction of his case, and of all the defences which he might have made, including this, the judgment is a valid judgment, and that the defence cannot be set up here in an action on that judgment. The case of *Steward* v. *Green*, 11 Paige, 535, seems directly in point. So, also, are *Hollister* v. *Abbott*, 11 Foster, 31 N. H. 442, and *Bradford* v. *Rice*, 102 Mass. 472.

It is clear that until the judgment of the Massachusetts court is set aside or annulled by some direct proceeding in that court, its effect cannot be defeated as a cause of action, when sued in another State, by pleading the discharge as a bar which might have been pleaded in the original action.

The judgment of the New York court is *Affirmed.*

HOBBS, Assignee, *v.* McLEAN & Another.

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

Argued March 17, 18, 1886.—Decided March 29, 1886.

Where three persons form a partnership, and agree to bear the losses and share the profits of the partnership venture in proportion to their contribution to its capital, and two of the partners furnish all the money and do all the work, they are entitled to be repaid their advances out of its assets, before payment of the individual creditors of the partner who paid nothing and did nothing to promote the partnership business.

When a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.

When many persons have a common interest in a trust fund, and one, for the benefit of all, at his own cost and expense, brings suit for its preservation or administration, a court of equity will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefit of his efforts.

When one brings adversary proceedings to take trust property from the possession of those entitled to it, in order that he may distribute it to those entitled adversely, and fails in his purpose, he cannot demand reimbursement of his expenses from the trust fund, or contribution from those whose property he has sought to misappropriate.

A, having contracted with the United States to furnish supplies of wood and hay to troops in Montana, entered into partnership with B and C for the purpose of executing the contract. A was to furnish half the capital, B and C one-fourth each, and profits and losses were to be divided on that basis: but in fact the capital was furnished by B and C. A delivered the wood according to the contract, but failed to deliver the hay, and, payment being refused, he brought suit in his own name in the Court of Claims against the United States to recover the contract price of the wood. In this suit B and C, each was a witness on behalf of A, and each testified that he had "no interest direct or indirect in the claim," except as a creditor of A, holding his note. Pending the suit A became bankrupt, and then died. His administratrix was admitted to prosecute the suit, but before entry of final judgment his assignee in bankruptcy was substituted in her place. Final judgment was then rendered in favor of the assignee, and the amount of the judgment was paid to him. B and C as surviving partners then filed a bill in equity against the assignee and the attorneys and counsel, to recover their shares in the partnership property. *Held:*

(1) That the interests of B and C in the partnership property were not affected by the fact that the contract under which they claimed was not made and

Statement of Facts.

attested by witnesses after the issue of a warrant for payment, as required by Rev. Stat. § 3477.

(2) That they were not affected by the provisions of Rev. Stat. § 3737 that a transfer of a contract with the United States shall cause an annulment of the contract so far as the United States are concerned.

(3) That the cause of action to recover of the assignee their proportionate shares of the partnership fund in his hands accrued to B and C on the receipt of the money by the assignee.

(4) That B and C were not subject in this suit to the disabilities as witnesses imposed by Rev. Stat. § 858 upon parties to suits by or against executors, administrators or guardians.

(5) That B and C were not estopped by their declarations in the Court of Claims as to their interest in the claim there in controversy, from setting up the interest in it which they seek to enforce in this suit.

(6) That the assignee was entitled to no allowance for compensation for services, expenses and attorney's fees, in recovering the fund in the Court of Claims from the United States.

The appellees were the plaintiffs in the Circuit Court. The record showed the following facts: On August 19, 1876, Major Card, a quarter-master in the army of the United States, advertised for bids for furnishing 6000 cords of wood and 800 tons of hay at the Tongue River Military Station, in Montana Territory. Campbell K. Peck, whose assignee in bankruptcy is the appellant, put in a bid, and, believing that the contract would be awarded to him, on August 19, 1876, entered into articles of copartnership with the plaintiffs, McLean and Harmon, for the purpose of carrying out the contract with the United States which he expected to make. These articles provided that Peck should furnish one-half the capital necessary to carry on the partnership business, and McLean and Harmon each one-fourth, and that the profits and losses of the partnership should be divided in like proportions. Harmon agreed to take charge of the office of this partnership, which was to be at Fort Lincoln, and superintend the business at that place, and McLean agreed to go to the place of delivery on the Yellowstone and superintend the business there, but neither was to make any charges for his services. The articles of partnership further provided, that, when the contract with the government was completed, a settlement of profits and losses should be made "on the basis of the above terms of

partnership," and, "if a dissolution is decided on, first all debts shall be paid, and then all profits divided in the proportions heretofore mentioned." After the signing of these partnership articles the bid of Peck was accepted, and on August 25, the contract between him and the United States was signed and delivered.

The partners did not deliver the hay required by the contract, because, as they claimed, they were prevented from so doing by the officers of the army of the United States, but did cut and deliver the wood. McLean and Harmon did all the work that was done, and advanced all the money that was expended in performing the contract, except about $100, which was furnished by Peck.

The wood delivered under the contract amounted in value at the contract price to $51,900, but the United States refused to pay that sum, claiming damages for the failure to deliver the hay, but consented to pay, and did pay, $10,919.37. McLean and Harmon received $10,000 of this sum, and Peck $919.37, which was over $800 more than he advanced for the performance of the contract. The parties interested being dissatisfied with the action of the government in refusing payment in full for the wood delivered, Peck, who was the only person to whom the government was bound, filed, on November 7, 1877, his petition in the Court of Claims against the United States, demanding $55,003.63 damages for the breach of the contract. The United States traversed the petition, and, upon final hearing in the Court of Claims, judgment was rendered for Peck, the claimant, for $43,113.63. From this judgment both parties appealed to this court, which, in February, 1880, affirmed the judgment of the Court of Claims and allowed the claimant, in addition to the amount already awarded him, the further sum of $2660, making the entire judgment in favor of the claimant $45,773.63.

While the case was pending in the Court of Claims, to wit, on August 31, 1878, Peck was, on his own petition, adjudicated a bankrupt in the District Court of the United States for the District of Iowa, and Hobbs, the appellant in the present case, was appointed assignee. While the case was pending in this

court Peck, on December 2, 1879, died, and his widow, Helen A. Peck, was afterwards appointed his administratrix, and in January, 1880, was substituted in the place of her intestate as the plaintiff in the cause. The case still being in this court, and after Mrs. Peck had, as administratrix, been made party plaintiff, Hobbs, as assignee, moved the court to be substituted as plaintiff in her stead, which motion was denied. The cause having been remanded to the Court of Claims, Hobbs, the assignee in bankruptcy, moved that court to substitute him as plaintiff in place of the administratrix, which motion was, on May 10, 1880, granted, and the money recovered from the United States was, after deducting about $10,000 attorneys' fees, paid over to Hobbs, the assignee.

McLean and Harmon, fearing that Hobbs would distribute the fund thus recovered among the general creditors of Peck, and believing that the fund belonged to them, filed in the Circuit Court for the Southern District of Iowa the bill in the present case, to which they made Hobbs, as assignee in bankruptcy of Peck, and John B. Sanborn and Charles King, lately partners as Sanborn & King, and Edward F. Brownell defendants, and in which they set out in detail the facts above recited, set up their claim to the fund as surviving partners, and prayed that the balance found due them from the partnership on an accounting might be paid them out of the fund, so far as it should be sufficient to pay the same.

The defendant Hobbs, as assignee, answered the bill, and the plaintiffs filed the general replication. Upon final hearing upon pleadings and proofs the Circuit Court adjudged and decreed as follows: After reciting the making of the partnership between the plaintiffs and Peck, and the performance by the partnership of the contract made by Peck with the United States, it found that, after charging to the partners all the moneys received by them respectively, it appeared that Peck had received more money than he had paid out in performing the contract, and that the plaintiffs had expended for the same purpose $41,032.31 more than they had received; that Hobbs, the assignee, had collected and received on the judgment against the United States recovered by Peck's administratrix

$35,773.63; and it was, therefore, adjudged and decreed that said sum was the money and property of the plaintiffs and that they recover it of the defendant Hobbs, who was ordered to pay it to the plaintiffs, with interest on the investment thereof, and that the plaintiffs also recover of Hobbs, as assignee, their costs and disbursements in the suit, to be paid by him out of any money in his hands as assignee. The appeal of Hobbs, as assignee, brought this decree under review.

Mr. James Hagerman for appellant. *Mr. Frank Hagerman* and *Mr. John H. Craig* were with him on the brief.

I. Peck's claim passed to assignee under the assignment in bankruptcy, and assignee was properly substituted in Peck's case in Court of Claims. Rev. Stat. §§ 5044, 5045, 5046, 5047. *Herndon* v. *Howard*, 9 Wall. 664; *Knox* v. *Exchange Bank*, 12 Wall. 379; *Person's Case*, 8 C. Cl. 543; *Erwin* v. *United States*, 97 U. S. 392; *Phelps* v. *McDonald*, 99 U. S. 298; *Peck's Case*, 14 C. Cl. 84.

II. The United States Circuit Court had no jurisdiction of this case, unless the complainants have an interest in the fund. Rev. Stat. § 4947.

III. On complainant's theory, the administratrix of Peck is a necessary party to this suit. *McKaig* v. *Hebb*, 42 Maryland, 227.

IV. The partnership agreement and powers of attorney and Peck's notes can be construed not to pass any interest, legal or equitable, in Peck's contract and claim. *Wright* v. *Ellison*, 1 Wall. 16; *Trist* v. *Child*, 21 Wall. 441.

V. The alleged partnership agreement and assignments are illegal, null, and void as to passing any interest in Peck's contract or claim as between assignor and assignee, and also as between United States and assignee. Rev. Stat. §§ 3477, 3737; *Trist* v. *Child*, 21 Wall. 441; *United States* v. *Gillis*, 95 U. S. 407; *Spofford* v. *Kirk*, 97 U. S. 484; *Wanless' Case*, 6 C. Cl. 123; *St. Paul Railroad Co.* v. *United States*, 112 U. S. 733; *Flint & Père Marquette Railroad Co.* v. *United States*, 112 U. S. 762; *Mellison* v. *Allen*, 30 Kansas, 382.

VI. The testimony of complainants in the Court of Claims

that they had no interest in Peck's contract was conclusive. *Mulligan* v. *Illinois Central Railroad Co.*, 36 Iowa, 181; *Marsh* v. *Mitchell*, 11 C. E. Green (26 N. J. Eq.), 497; *Edson* v. *Freret*, 11 La. Ann. 710. It operates as an estoppel. *Bronson* v. *Worth*, 7 Wall. 32; *Stowe* v. *United States*, 19 Wall. 13; *Bank of Pittsburg* v. *Neal*, 22 How. 96. And destroys their credibility. *The Santissima Trinidad*, 7 Wheat. 283.

VII. Complainants were incompetent witnesses under Rev. Stat. § 858. Assignees in bankruptcy are within the intent of this statute. *Crocker* v. *National Bank*, 4 Dillon, 358; *Tiffany* v. *Boatman's Institution*, 18 Wall. 375; *Tiffany* v. *Nat. Bank*, 18 Wall. 408; *Carpenter* v. *Rannels*, 19 Wall. 138; *United States* v. *Freeman*, 3 How. 556, 565.

VIII. Under the Iowa statute, complainants could not testify as to communications and transactions with Peck. Code of Iowa, 1873, § 3639; *Williams* v. *Brown*, 45 Iowa, 102; *Burton* v. *Baldwin*, 61 Iowa, 283; *First National Bank* v. *Owen*, 52 Iowa, 107; *Smith* v. *Johnson*, 45 Iowa, 308; *Van Sandt* v. *Cramer*, 60 Iowa, 424; *Conn. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250; *Lucas* v. *Brooks*, 18 Wall. 436; *Packet Co.* v. *Clough*, 20 Wall. 528.

IX. The judgment of the Court of Claims in Peck's suit, and the order substituting Hobbs, are *res judicatæ*. 1 Greenleaf on Ev. § 535; Bigelow on Estoppel, 3d ed. 59; *Stoddard* v. *Thompson*, 30 Iowa, 82; *Davis* v. *Milburn*, 4 Iowa, 246; *McNamee* v. *Moreland*, 26 Iowa, 96; *Chicago* v. *Robbins*, 2 Black, 418; *Cromwell* v. *Sac County*, 94 U. S. 351.

X. Complainant's right of action is barred by the statute of limitations. Rev. Stat. § 5057; *Ozeas* v. *Johnson*, 4. Dall. 434; *Bank* v. *Carrollton Railroad*, 11 Wall. 624; *Vinal* v. *West Virginia Oil Co.*, 110 U. S. 215; *Case* v. *Beauregard*, 99 U. S. 119; *Bailey* v. *Glover*, 21 Wall. 342.

XI. The assignee is entitled in any event to have compensation from the fund for services, expenses and attorneys' fees. *Trustees* v. *Greenough*, 105 U. S. 527; *Central Railroad* v. *Pettus*, 113 U. S. 116.

XII. The assignee is entitled to recover on his cross bill.

XIII. Complainants have no standing in a court of equity.

Meguire v. *Corwine*, 101 U. S. 108; 1 Wharton on Contracts, § 340; *Irwin* v. *Williar*, 110 U. S. 499.

Mr. Charles E. Flandrau and *Mr. Walter H. Sanborn* for appellees.

Mr. Justice Woods, after stating the case as reported above, delivered the opinion of the court.

The findings of fact made by the Circuit Court in its final decree are, in our opinion, amply sustained by the evidence. These findings, and other facts not disputed, establish *prima facie* the justice and equity of the decree.

Upon the facts of the case, the decree of the court is simply to this effect, that, where three persons form a partnership, and agree to bear the losses and share the profits of the partnership venture in proportion to their contributions to its capital, and two of the partners furnish all the money and do all the work, they are entitled to be repaid their advances out of its assets before payment of the individual creditors of the partner who paid nothing and did nothing to promote the partnership business. The decree may stand on even stronger grounds. There is no evidence in the record to show that there were any unpaid debts outstanding against the partnership of which Peck and the plaintiffs were the members. The decree of the court is based on the assumption that there were no such debts. The money, therefore, collected on the judgment recovered by Peck's administratrix was assets of the partnership, to which the partners were entitled in proportion to the amount paid in by them, and the record clearly shows that the money so collected was the only assets of the partnership. As McLean and Harmon had paid in all the money, they were entitled to all the money collected on the judgment, not by reason of any right to priority of payment, nor by reason of any lien, but because it was their property, and no other person had any claim to it. The plaintiffs' right to the fund was not at all impaired by the bankruptcy or death of Peck. Their claim was just as strong as if Peck were still living, and had received and collected the judgment in his own name, and the money had been taken

from his hands and impounded in the registry of the court. The decree might, therefore, stand on the ground which it in fact asserts, that the money in controversy was the absolute property of the plaintiffs.

The defendant, however, assails the decree on several grounds, which we shall proceed to notice.

It was shown by the evidence that on July 20, 1877, Peck executed and delivered to Harmon a paper, of which the following is a copy:

"Fort Abraham Lincoln, *July* 20, 1877.

"For value received, I promise to pay to William Harmon, or order, twenty-three thousand dollars, out of moneys I may hereafter receive on account of my claim against the United States Government, for contract for wood, at Tongue River cantonment, on the Yellowstone River.

"C. K. Peck."

On the same day he executed and delivered to McLean a paper, similar in terms, for the payment to him of $17,000 out of the same fund. The appellant insists that the contract of partnership between Peck and the plaintiffs, and the promises of Peck above mentioned, were forbidden by the statutes of the United States, and were, therefore, illegal and void, and gave no rights to the plaintiffs to the fund in controversy. The statutes relied on are §§ 3477 and 3737 of the Revised Statutes, which read as follows:

"Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. . . ."

"Sec. 3737. No contract or order, or any interest therein, shall be transferred by the party to whom such contract or

order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

We shall first consider these two sections in their bearing upon the contract of partnership between Peck and the plaintiffs. It is obvious that § 3477, which forbids assignments of claims against the United States or any interest therein, unless under the circumstances therein stated, can have no reference to such a contract as the partnership articles between Peck and the plaintiffs. When those articles were signed there was no claim against the United States to be transferred. Peck had at that time no contract even with the United States, and there was no certainty that he would have one. What is a claim against the United States is well understood. It is a right to demand money from the United States. Peck acquired no claim in any sense until after he had made and performed, wholly or in part, his contract with the United States. Section 3477, it is clear, only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment, or may be prosecuted in the Court of Claims. The section simply forbids the assignment of such claims before their allowance, the ascertainment of the amount due thereon, and the issue of a warrant for their payment. When the contract of partnership was made Peck had no claim which he could present for payment or on which he could have brought suit. He, therefore, had no claim the assignment of which the statute forbids. It is so clear that the articles of partnership do not constitute such an assignment as is forbidden by the section under consideration, that it would be a waste of words further to discuss the point.

Nor are the articles of partnership forbidden by § 3737. They do not transfer the contract or any interest therein to the plaintiffs, and cannot fairly be construed to do so. But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination

to and not in violation of § 3737; and if they can be construed consistently with the prohibitions of the section they should be so construed. For it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted. Whart. on Ev., 2d ed., § 1250; Best's Evidence, 6 Eng. Ed., 1st Am. Ed., §§ 346, 347; *Shore* v. *Wilson*, 9 Cl. & F. 355, 397; *Moss* v. *Bainbrigge*, 18 Beav. 478; *Lorillard* v. *Clyde*, 86 N. Y. 384; *Mandal* v. *Mandal*, 28 La. Ann. 556. Interpreting the articles in the light of the statute, as it is the duty of the court to do, they were not intended to transfer, and do not transfer, to the plaintiffs any claim or demand, legal or equitable, against the United States, or any right to exact payment from the government by suit or otherwise. They may be fairly construed to be the personal contract of Peck, by which, in consideration of money to be advanced and services to be performed by the plaintiffs, he agreed to divide with them a fund which he expected to receive from the United States, on a contract which he had not yet entered into. This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be held to effect a transfer of Peck's contract with the United States and to be a violation of the statute.

We are of opinion that the partnership contract was not opposed to the policy of the statute. The sections under consideration were passed for the protection of the government. *Goodman* v. *Niblack*, 102 U. S. 556. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed.

One or both of the sections of the statute which we are now considering have been under the review of this court in the following cases: *United States* v. *Gillis*, 95 U. S. 407; *Erwin* v. *United States*, 97 U. S. 392; *Spofford* v. *Kirk*, 97 U. S. 484;

Goodman v. *Niblack*, 102 U. S. 556; *Bailey* v. *United States*, 109 U. S. 432; *St. Paul and Duluth Railroad Co.* v. *United States*, 112 U. S. 733. In none of them is any opinion expressed in conflict with the views we have announced in this case.

Our conclusion, therefore, is, that the articles of partnership were not forbidden by the letter or policy of this statute.

In respect to the papers executed by Peck on July 20, 1877, by which he agreed to pay $23,000 to Harmon and $17,000 to McLean, respectively, "out of moneys" he might "thereafter receive on account of" his "claim against the United States Government for contract for wood," &c., it is plain they confer no new rights on the plaintiffs, and take away no old ones. The evidence shows that Harmon and McLean were entitled, under the partnership articles, to the money specified in these memoranda. Peck was, therefore, only promising to do what, on a good consideration, he had already by the articles of partnership promised to do. There was no new consideration for these new promises. The only office, therefore, which the memoranda performed was to show the amount then due the plaintiffs, respectively, under the articles of partnership. It would be a strange conclusion to hold that, by accepting these papers, the plaintiffs lost their right, which they had already acquired under the articles of partnership, to have the money therein mentioned paid over to them when it should be collected by Peck, their copartner. If the obligation assumed by Peck in his articles of partnership was valid and binding, it was not impaired or annulled by the giving and the acceptance of these memoranda. From what we have already said in discussing the articles of partnership, it is clear that they were not forbidden by the language or policy of the sections prohibiting the transfer of claims and contracts.

It is next assigned for error that the Circuit Court did not give effect to the defence of the statute of limitation of two years, prescribed by section 5057 of the Revised Statutes, which was set up in the answer of the defendant.

The section mentioned forms a part of § 2 of the bankrupt act of March 2, 1867, ch. 176, 14 Stat. 517, and provides that

no suit at law or in equity shall be maintained in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property, or rights of property, transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.

It is plain that the facts shown by the record do not sustain this defence. This suit is for the recovery, as assets of a partnership, of the money collected on the contract between Peck and the United States, and its distribution among the partners on a settlement of the partnership affairs. If Peck had lived and had not been adjudicated bankrupt, the plaintiffs could not have maintained this suit against him until the money which is the subject of this controversy had been collected from the United States. They had no right under this contract with Peck to demand their share of the money until the money had come to his hands. The bankruptcy and death of Peck did not change the terms of the contract. They could not sue his assignee for a distribution of the fund until the fund had been received. The judgment against the United States in favor of Peck's administratrix was not affirmed by this court until February 10, 1880, and the money was not received by the defendant until after he had been substituted as claimant in the case in place of Helen A. Peck, administratrix, by order of the Court of Claims, on May 10, 1880. This suit was begun September 22, 1880.

A bill like the present, for the settlement of the affairs of the partnership and the distribution of its assets among the partners, would have been premature until the final determination of the suit of Peck against the United States, for that suit involved all the assets of the partnership, and until it was decided there could be no adjustment of the partnership concerns and no distribution of its assets; in fact, it was uncertain whether there would be any assets to distribute. As, therefore, the plaintiffs were not entitled to the relief prayed in the bill until final judgment in the suit of Peck against the United States, and especially had no demand against the defendant until the fund, which they assert was assets of the partnership, came to

his hands, it is plain that the statute of limitation was not well pleaded.

It is next assigned for error that the Circuit Court admitted the testimony of McLean and Harmon, the plaintiffs, offered in their own behalf, in regard to transactions with and statements by Peck, he being dead, and the suit being against his assignee in bankruptcy. It is insisted that the testimony of these witnesses was incompetent under section 858 of the Revised Statutes, which provides as follows: "In the courts of the United States no witness shall be excluded . . . in any action because he is a party to or interested in the issue tried: *Provided*, that, in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of the witnesses in the courts of the United States, in trials at common law, and in equity and admiralty."

The witnesses admitted by the Circuit Court were not excluded by the terms of this statute. The suit in which they testified was not an action by or against an executor, administrator, or guardian. But the counsel for the defendant insists that the policy of the act applies to suits by or against assignees as well as to suits by or against executors, administrators, or guardians, and that we ought to construe the act so as to include such suits. We cannot concur in this view. The purpose of the act was to remove generally the old incapacity to testify imposed on parties or persons interested in the suit. This was done by a sweeping provision, subject to certain well-defined exceptions, but the exceptions did not include suits by or against assignees in bankruptcy. We cannot insert the exception. When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. "We are bound," says Mr. Justice Buller, in *Jones* v. *Smart*, 1 T. R.

44, "to take the act of Parliament as they have made it;" and Mr. Justice Story, in *Smith* v. *Rines*, 2 Sumner, 338, 354, 355, observes, "It is not for courts of justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation." See also *King* v. *Burrell*, 12 A. & E. 460; *Lamond* v. *Eiffe*, 3 Q. B. 910; *Bloxam* v. *Elsee*, 6 B. & C. 169; *Bartlett* v. *Morris*, 9 Port. (Ala.) 266. The objection made to the admission of the testimony of the plaintiffs was properly overruled.

The next ground of complaint against the decree of the Circuit Court is, that the court did not hold the plaintiffs estopped from asserting title to the fund in controversy, by the fact that they each testified in the suit of Peck against the United States, in which the fund was recovered, that he had no interest, direct or indirect, in the claim of Peck, except that he held one of the notes or memoranda made by Peck, a copy of one of which has already been given.

It must be conceded that this testimony was evasive and disingenuous, but it was not false. But admitting that the testimony was untrue, it is difficult to see how any estoppel is raised which the defendant can set up against a recovery in this case by the plaintiffs. An equitable estoppel is raised when there is some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326. If any estoppel could be set up in this case by reason of the testimony of the plaintiffs, it would be one in favor of the United States, who alone could have been injured by that testimony.

It is clear that the estoppel could not be set up by the defendant, for the evidence was given on his side of the controversy, and he is now in possession of and claims the fund which that testimony aided Peck, whose assignee he is, to recover. There was, therefore, no injury to the defendant and no estoppel which he could set up against these plaintiffs. See *Cushing* v. *Laird*, 107 U. S. 69.

It is true, his counsel say, that, by reason of the denial by the plaintiffs that they had any interest in Peck's claim, the defend-

ant was induced to employ counsel and move both this court and the Court of Claims, that he be made, as assignee of Peck, the party plaintiff in the suit against the United States, and to expend a large sum of money in prosecuting his motions. As we have already found that the plaintiffs were entitled to the fund in controversy, and the defendant was not, this contention amounts to this, that the plaintiffs should be precluded from a recovery of their own property, and it ought to be turned over to the defendant, because the defendant, misled by the testimony of the plaintiffs given in a case to which he was not at the time either a party or privy, was induced to expend money in a proceeding to get possession of the subject-matter of the controversy, to which, as it turned out, he had no title whatever. Upon such a state of facts no estoppel is raised. But there is no proof in the record that the defendant was misled by the testimony of the plaintiffs, or that he did not know the exact truth when he took the proceedings referred to. In no point of view, therefore, can the defendant assert that the plaintiffs are estopped to claim the fund in controversy.

Lastly, the defendant insists that the Circuit Court erred in not allowing him compensation for his services, expenses, and attorneys' fees in recovering the fund in the Court of Claims from the United States. In reply to this contention, it is sufficient to say that the defendant rendered no services whatever in the recovery of the fund. Judgment had been rendered in the Court of Claims in favor of the administratrix of Peck, and had been affirmed by this court, and the mandate of this court had been sent to the Court of Claims, before the defendant was admitted as plaintiff in the suit for the recovery of the fund. All he did was to get the fund into his possession. As in our view the fund belongs to the plaintiffs in this suit, all that comes out of it for the compensation of the defendant comes out of their pockets. We see no reason why they should pay the defendant, who, instead of aiding them in securing their rights, has been an obstacle and obstruction to their enforcement. The services for which the defendant seeks pay from the plaintiffs were not rendered in their behalf, but in hostility to their interest.

Syllabus.

When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. See *Trustees* v. *Greenough*, 105 U. S. 527, where the subject is discussed by Mr. Justice Bradley, and the cases cited; and *Central Railroad Co.* v. *Pettus*, 113 U. S. 116. But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.

The Circuit Court was right in not compelling the plaintiffs to pay for services rendered and expenses incurred in a proceeding adversary to their interest, and carried on for the benefit of others.

There is no error in the record. *Decree affirmed.*

BURNES *v.* SCOTT & Another, Executors.

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

Argued March 23, 1886.—Decided April 5, 1886.

In a suit at law, by the payee of a promissory note or his representatives, against the maker, evidence is inadmissible to show that the note was not intended to be a promissory note, but was given as a memorandum not to be enforced against the maker.

A defence in an action at law by the payee of a promissory note, or his representatives, that there was a failure of consideration in that the note was based upon certain partnership transactions between the parties which are

still unsettled, and the amount due from the one to the other therefore unknown, is an equitable defence which cannot be set up in that action.

The making of a champertous, and therefore under the law of the State void and illegal, contract for the prosecution of a suit to collect a promissory note, cannot be set up in bar of a recovery on the note.

This was an action at law upon a promissory note. The case is stated in the opinion of the court.

Mr. B. F. Stringfellow for plaintiff in error.

Mr. George W. DeCamp for defendant in error.

Mr. Justice Woods delivered the opinion of the court.

This was an action at law brought by Milton Courtright against James N. Burnes, the plaintiff in error, upon the note of the latter made at Chicago, and dated October 10, 1872, whereby he promised to pay, thirty days after date, to the order of F. H. Winston, $7333, at the Cook County National Bank, in Chicago. Courtright by indorsement and transfer became the owner and holder of the note.

The defendant pleaded four pleas. The first of these was a general denial of the averments of the petition.

The second plea was in substance as follows: That when the note was made, the plaintiff Courtright, the defendant Burnes, the said Winston, and one Campbell had been, and were, partners in a contract for building a certain railroad therein named; that prior to the date of the note Winston had received and was in possession, as part of the assets of the partnership, of forty bonds for $1000 each, of the city of Atchison, subject to the payment of the partnership debts, and, after such payment, for distribution among the partners; that a short time before the date of the note the partners had appointed the defendant a trustee to settle the partnership affairs; that when the note was given the partnership affairs had not been settled, and were not settled at the time of filing the plea; that at the time of the making of the note, Winston turned over to defendant the bonds above mentioned, and estimated that there would be due him, as a partner in the firm, from its assets, the sum men-

tioned in said note, and thereupon requested the defendant, as trustee of the partners, to make the note "with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said Winston, on account of said bonds, in a settlement among said partners;" that the defendant executed the note accordingly, as trustee of the partnership and not as his individual note, and the plaintiff acquired title to the note with knowledge of these facts.

By the third plea it was averred as follows: That the note sued on "was and is wholly without consideration, and is null and void, and that said note is based upon and grew out of transactions relating to the business of said partners; that said partners are interested in the same, and are necessary parties to a suit relating to said note, and the amount due on said note, if any, cannot be ascertained until a final settlement of said partnership can be had."

The last plea was that the suit was prosecuted under an agreement between the plaintiff and George W. DeCamp, his attorney, whereby the latter undertook to prosecute the suit and to pay all the expenses incident to its prosecution, in consideration that he should receive four tenths of the amount recovered.

The parties waived a trial by jury and submitted the issues of fact as well as of law to the court, which made a general finding for the plaintiff and entered judgment thereon in his favor against the defendant Burnes for $11,401.60, who thereupon sued out this writ of error. After the record was filed in this court Courtright died, and the executors of his last will were made defendants in error in his stead.

The bill of exceptions shows that upon the trial of the case the defendant, to sustain the issue on his part, offered evidence tending to show that "Winston, the payee and assignor of the note sued on," Courtright, "the plaintiff," Burnes, "the defendant, and one Campbell, were the contractors for the construction of the Chicago and Southwestern Railroad, as partners, and that Winston was entitled to an interest of two fifteenths in such contract; that Winston had charge of the execution of

the contract and possession and control of the assets arising from the contract; that after the completion of the road, in October, 1872, Winston delivered to defendant forty bonds of the city of Atchison for one thousand dollars each, which had been received and were then held by him as part of the assets under such contract; that the bonds were delivered by Winston to and received by defendant as the trustee for the parties in interest in the contract, and that at the time the bonds were so delivered defendant gave to Winston the note sued on."

The defendant also offered evidence to show "that the note sued on when given was not intended by him, the maker, nor by Winston, the payee, as a promissory note, but was only intended, and so given by him and received by Winston, as a memorandum of the then estimate of the value of the estimated interest of Winston in the Atchison bonds then delivered as part of the profits of the aforesaid contract for the construction of the Atchison Branch, to be accounted for on a settlement between the partners to such contract;" "that the only consideration of the note sued on was the transfer by Winston to defendant of the interest of Winston in the Atchison bonds, as part of the profits of the contract for the construction of the Atchison Branch;" and "that upon a settlement of the partnership accounts, between said Winston and his partners in the contract for the construction of said Atchison Branch, the said Winston would have had no interest in the profits of said contract, having received more than his share thereof prior to the giving of said note."

To all of which evidence so offered plaintiff objected as incompetent and irrelevant, and the objections were sustained by the court, and the evidence excluded. The exclusion of the testimony so offered is now assigned for error by the defendant.

So far as the evidence excluded was offered in support of the second plea, it is plain that it was inadmissible. Its purpose was to vary and contradict by an alleged contemporaneous verbal agreement the contract which the parties had reduced to writing. It was offered to show that a promissory note in the usual form was not intended by the parties to be a promissory note, but was a mere memorandum by which the maker prom-

ised nothing; which gave no rights to the payee, and was to all intents and purposes vain, futile, and of no force or effect whatever. It is not necessary to cite authority to show that the evidence was inadmissible for such a purpose.

The counsel for defendant not strenuously insisting that the evidence was admissible to support the second plea, insist that it was competent to prove the third. They argue that as want of consideration may be shown in defence of an action on a promissory note, the evidence should have been received.

As a general rule want of consideration is a defence to a promissory note, but it is not always a defence which can be made at law. It frequently requires the aid of a court of equity to give it effect. The plea, to support which the defendant contends the evidence of want of consideration was admissible, clearly sets up an equitable defence. It alleges that the note sued on is based on the "transactions relating to the business of said partners." Referring, therefore, to the preceding plea, which states the business of the partners, as we are authorized to do, we learn that the partnership business had not at the time of filing the pleas been settled, or the interest of Winston therein or in the bonds been ascertained. The plea under consideration further avers that the members of the partnership were interested in the said business and were necessary parties to a suit relating to the note, and that the amount due thereon, if anything, could not be ascertained until the final settlement of the partnership. It is plain, therefore, that the defence set up by the plea is not the legal defence of want of consideration, for the plea admits, by implication, that there may be something due on the note, but the equitable defence that the amount due on the note, if anything, is dependent on the amount coming to Winston from the assets of the partnership, which cannot be ascertained without a settlement of the partnership affairs in a suit to which all the partners are necessary parties. And yet having so pleaded, the defendant insists, in argument, that in a trial upon the promissory note in a court of law, and without the presence of two of the four partners, evidence is admissible to settle the partnership, and to prove, without making Winston a party to the suit, that there is noth-

ing due him out of the partnership assets. The pleading and the contention of the defendant appear, therefore, to be contradictory and inconsistent.

Plainly the relief, if any, to which the facts set up in this plea entitles the defendant is an injunction to stay the suit at law upon the note until a settlement of the partnership and an ascertainment of the amount, if anything, coming to Winston out of the assets of the partnership. This is a remedy which a court of equity only can grant. But the defendant insists on a verdict and judgment in his favor, without settlement of the partnership on which, as he asserts, the validity of the note depends.

Under the jurisprudence of the courts of the United States a court of law can no more take cognizance of an equitable defence than a court of equity can entertain a suit upon a purely legal title. "The Constitution of the United States," says Mr. Chief Justice Taney, in delivering judgment in the case of *Bennett* v. *Butterworth*, 11 How. 668, 675, "in creating and defining the judicial power of the general government establishes this distinction between law and equity, and a party who claims a legal title must proceed at law. . . . But if the claim is an equitable one he must proceed according to the rules which this court has prescribed regulating proceedings in equity in the courts of the United States."

So in *Thompson* v. *Railroad Companies*, 6 Wall. 134, the court referred to *Bennett* v. *Butterworth*, and cited with approval and adopted the following extract from the opinion in that case: "Although the forms of proceedings and practice in the State courts shall have been adopted in the Circuit Courts, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended in one suit."

So in the case of *Jones* v. *McMasters*, 20 How. 8, 22, which was an action at law for the recovery of the possession of land, it was held that when the grant from the government on which the plaintiffs relied was regular in form, it was not proper, by way of defence, to go behind the survey and location; that, "if they were voidable for irregularity or other cause, the ques-

tion was not one for a court of law in an action to recover possession, but for a court of equity to reform any error or mistake."

So in *Foster* v. *Mora*, 98 U. S. 425, 428, it was said that, "in actions of ejectment in the United States courts, the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the Federal courts." To the same effect see *Greer* v. *Mezes*, 24 How. 268; *Watkins* v. *Holman*, 16 Pet. 25; *Bagnell* v. *Broderick*, 13 Pet. 436; *Bank of Hamilton* v. *Dudley*, 2 Pet. 492. See also Peeler's Law and Equity in U. S. Courts, ch. 1, and note 26, pp. 28, 29.

If the defence set up in the plea under consideration could be made effectual in an action at law, it would render obsolete in the equity courts of the United States that great head of equity jurisdiction under which injunctions are granted to stay proceedings at law. "The occasion," says Mr. Justice Story, "on which an injunction may be used to stay proceedings at law are almost infinite in their nature and circumstances." "Thus, an injunction is sometimes granted to stay trial, sometimes after verdict to stay judgment, sometimes after judgment to stay execution, and sometimes after execution to stay the money in the hands of the sheriff," &c. Story Eq. Jur. §§ 885, 886, and see §§ 881, 882; Eden on Injunctions, ch. 2, p. 3; *Waterlow* v. *Bacon*, L. R., 2 Eq. 514; *Hibbard* v. *Eastman*, 47 N. H. 507; *Hopkins* v. *Fletcher*, 47 Missouri, 331; *Tommey* v. *Ellis*, 41 Geo. 260.

It is clear, therefore, that the matters set up in the third plea were proper for the consideration of a court of equity, and that they could not be set up as a defence in a court of law. All the evidence offered to prove them was, therefore, properly excluded.

It further appears from the bill of exceptions that in support of the plea that the plaintiff had made a champertous agreement with his counsel for the prosecution of this suit, the defendant offered evidence which tended to prove a contract made by the plaintiff with his counsel, George W. DeCamp, by which the latter agreed to prosecute the suit and defray all the ex-

penses thereof, in consideration of which he was to receive a certain proportion of the sum recovered. The court, however, did not give effect to this plea, and overruled a motion made by the defendant to dismiss the action on the ground that the plaintiff had made such champertous contract. This action of the court the defendant assigns for error.

At common law and by statute, both in England and in many of the United States, champerty was a criminal offence. But at the present time, in most of the States, to aid the lawful suit of another with money or services in consideration of a share in the recovery, is not considered or punished as a crime. But in many of the States champertous contracts are considered void. This is the case in Missouri where the present case was tried, the Supreme Court so holding, on the ground that the common law had been adopted by statute in that State. See *Duke* v. *Harper*, 66 Missouri, 51. The defendant now asks us to go a long step beyond this ruling.

The question raised by the present assignment of error is not whether a champertous contract between counsel and client is void, but whether the making of such a contract can be set up in bar of a recovery on the cause of action to which the champertous contract relates.

We must answer this question in the negative. It was wisely said by the Supreme Court of New York, in the case of *Thalhimer* v. *Brinkerhoff*, 3 Cowen, 623, that "the right of litigation may be abused, and proper remedies for groundless and vexatious litigation must exist; but the remedies for the abuse of this right should be such as not to impair the free use of the right itself. As the justice or injustice of the claim cannot be known before the termination of the cause, the checks upon unjust litigation must in general consist, not in excluding the suit or the suitor from the courts, but in redress following the decision of justice upon the merits of the case."

This is in accord with the views of this court. The precise question under consideration was decided in the case of *Boone* v. *Chiles*, 10 Pet. 177. That was a bill in equity to establish the title to a tract of seven hundred acres of land in Bourbon County, in the State of Kentucky. Among other defences it

was alleged that an agreement in writing had been made between Boone, the plaintiff, and one Engles, by which Engles undertook at his own expense to prosecute a suit for the seven hundred acres in dispute, and, as a consideration for his trouble, was to have one-half of the land, and that the suit was prosecuted under that agreement; that it was, therefore, a case of champerty and maintenance forbidden by law, in which the court could give no relief. But the court held that, although the English statutes which had been adopted in Kentucky punished the offence and declared the contract for maintenance void between the parties, the right of the plaintiff was not forfeited by such an agreement, and it might be asserted against the defendants whether the contract with Engles was valid or void. The same rule has been declared in other American cases. *Whitney* v. *Kirtland*, 27 N. J. Eq. (12 C. E. Green), 333; *Robison* v. *Beall*, 26 Georgia, 17; *Allison* v. *Chicago & Northwestern Railroad Co.*, 42 Iowa, 274.

So in *Hilton* v. *Woods*, L. R. 4 Eq. 432, it was strenuously urged that the bargain between the plaintiff and Mr. Wright, under which the suit was instituted, amounted to champerty and maintenance, and consequently disqualified the plaintiff to sue, and that the court was bound to dismiss the bill. But the Vice Chancellor said: "I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that whenever the right of the plaintiff in respect of which he sues is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met any, which goes the length of deciding that where a plaintiff has an original and good title to property he becomes disqualified to sue for it by having ventured into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise." There was, therefore, a decree for the plaintiff, though without costs.

In *Elborough* v. *Ayres*, L. R. 10 Eq. 367, it was conceded that the fact that the plaintiff, in an action for malicious prosecution, had been maintained, would be no bar to the action, and the Vice-Chancellor held that such maintenance would be no

ground for the interference of a court of equity to prevent the action from going on, citing Vice-Chancellor Wigram in *Evans* v. *Prothero* [not reported on that point].

The only cases to which we have been referred in which the rule insisted on by the defendant has been maintained were two cases decided in the Supreme Court of Wisconsin. *Barker* v. *Barker*, 14 Wisc. 131, and *Allard* v. *Lamirande*, 29 Wisc. 502.

We think, therefore, that, both upon reason and weight of authority, the court did not err in refusing to give effect to the fourth plea of the defendant, or in refusing to dismiss the suit because it was prosecuted under a champertous agreement between the plaintiff and his counsel.

Judgment affirmed.

NEW YORK MUTUAL LIFE INSURANCE COMPANY *v.* ARMSTRONG, Administratrix.

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

Argued March 16, 17, 1886.—Decided April 5, 1886.

A policy of life insurance payable to the assured or his assigns at a future day named, or if he should die before that day to his legal representatives within sixty days after notice and proof of his death, is assignable if the assignment is not made to cover a speculative risk; and an assignment of it passes to the assignee the right to receive the sum insured in case of the death of the assured before the day named.

Proof that the assignee of a policy of life insurance caused the death of the assured by felonious means is sufficient to defeat a recovery on the policy.

In a suit brought by an assignee of a policy of life insurance, obtained on the application of the assured at the instigation of the assignee, to recover of the insurers after the death of the assured, the defendants set up that it was plaintiff's purpose, in procuring the insurance to be obtained, to cheat and defraud defendants, and offered to show that he effected insurances upon the life of the assured in other companies at or about the same time for the like fraudulent purpose: *Held*, That the evidence was admissible.

Statement of Facts.

On the 8th of December, 1877, the Mutual Life Insurance Company of New York issued a policy of insurance on the life of John M. Armstrong, of Philadelphia, for $10,000. It was what is known as an endowment policy; that is, a policy payable to the assured if he live a designated time, but to some other person named if he die before the expiration of that time. It was payable, subject to certain conditions, to the assured *or his assigns* on the 8th of December, 1897, at the office of the company in New York; or, if he should die before that time, to *his legal representatives*, within sixty days after notice and proof of his death. It recited that it was issued in consideration of his application, and of the statements contained therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in the contract adopted and warranted to be true, and the only statements upon which the contract was made; and in further consideration of the payment of $138.60 quarterly each year during the continuance of the policy.

On the 25th of January, 1878, Armstrong died, and his widow was appointed administratrix of his estate. The required notice and proof of his death were furnished, and the insurance money not being paid, she brought this action for its recovery in a court of the State of New York, and, on motion of the company, it was removed to the Circuit Court of the United States.

The company set up several special defences to the action. One of them was, that the policy was obtained by one Benjamin Hunter, with the intent to cheat and defraud the company by compassing the death of the assured by felonious means and collecting the amount of the insurance, and which he attempted to carry out by causing his death; another was, that the statements made in the application of the assured as to previous insurances upon his life were false, the amounts being much larger than those stated.

On the trial it appeared in evidence that on the 3d or 4th of December, 1877, Hunter made some inquiries at the office of the company in Philadelphia as to the rates of insurance on the life of a person aged forty or forty-one years upon an

endowment policy of twenty years, stating that he thought of insuring for his own benefit the life of a person in the sum of $10,000. After some conversation on the subject of insurance generally, he left, stating that the person to be insured would probably call in a day or two. On the 5th of the month Armstrong called, and informed the agent that he came at the request of Hunter to make application for a life insurance. He was thereupon examined, and after answering the questions usually propounded to applicants, and among others those in relation to existing insurances on his life, he signed a formal application, leaving, however, blank the place for the amount of the insurance which he desired, and for the answer to the question touching the payments of the premium. He also executed an assignment of the policy, leaving blanks for its date and for that of the policy, and for the name and residence of the assignee. This was his entire connection with the transaction. In the afternoon of the same day, or on the following morning, Hunter informed the office that the amount of the insurance desired was $10,000, and that it would be more convenient for him to pay the premiums quarterly. The term "quarterly" and the sum "$10,000" were, therefore, upon his instructions, inserted in the application, which was then sent to New York and the policy was there executed by the company. Before the receipt of the policy in Philadelphia he visited the office, and stated that, as he intended to leave the city and be absent for some time, he would pay the premium, and that his lawyer would call for the policy. He accordingly paid the stipulated premium, and the fee for the policy. Some days afterwards his lawyer received the policy and also the assignment, which was attached, the blanks having been filled. They were subsequently delivered to Hunter, and were found in his possession at his death.

Within six weeks after the policy was issued Armstrong was attacked at night in a street in Camden, New Jersey, and received blows on his head which fractured his skull, from the effects of which he died two days afterward. Suspicion fell upon Hunter as the perpetrator or instigator of the attack. He was accordingly arrested, and was indicted and tried for the

murder of Armstrong in one of the courts of that State, and was convicted. He was sentenced to death, and was hanged. By stipulation the testimony of any living witness might be read from the record of his testimony in that case, with like effect as if he were present and testified in this action, subject to all legal objections to its relevancy, competency and materiality. As the first step in proof of the defence that the policy was obtained to cheat and defraud the company, the defendant offered to read from that record the testimony of a witness to show that Hunter, being at the time the sole owner of the policy, intentionally caused the death of Armstrong; but the court, upon objection of the plaintiff, excluded the testimony, and an exception was taken. The defendant offered in different forms to make this proof, but the court refused to receive it, accompanying its ruling in one instance with this statement to counsel: "I will take your offer as broad as you choose to make it; that you offer the testimony to prove that Hunter procured the application for the policy on Armstrong to be made, and that he did so for the purpose of having the insurance effected, and then disposing of Armstrong, and then getting the money; make it as broad as that, and I will exclude it."

The defendant also offered to prove that, about the time the policy in suit was issued, Hunter, with like fraudulent intent, obtained policies of insurance in two other companies upon the life of Armstrong, one made directly to himself, and the other to Armstrong, with an assignment executed simultaneously to himself, and that he paid the premiums thereon; one of the policies being for $10,000 and the other for $6000; but upon the objection of the plaintiff the testimony was excluded, and an exception taken.

The court, among other things, instructed the jury, in substance, that the contract of insurance was divisible; that the last part, providing for the payment of the insurance money to the *legal representatives* of Armstrong in case he should die before the expiration of the policy, was not assignable; that his assignment only transferred the interest, payable at the expiration of the policy; and that the plaintiff was his legal repre-

sentative, entitled to the policy and to whatever was due upon it. The defendant excepted. A verdict for the full amount of the policy, with interest, was rendered, and judgment entered thereon. 20 Blatchford, 493.

Mr. Joseph H. Choate for plaintiff in error.

Mr. Herbert T. Ketcham for defendant in error. *Mr. George M. McKellar* was with him on the brief.

I. Neither the assignment nor its duplicate was the act of Armstrong. Proof, sufficient to sustain a finding, was submitted to the jury that he never executed either paper, never authorized their execution, and never made or sanctioned any delivery of either paper; that whether he gave any authority for the delivery or not, no delivery was made; and that any delivery, if made, was void for fraud. The verdict must be assumed to embrace in its general finding a conclusion upon conflicting evidence that no delivery was in fact made. Could the jury have found that the completion of the paper and its delivery were authorized by Armstrong, they must also have found that the paper, though delivered, was induced by fraud, practised upon Armstrong by Hunter. The plaintiff in error by its several answers, offers to prove, requests to charge, and present argument, asserts that from the issuing of the policy to the death of Armstrong, Hunter maintained the fraudulent intent to secure the ownership of the policy, to murder Armstrong, and to collect the funds of the insurance. It was essential to this scheme that the policy should be assigned to him; and an assignment obtained for such purposes must be void, as having been obtained by fraud.

II. The proposition that the policy in suit was a contract between Hunter and the company, and, as such, was void for Hunter's fraud, will not be entertained by this court; since the verdict of the jury has already been shown to embrace a finding that Hunter never took any relation whatever to the contract of insurance.

In the face of the verdict, an inquiry into Hunter's conduct, intentions and transactions is immaterial, for they cannot affect

the policy if it be held that they did not bring him into relations with it. The contract was in writing, Armstrong and the company were the sole contracting parties. Extrinsic evidence cannot be allowed to vary this. *Rawls* v. *American Mutual Life Ins. Co.*, 27 N. Y., 282, and *Lawrence* v. *Fox*, 20 N. Y. 268, are not like this case. The familiar rule that instruments simultaneously executed may be construed together is not applicable, except when the contracts are between the same parties.

III.. Hunter's fraud cannot be imputed to Armstrong on the theory that he was Armstrong's agent. The answer alleges no fraud on the part of Armstrong.

IV. Conceding that policies of life insurance are assignable, we respectfully submit as the result of the authorities that the policy in question, so far as it contained assurance in the event of death, was an *irrevocable settlement.* The insurance when proposed was subject to Armstrong's complete right of disposition, and he could have preserved the right of assignment. But when he directed its payment to his "legal representatives," he exhausted this right and parted with that which until then had been in his control. How many times must he be permitted to part with it to satisfy his right of disposition? See *Worley* v. *N. W. Masonic Association*, 13 Reporter, 233; *Kelly* v. *Mann*, 13 Reporter, 12; *Greeno* v. *Greeno*, 23 Hun, 478.

V. As to the alleged misstatements of Armstrong it was an affirmative defence which should have been pleaded. *Piedmont & Arlington Ins. Co.* v. *Ewing*, 92 U. S. 377; N. Y. Code Civil Procedure, § 500; *Murray* v. *New York Life Ins. Co*, 85 N. Y. 236. Where the statements are not vouched for as absolutely and subjectively true, they affect the validity of the insurance only to the extent to which they in fact induce the contract; for the applicant is bound not by an express engagement but by the general law of morals which governs every transaction, and his policy is not to be avoided save for statements which are made with the knowledge of their untruth and the intent to deceive. In one instance, deviation from existing fact is a *breach of contract.* In the other, it is nothing unless fraudulent. *Moulor* v. *Am. L. Ins. Co.*, 111

U. S. 335, and cases cited. The contract in this case is precisely within the rule established in *Moulor* v. *Ins. Co.*

Mr. Justice Field, after stating the case as above reported, delivered the opinion of the court.

From the charge of the court, and its opinion on the motion for a new trial, 20 Blatchford, 493, it appears that the refusal to admit testimony of Hunter's fraudulent purpose in procuring the policy, and his feloniously causing, whilst the sole owner of it, the death of the assured, was founded upon the assumption that the insurance money, payable in case the death occurred before the expiration of the policy, went to the legal representatives of the assured, and was not assignable, and that the assignment not taking effect Hunter had no interest in the policy, and, therefore, if he did feloniously cause the death, the fact could have had no effect in controlling the payment.

Assuming this to be the reason for excluding the evidence offered, the ruling cannot be upheld. The position that the assignment did not take effect, because the assured died before the expiration of the policy, is untenable. The provision for payment in such case to his legal representatives was intended to meet the contingency of his dying without having disposed of his interest, and not to limit his power over the contract during his life, and pass the insurance to those who should represent him after his death. The term "legal representatives" is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons who, with respect to his property, stand in his place and represent his interests, whether transferred to them by his act or by operation of law. It may, in this case, include assigns as well as executors and administrators. *New York Life Insurance Co.* v. *Flack*, 3 Maryland, 341.

A policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies; and payment thereof may be enforced for the benefit of the assignee, and, under the system of pro-

cedure in many States, in his name. *Warnock* v. *Davis*, 104 U. S. 775, 780; *Archibald* v. *Mutual Ins. Co. of Chicago*, 38 Wis. 542, 545; *De Ronge* v. *Elliott*, 8 C. E. Green (23 N. J. Eq.), 486, 495. The assignee here, Hunter, represented that he was the special partner of Armstrong, and had placed $5000 in the partnership, and was apprehensive that he might be charged as a general partner. If he was a special partner the contract was not a wager policy. And as it was not a contract for the benefit of the wife of the assured, it does not fall within those cases where, for the protection of the beneficiary, the power of the assured to divert the course of payment is restricted.

The assignment conveying to Hunter the whole interest of the assured, his representatives alone would have a valid claim under it, if the policy were not void in its inception. Proof, therefore, that he caused the death of the assured by felonious means must necessarily have defeated a recovery; and the court erred in refusing to admit testimony tending to prove that such was the fact.

The theory of the defence is, that the purpose of Hunter in obtaining the insurance was to cheat and defraud the company. In support of that position evidence that he effected insurances upon the life of Armstrong in other companies at or about the same time, for a like fraudulent purpose, was admissible. A repetition of acts of the same character naturally indicates the same purpose in all of them; and if when considered together they cannot be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act. A creditor has an insurable interest in the life of his debtor, and may very properly procure an insurance upon it for an amount sufficient to secure his debt, but if he takes out policies in different companies at or nearly the same time, and thus increases the insurance far beyond any reasonable security for the debt, an inquiry at once arises as to his motive, and it may be considered as governing him in each insurance. In *Castle* v. *Bullard*, 23 How. 172, 186, where the defendants were charged with having fraudulently sold the goods of the plaintiff, evidence that they had committed similar

fraudulent acts at or about the same time was allowed, with a view to establish their alleged intent with respect to the matters in issue. The court said: "Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration." In *Lincoln* v. *Claflin*, 7 Wall. 132, an action was brought for fraudulently obtaining property, and evidence of other frauds of a like character, committed by the defendants at or near the same time, was held to be admissible. "Its admissibility," said the court, "is placed on the ground that where transactions of a similar character executed by the same parties are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in *Cary* v. *Hotailing*, 1 Hill, 311, and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions to the general rule that other offences of the accused are not relevant to establish the main charge." In *Butler* v. *Watkins*, 13 Wall. 456, 464, speaking on the same subject, this court said: "In actions for fraud large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at or about the same time and in relation to a like subject, was actuated by the same spirit." In *Bottomley* v. *United States*, 1 Story, 135, 144, Mr. Justice Story held the same doctrine, and cited several instances of its application. Thus, in the case of a prosecution for uttering counterfeit money, the fact that the prisoner has in his possession, or has uttered, other counterfeit money, is held to be proper evidence to show his guilty knowledge; and upon an indictment for receiving stolen goods, evidence that the prisoner had received at various other times different parcels of goods which had been stolen from the same persons is held admissible in proof of his guilty knowledge. So, on an indictment for a conspiracy to create public discontent and disaffection, proof is admissible against

the prisoner that at another meeting held for an object professedly similar, at which the prisoner was chairman, resolutions were passed of a character to create such discontent and disaffection. "In short," said the learned justice, "wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, tending to establish such intent or knowledge, are proper evidence. In many cases of fraud it would be otherwise impossible satisfactorily to establish the true nature and character of the act." Many other authorities might be cited to the same purport.

The evidence offered that Hunter obtained insurances in other companies on the life of Armstrong at or near the same time, was, under these authorities, clearly admissible. It tended to establish the theory of the defendant that the insurance in this case was obtained by Hunter upon the premeditated purpose to cheat and defraud the company. Especially would it have had that effect if followed by proof of the manner of the death of Armstrong.

But, independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired.

This view renders it unnecessary to consider the effect upon the policy of the statements, made in the application of the assured, as to the amount of other insurances on his life.

Judgment reversed, and cause remanded for a new trial.

Mr. Justice Matthews did not sit in this case nor take part in its decision.

EXPRESS CASES.

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

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

MEMPHIS & LITTLE ROCK RAILROAD COMPANY *v.* SOUTHERN EXPRESS COMPANY.

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

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *v.* DINSMORE, PRESIDENT & SHAREHOLDER IN ADAMS EXPRESS COMPANY.

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

Entered April 9, 1886.

The parties having filed a stipulation concerning the method of adjusting the accounts under the decree of the court the decree is modified in accordance therewith.

The judgment and decree in these cases were announced with the opinion of the court on the 1st March last. *Ante* 1–29. On the 9th April

Mr. Chief Justice Waite announced as follows:

In pursuance of a stipulation of counsel for the respective parties filed in these cases, it is ordered by the court that the decrees entered by this court in these cases be, and they are hereby, amended by adding thereto the following:

It is further ordered that said reversal shall be without prejudice to the proceeding already had in adjusting the accounts between the parties of the business done while the injunction therein granted by that court was in force, but not to fix any

particular standard of compensation in respect of the transactions in question; and proceed with the adjusting of such accounts and to make proper orders for the speedy adjusting of the same, to the end that just compensation may be made to the defendant below on dismissing said bill for services performed pending the suit; and to that end the master heretofore appointed therein, or such other master as the court may appoint in his place, may consider all the proofs relevant thereto heretofore taken in the cause, whether before or since a final hearing, and such other proofs as may be adduced relating to the extent and value of the service rendered by the defendant below for the complainant, and the payments made on account thereof, and relating to such other matters, necessary to be inquired into, in order to adjust said accounts between the various parties, to the end that a proper final decree may be entered in accordance with the opinion of this court.

ALABAMA & Others *v.* MONTAGUE & Another.

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

Submitted March 31, 1886.—Decided April 12, 1886.

By an act of the Legislature of Alabama the State loaned its credit to the Alabama & Chattanooga Railroad Company, upon condition that the company should first give to the State "a first mortgage upon the lands granted by the United States to said Railroad Company" and a first mortgage "on the telegraph line and telegraph offices along the line of said road belonging to said company; also on the machine shops and all other property in the State and in Georgia, Tennessee and Mississippi belonging to said company; also on all coal mines now opened or hereafter to be opened and worked, belonging to said company; also upon all iron or other mineral lands, and all iron-manufacturing establishments now in operation and hereafter to be constructed." The company made a mortgage to the State in which the words of description were identical with the language of the statute. In a suit in equity brought to foreclose the mortgage, as covering some town lots in Tennessee not granted by the United States to the company, and not coming within either of the specified classes, *Held:*

Statement of Facts.

(1.) That the words of description in the mortgage did not cover the lots.
(2.) That the words "all other property" were intended to cover property of the company in and about the telegraph offices, machine shops, coal mines, iron mines and manufacturing establishments, about which a doubt might otherwise arise whether it was part of those classes of property.
Wilson v. *Boyce,* 92 U. S. 320, distinguished.

This was a bill in equity to foreclose a mortgage alleged to have been made by the Alabama and Chattanooga Railroad Company to the State of Alabama on certain town lots in Chattanooga. The case is stated in the opinion of the court. For the purpose of understanding the points made in argument, it is sufficient to say that the act of the Legislature of Alabama, authorizing the loan of the credit of the State to the company contained the following provision: "That the Governor of the said State shall only issue said bonds upon receiving in exchange therefor an equal amount of first mortgage bonds of said railroad company, bearing the same rate of interest as the above-mentioned State bonds, and secured by first mortgage upon the lands granted by the United States to said railroad company, and upon any interest which said company now has or may hereafter lawfully acquire in or to said lands, with this reservation," "Provided further, That the Governor shall require said railroad company, before issuing to said company said bonds, to give the State of Alabama a first mortgage on the telegraph line and telegraph offices along the line of said road belonging to said company; also on the machine shops and all other property in the State and in Georgia, Tennessee, and Mississippi belonging to said company; also on all coal mines now opened, or hereafter to be opened and worked, belonging to said company; also upon all iron or other mineral lands and all iron-manufacturing establishments now in operation and hereafter to be constructed."

The company executed the required mortgage with words of description identical with those in the mortgage. It was not claimed in the bill that the premises in controversy were embraced in either class of property specially named: but they were shown to have been acquired by deed subsequent to the mortgage, in execution of a contract for sale made prior to it.

Argument for Appellants.

Decree below for respondent on the ground that the statute of limitations was a bar, from which complainants appealed.

Mr. Samuel F. Rice for appellants argued upon the question decided here:

The statutory provisions of Tennessee (the *lex rei sitæ*), in relation to conveyances of every kind, were intended "to reduce the forms of conveyance to their simplest elements, and to give *the largest meaniny to granting words*, unless limited by the instrument itself." *Daly* v. *Willis*, 5 Lea, 100, 104. Hence, the largest meaning must be given to "the granting words" contained in the mortgage of March 2, 1870. *Pennock* v. *Coe*, 23 How. 117.

Upon the admitted or established facts, that on March 25, 1869, the Alabama & Chattanooga Railroad Company purchased the lands here in controversy from J. P. McMillin, the then undisputed owner, and paid him one third of the purchase-money and acquired control thereof; and that afterwards, on March 2, 1870, the company executed to the State of Alabama the mortgage of that date, embracing amongst other specified lands "all other property in said States of Alabama, Georgia, Tennessee and Mississippi, belonging to said company;" and that said mortgage was duly registered on March 24, 1870, in Hamilton County, Tennessee, in which county the lands in controversy are situated; and that afterwards and on March 31, 1870, said McMillin received from said company the other two-thirds of the purchase-money and executed a deed of conveyance of the lands here in controversy to said company,—the said conveyance of McMillin to said company, as against all persons who, like the defendants, acquired or derived their only claim to said last-mentioned lands from or under the mortgagor, by transactions entirely subsequent to the registration of the mortgage, converted the equitable title of the company "into a legal title, which, at once, by operation of law, inured to the benefit" of the mortgagee. *Skidmore* v. *Pittsburg, Cincinnati & St. Louis Railway Co.*, 112 U. S. 33; *Bush* v. *Marshall*, 6 How. 284, 291; *Thredgill* v. *Pintard*, 12 How. 24; *Henshaw* v. *Wells*, 9 Humphreys, 568; *Crook* v. *Lunsford*,

2 Lea, 237; *Bank of Greensboro* v. *Clapp*, 76 N. C. 482; *Crane* v. *Turner*, 7 Hun, 357; *Van Rensselear* v. *Kearney*, 11 How. 297, 323; *Doe* v. *Larmore*, 116 U. S. 198.

The recital of the execution of the bond for title in the deed of McMillin to the Alabama and Chattanooga Railroad Company, is sufficient evidence of the execution of that bond, as against the defendants in this cause. *Carver* v. *Astor*, 4 Pet. 1; *Crane* v. *Morris*, 6 Pet. 598.

The parting with, or loan of money, or its equivalent, upon the faith of the mortgage, is, *pro tanto*, a sale, and gives such a mortgagee, to the extent of the loan, all the rights of a *bona fide* purchaser for value without notice. *Chadwell* v. *Wheless*, 6 Lea, 312; *Carpenter* v. *Longan*, 16 Wall. 271.

The objection, that the mortgage does not convey the lands here in controversy, by specific designation and description, is clearly insufficient, both upon reason and authority. *McGavock* v. *Deery*, 1 Coldwell, 265; *Seifreid* v. *People's Bank*, 2 Tenn. Ch. 17; *Sheets* v. *Selden's Lessee*, 2 Wall. 177; *Wilson* v. *Boyce*, 92 U. S. 320; *Spindle* v. *Shreve*, 111 U. S. 542; *Frey* v. *Clifford*, 44 Cal. 343; *Barton's Lessee* v. *Morris*, 15 Ohio, 408; *Hoxie* v. *Lawrence*, 117 Mass. 111; *St. Louis, etc., Railway Co.* v. *McGee*, 115 U. S. 469, 476, citing approvingly, *Wilson* v. *Boyce*.

Mr. Xenophon Wheeler for appellees.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the Eastern District of Tennessee. The suit was originally brought in the Chancery Court of Hamilton County, from which it was removed into the court first mentioned. It was a bill to foreclose a mortgage on twenty-two acres of land in that county, which is described with particularity by metes and bounds in the bill, and is there alleged to have been purchased of J. P. McMillin by the Alabama and Chattanooga Railroad Company, the mortgagor, on the 25th day of March, 1869. No such description of the land is found in the mort-

gage which is the foundation of this suit, and if it is covered by that mortgage, it is by a phrase which, it must be supposed, was intended to cover it by a general reference to all other property of the mortgagor in the State of Tennessee, rather than by any specification of this property.

The defendants deny that, by any fair or just construction of the mortgage, it can be held to include the twenty-two acres in question.

There are other grounds of defence set up, on one of which the decree against plaintiffs was rendered, namely, that the suit was barred by the statute of limitation. But if the defendants are right in the assertion that the land was not conveyed by the mortgage deed, all other questions are immaterial.

It appears that the Legislature of the State of Alabama authorized the governor of the State to issue to the Alabama and Chattanooga Railroad Company its bonds to the amount of $2,000,000. The statute, however, required the governor, before he delivered these bonds, to demand of the company its own bonds of an equal amount, secured by a mortgage on certain property mentioned in the statute. The mortgage was made and the bonds issued to the State in exchange for bonds of the State delivered to the company.

As the language descriptive of the property to be mortgaged, as found in the statute, is found identically in the reciting part of the mortgage and in its granting clause, and as this question is to be decided by a construction of that language, it will be given here *verbatim* from the mortgage deed:

"Exhibit 'C' to original bill."

"This instrument of mortgage, made this second day of March, in the year eighteen hundred and seventy, by and between the Alabama and Chattanooga Railroad Company, a corporation of the States of Alabama, Georgia, Mississippi, and Tennessee, the party of the first part, and the State of Alabama, the party of the second part, witnesseth: That whereas said State of Alabama, by an act entitled 'An Act to loan the credit of the State of Alabama to the Alabama and Chattanooga Railroad Company, for the purpose of expediting the

construction of the railroad of said company within the State of Alabama,' and approved February 11th, 1870, has granted certain aid to said corporation, and has in and by said act required the governor of said State to issue bonds of said State to an amount not exceeding two millions of dollars in favor of said company, bearing interest at a rate not — eight per cent. per annum, which said interest shall be payable semi-annually in currency or coin, and the bonds shall be payable at the expiration of not less than fifteen nor more than thirty years upon the terms and conditions in said act set forth; and whereas said act further provides that the governor of the State shall only issue said bonds upon receiving in exchange therefor an equal amount of first-mortgage bonds of said railroad company, bearing the same rate of interest as the abovementioned State bonds, and secured by a first mortgage upon the lands granted by the United States to said railroad company and upon any interest which said company now has or may hereafter lawfully acquire in or to said lands, with this reservation: That the said Alabama and Chattanooga Railroad Company shall have the privilege and right of selling said lands, or any part thereof, in accordance with the act of Congress granting the same: Provided, however, that the proceeds of said sale shall be appropriated to the payment of the aforesaid first-mortgage bonds of the said railroad company issued to the State: Provided, further, That the governor shall require said railroad company, before issuing to said company said bonds, to give the State of Alabama a first mortgage on the telegraph line and telegraph offices along the line of said road belonging to said company; also on the machine-shops and all other property in the State and in Georgia, Tennessee, and Mississippi belonging to said company; also on all coal mines now open or hereafter to be opened and worked belonging to said company; also upon all iron or other mineral lands and all iron manufacturing establishments now in operation or hereafter to be constructed; and whereas said Alabama and Chattanooga Railroad Company, in order to obtain said State aid, proposes to issue to said State bonds of said corporation, secured as is by said act required, and entitled

first-mortgage land bonds of the Alabama and Chattanooga Railroad Company:

"Now, therefore, the said Alabama and Chattanooga Railroad Company, in compliance with the terms and conditions of said act, and for the purpose of obtaining the aid thereby granted to this corporation, and in order to secure the punctual payment of all said first-mortgage land bonds of this corporation, does hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the State of Alabama, and its successors and assigns, forever, all lands granted by the United States to and for the benefit of this company, and all the right, title, interest, and estate which said company now has, or may hereafter lawfully acquire, in or to said lands, subject to this reservation to said company, as by said act provided; that said company shall have the privilege and right of selling said lands, or any part thereof, in accordance with the act of Congress granting the same, and entitled 'An Act to renew certain grants of land to the State of Alabama,' and approved April 10th, 1869; Provided, however, That the proceeds of said sales shall be appropriated to the payment of the first-mortgage land bonds of said company to be issued to the State of Alabama, as aforesaid; also the telegraph line and telegraph offices along the line of said road, and belonging to said company; also the machine-shops and all other property in said States of Alabama, Georgia, Tennessee, and Mississippi belonging to said company; also all coal mines now open or hereafter to be opened and worked belonging to said company, and all iron or other mineral lands, and all iron-manufacturing establishments now in operation and hereafter to be constructed; saving and excepting only from said granted premises such and so much of the same as said company may have heretofore conveyed in mortgage in or by either or both of two indentures of mortgage, both made on December 19th, 1868, and covering the railroad and certain other property of said company, for a more specific description whereof reference is hereby made to said two indentures, the same having been recorded in the counties where said road is located."

It is to be observed that the land sued for is nowhere spoken

of in this record otherwise than as *land*, pure and simple, nor is there any claim that it was land granted by Congress.

Now, the mortgage deed describes *ex industriâ* the several species of lands which it conveys. The first of them, by far the most important, is "all lands granted by the United States to and for the benefit of this company, and all right, title, interest or estate which said company now has or may hereafter lawfully acquire in or to said lands." If the company had intended to grant *all its lands* within the States of Alabama, Georgia, Tennessee and Mississippi, and it must have had other lands in these States, why not have said so, instead of saying all the lands granted by the United States? It was, therefore, only this class of lands which was conveyed by this first clause of the deed. After some reservation of the right of the mortgaging company to sell these lands and appropriate the proceeds to payment of the bonds secured by the deed, the granting language proceeds, "also the telegraph line and telegraph offices along the line of said road and belonging to said company; also the machine-shops and *all other property* in said States of Alabama, Georgia, Tennessee, and Mississippi belonging to said company; also all coal mines now open or hereafter to be opened and worked belonging to said company, and all iron or other mineral lands, and all iron-manufacturing establishments now in operation and hereafter to be constructed."

While the company is thus specific in its description of the subjects of the mortgage, enumerating with great particularity its land grant from Congress, its telegraph lines and offices, its machine-shops, and its coal mines, it is quite unreasonable to suppose that the company would have been thus needlessly minute in its description of the property conveyed, enumerating with great particularity the four or five classes of property, mostly real estate, which were intended to pass, if it had also intended that the three words, "all other property," should stand for everything in the four States which the company owned, and especially all its lands.

These words, which are found neither in the beginning of the granting clause as a general phrase to be afterwards emphasized by a more minute description, nor at the end, as a

summary of what had preceded them, have their appropriate use in the precise place where they are found. We say they are there appropriate, because in conveying the telegraph offices, the machine-shops, the coal mines, the iron mines, and the manufacturing establishments, there might in them be found much property belonging to the company about which a doubt would arise whether it was a part of these offices, mines, machine-shops, and manufacturing establishments. All such doubt or ambiguity is removed by declaring that all the property of the grantors in these places, or used in any of these pursuits, is conveyed. For this purpose the phrase "all other property" is apt, and is used in the right place in a description designedly minute and elaborate. It is among its kind, *ejusdem generis*, and its purpose is answered when its use is limited to explain the other words in this immediate connection.

It is not to be denied that in a writing descriptive of property to be transferred or assigned, the more general words which include all that is intended to be conveyed are not to be frittered away by an attempt at a description of each particular thing, fairly included in the more general language. But in such case it must be apparent that the intent was to include all that could be embraced within the more general terms. If, for instance, the description of the property mortgaged had commenced by saying "all the property of the grantor, real, personal, and mixed, in the States of Alabama, Georgia, Mississippi, and Tennessee," and had then attempted to enumerate this property, but had omitted some of it, this omitted part would have passed as in *Spindler* v. *Shreve*, 111 U. S. 542, 544. So where the instrument professes "to convey all my property," or "all my estate," or "all my lands wherever situated." In all these cases referred to in *Wilson* v. *Boyce*, 92 U. S. 320, 325, there were no words to qualify the generality of this description.

In fact there were no other words of description, and their full effect must be given to them. This latter case is relied on by appellant's counsel as conclusive in the one now under consideration. In that case the bonds issued to certain railroad companies were declared to be a "first lien upon the

road and property of the several companies so receiving them," and this was held to cover the lands owned by said companies. It is obvious here the two words "*road and property*" of those companies were used as representing all the property they owned. Nothing further in the way of description was needed or was desirable. But this form of words differs widely from the elaborate description of what is conveyed in the deed of the mortgaging company here, and the meaning also is as different. In the latter case the road, its bed, its rolling-stock, and much other property probably was *not* conveyed, and no expression is found implying that all its *lands* were conveyed. And if we limit the words "*all other property*" to what we have supposed to be their meaning, there is nothing else to imply that the company intended to mortgage all its property, of every kind and description, whether real or personal.

We do not believe this was intended or can be fairly implied from the language used, the minute descriptive character of which is found three times in this contract, namely, in the statute authorizing the transaction, in the preliminary recital of the mortgage deed, and in its granting clause, all of which is useless if the phrase "all other property," as there used, was intended to include all lands and all interest in lands in the four States through which the road passed.

The decree of the Circuit Court is

Affirmed.

ALABAMA & Others *v.* MONTAGUE & Another.

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

Submitted March 31, 1886.—Decided April 12, 1886.

This case involves the same questions as the case just decided, *Alabama* v. *Montague*, *ante* 602, and on the authority of that case the judgment below is affirmed.

Statement of Facts.

Ejectment. Judgment below for defendants. Plaintiffs below sued out this writ of error.

Mr. Samuel F. Rice for plaintiffs in error.

Mr. Xenophon Wheeler for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

This was an action of ejectment tried by a jury in the same court which decided the preceding case, in which the plaintiffs in error based their right to recover on the same mortgage which they sought to foreclose in that suit. The court instructed the jury against them on the ground that they had no legal title.

As the foregoing opinion decides that they had no title at all, legal or equitable, the judgment of the court below must be

Affirmed.

STEWART *v.* VIRGINIA.

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

Submitted April 5, 1886.—Decided April 12, 1886.

A proceeding under the acts of the Legislature of Virginia for the identification and verification of coupons tendered in payment of taxes, debts, or demands due the State is not a suit of a civil nature arising under the Constitution or laws of the United States, within the meaning of the act of March 3, 1875, regulating removals of causes.

The plaintiff in error owed the State of Virginia $3807 for taxes for the year 1885. He tendered the State's tax-receivable coupons in payment thereof for identification and verification under the provisions of the act of January 14, 1882, and at the same time he paid his tax in money. He thereupon filed his

petition in the County Court of Henrico County, praying that a jury might be empaneled to try whether his coupons were genuine coupons, legally receivable for taxes. The Commonwealth having been summoned to answer this petition, at the first term at which the cause could be tried, he filed his petition praying for a removal of the case to the Circuit Court of the United States, as a case arising under the Constitution of the United States. The ground of removal set out in the petition was as follows:

"And your petitioner states that the said suit is one arising under the Constitution of the United States in this, to wit, that it is a proceeding under the act of Assembly of the State of Virginia, approved January 14th, 1882, entitled 'An Act to prevent frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of Revenues,' as amended by an act of Assembly of the said State approved March 12th, 1884, entitled 'An Act to amend and re-enact section 1 of an act approved January 14th, 1882,' &c., the said acts providing for the identification and verification of certain coupons issued by the State of Virginia which she contracted to receive in payment of all taxes, debts, and demands due her.

"That by an act of the General Assembly of the State of Virginia approved March 15th, 1884, entitled 'An Act to provide for the assessment of taxes on persons, property, and income,' &c., the collectors of taxes due to said State are forbidden to receive said coupons in payment of a certain proportion of said taxes; that this last-mentioned act is repugnant to section 10, article 1, of the Constitution of the United States, and is therefore null and void; that it is necessary in the trial of the before-mentioned suit for the court trying the same to pass upon the validity and constitutionality of the said last-mentioned act, for the reason that your petitioner, previous to the commencement of said suit, had tendered said coupons in payment of all their taxes, including that part thereof which said act forbids to be paid in said coupons, and the purpose of said suit is to recover that part of said taxes as well as the other part thereof; that this cause could not have

been tried before the present term of this court, and that the same has not yet been tried."

The case was removed to the Circuit Court, and thence remanded by the Circuit Court to the State Court. This writ of error was sued out to review that judgment.

Mr. William L. Royall and *Mr. A. B. Guigon* for plaintiff in error.

Mr. R. A. Ayers, Attorney General of Virginia, for defendant in error.

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

The order remanding this case is affirmed. A proceeding under the act of Assembly of Virginia, approved January 14, 1882, *Antoni* v. *Greenhow*, 107 U. S. 771, as amended by the act of March 12, 1884, for the "identification and verification" of coupons tendered in payment of taxes, debts, or demands due the State, is not a suit of a civil nature arising under the Constitution or laws of the United States within the meaning of the act of March 3, 1875, 18 Stat. 470, ch. 137. The only purpose of such a proceeding is to determine whether the coupons tendered "are genuine, legal coupons, which are legally receivable for taxes, dues and demands." The court has nothing to do in that proceeding with the obligation of the State to receive the coupons in payment of the particular tax or demand for which they were tendered. The tender being made, it becomes the duty of the collector, under the law, to receive and receipt for the coupons "for the purpose of identification and verification," and to deliver them to the judge of the proper court to that end. The tax-payer then files his petition praying "that a jury be impaneled to try the question as to whether they are genuine, legal coupons, which are legally receivable for taxes, debts and demands." This is the only issue that can be tried, and if finally decided in favor of the tax-payer, the coupons are to be received by the collector for such of the taxes, dues and demands for which they were tendered as can, under the contract of the State, be paid in that way.

Statement of Facts.

The court has no authority under the law to determine in that proceeding what taxes may be so paid. It thus appears that the issue to be tried cannot involve any question arising under the Constitution or laws of the United States.

Affirmed.

CAMPBELL *v.* DISTRICT OF COLUMBIA.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued April 1, 2, 1886.—Decided April 12, 1886.

O & H, partners, contracted with the District of Columbia to put down a water main. They notified the agent of the District that they authorized C to perform the work and receive the money, and the agent accepted the arrangement. C performed the work, and receipted from time to time for payments on the contract. On a suit in his own name for extra work: *Held,* That he was bound by the terms of the contract in that respect, and by receipts given in accordance therewith.

Assumpsit to recover for work and labor done and materials furnished on the construction of a water main in Georgetown in the District of Columbia. The record showed that in July, 1870, the District contracted with O'Hare, Himber & Co. for the construction of the main, by a written contract which provided, among other things, that "No claims for extra work shall be made unless the same shall be done in pursuance of a written order from the engineer." Soon after commencement of the work, a member of the firm of O'Hare, Himber & Co., by their authority, addressed the following letter to the superintendent in charge of the construction on the part of the District:

"WASHINGTON, D. C., *April* 15, 1872.

"General O. E. Babcock, Sup't Washington Aqueduct.

"SIR: I hereby authorize R. G. Campbell to lay the 36 inch water main from the west side of Rock Creek bridge to the public alley east of the market-house on Bridge Street, and all

work pertaining to the same under the contract of O'Hare, Himber & Co., and I will sign all vouchers and hereby authorize the money for the same to be paid to said R. G. Campbell.

"D. E. DAVENPORT.

"Witness:

THEODORE B. SAMO."

With Babcock's consent Campbell completed the work. At the close he made a large claim for extra work, of which the engineer only allowed $1807.90, which was paid him in four payments. On receiving the fourth payment he gave the following receipt:

"WASHINGTON, D. C., *Nov.* 24, 1874.

"District of Columbia to R. G. Campbell, Dr.

"For balance due for extra work on the 36 inch water main, as allowed by the engineer and the act of the Legislative Assembly, being the amount of his claim left unpaid on account of the appropriation having been exhausted, $269.40.

"Original bill as allowed.....		$1807 90
Paid Sept. 29, 1873.....	$1000 00	
Paid June 3, 1874.....	388 88	
Paid July 29, 1874.....	149 62	
		1538 50
Balance due.....		$269 40

"Received this 7th day of December, 1874, from the Board of Audit their certificate No. 9184 for $269.40, in full settlement of the above stated claim.

"R. G. CAMPBELL."

Campbell then brought this suit in his own name in the Supreme Court of the District, demanding $12,000 for extra work, materials, demurrage, &c., according to a bill of particulars accompanying the declaration. Judgment below for defendant, which was affirmed in General Term. This writ of error was then sued out by plaintiff below.

Mr. Enoch Totten for plaintiff in error.

Statement of Facts.

Mr. A. G. Riddle for defendant in error.

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

This judgment is affirmed. There was no evidence whatever in the case tending to prove that the work was done by Campbell otherwise than under the contract of O'Hare, Himber & Co. He took the place of that firm in the contract so far as the work he undertook to do was concerned. Davenport, one of its members, authorized him to do the work and receive the pay upon vouchers, which he, Davenport, agreed to sign. It was upon this authority that Campbell entered upon the work with the permission of the chief engineer in charge. In this way he became bound by the terms of the contract. Under these circumstances, his acceptance of the allowance made by the chief engineer for all his present claims for extra work, as "in full settlement of the above stated claim," operated as a complete discharge of the District from all further liability to him on that account. The provision in the act of the legislative assembly of the District, "that this receipt shall not debar the above named persons from any right they may have in any court," clearly applies only to the claim of Robert Strong & Co. As to all others named in the act, "the receipt was to be in full of all claims on account of the said work."

Affirmed.

LONG & WIFE v. BULLARD.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

Argued April 1, 1886.—Decided April 12, 1886.

A discharge in bankruptcy does not release real estate of the bankrupt, assigned to him as a homestead under the provisions of Rev. Stat. § 5045, from the lien of a mortgage created by him before the bankruptcy, to secure a debt against him which is not proved, nor released under the provisions of Rev. Stat. § 5075.

The material facts appearing in this record were as follows: In the month of December, 1869, parts of lots 5 and 6, in

square 90, of the city of Macon, were set off under the laws of Georgia to Betsey A. Long, the wife of Francis M. Long, as a homestead. The property was at the time incumbered by a mortgage made by Francis M. Long to the Ocmulgee Building Association. Proceedings were afterwards had to foreclose this mortgage, and to save the property from sale Francis M. Long applied to Daniel Bullard for a loan of money. This loan was made at usurious interest, and Long and his wife executed to Bullard their joint note, dated November 18, 1872, for $1220, payable twelve months after date, and conveyed to him the homestead property by a deed absolute on its face as security. On the 29th of May, 1873, Francis M. Long was adjudged a bankrupt, and on the 15th of April, 1874, he received his discharge. In his schedules the debt to Bullard, with its security on the homestead premises, was duly entered. On the 28th of June, 1873, the same premises were set apart to the bankrupt to be retained by him under the bankrupt law as being exempt under the State law from levy and sale upon execution. Bullard did not prove his debt in the bankrupt proceedings.

On the 9th of February, 1878, Bullard brought suit in the Superior Court of Bibb County, Georgia, to subject the property to the payment of his debt. In his bill he alleged that the money he loaned was used to pay off the prior incumbrance on the homestead, and he claimed a valid lien on that account. He also set forth the bankruptcy of Francis M. Long, and the assignment of the property to him under the bankrupt law as a homestead.

Long and his wife in their answer stated that the deed to Bullard was void for usury in the debt for which it was given as security; that only $727.94 of the amount actually lent by Bullard was used to pay off the prior incumbrance; that the money was lent to the husband and not to the wife; and that the husband had been discharged in bankruptcy. Upon these facts, it was insisted that the homestead rights of Mrs. Long and her children were superior to the claim of Bullard under his conveyance, and that the property could not be sold to pay him.

Upon the trial the court charged the jury, in substance, that

there could be no personal recovery against the husband upon the note, but that the property could be subjected to the payment of the amount due, as the discharge of Long in bankruptcy did not release the lien of the mortgage. This was excepted to by the Longs. A verdict was returned in favor of Bullard for the amount of money actually lent, excluding the usurious interest. Thereupon the Longs moved for a new trial, on the ground, among others, of error in the instructions to the jury as to the effect of the discharge in bankruptcy. This motion was granted, but only because the property was subjected to the payment of a larger sum than was used to pay off the prior incumbrance. From the order granting a new trial, Bullard took a writ of error to the Supreme Court, where it was adjudged, April 19, 1882, that the judgment of the Superior Court granting the new trial be affirmed, "unless the plaintiff in error will write off from his verdict in the court below the sum of three hundred dollars." The only questions decided on this writ of error, as shown by the opinion, were such as related to the right of Bullard to recover the full amount of his loan, instead of the amount used to pay off the incumbrance on the homestead.

When the case got back to the trial court the specified amount was "written off," and a decree entered accordingly for a sale of the property to pay what remained due according to the verdict as reduced. Francis M. Long thereupon excepted to the decree, among other things, because the property ordered to be sold "constitutes and is his homestead, exempted, set apart, and secured to him by the bankrupt court of the United States . . . in a bankruptcy proceeding in that court, . . . as against this said debt of complainant's, and all others of said defendant then existing, . . . said homestead being set apart, allowed, and secured to the defendant, then bankrupt, under and by virtue of § 5045 of the Revised Statutes, . . . and which said exemption was valid against said debt of said complainant under and by virtue of said act of Congress, and said part of said decree charging said exemption with the payment of said debt of complainant's and directing a sale . . . is in contravention and in violation of that

act of Congress;" and because the decree charging the property with the debt "is in violation of his discharge in bankruptcy as shown in the record and proceedings in this cause, and his rights under the same as declared by and set out in § 5119 of the Revised Statutes, . . . and is in conflict with and in derogation of that act of Congress." Another writ of error from the Supreme Court was thereupon sued out by Francis M. Long and Betsey A. Long, but the court being of the opinion "that the judgment pronounced in this case when it was here at the last term was conclusive on the questions there presented, and that the decree in the court below now excepted to was in conformity with that judgment, and that a failure on the part of Long and wife to except to the overruling of these motions for a new trial, on the other grounds than that on which it was allowed, was conclusive against them, and could not now be reopened," affirmed the decree. To reverse that judgment this writ of error was brought.

Mr. T. B. Gresham for plaintiffs in error.

Mr. Clifford Anderson for defendant in error.

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

It perhaps sufficiently appears that a determination of the question, as to the effect of the discharge in bankruptcy upon the right of Bullard to enforce a lien upon the property in existence at the time of the commencement of the proceedings in bankruptcy, was necessarily involved in the decision of the Supreme Court which is here under review, and that this decision was adverse to the right set up by Long. This being the case, we have jurisdiction, but there cannot be a doubt of the correctness of the decision. By § 5119 of the Revised Statutes the discharge releases the bankrupt only from debts which were or might have been proved, and by § 5075 debts secured by mortgage or pledge can only be proved for the balance remaining due after deducting the value of the security, unless all claim upon the security is released. Here the creditor neither proved

his debt in bankruptcy nor released his lien. Consequently his security was preserved notwithstanding the bankruptcy of his debtor. *McHenry* v. *La Société Française*, 95 U. S. 58; *Dudley* v. *Easton*, 104 U. S. 99, 103; *Porter* v. *Lazear*, 109 U. S. 84, 86. The dispute in the court below was as to the existence of the lien at the time of the commencement of the proceedings in bankruptcy. That depended entirely on the State laws, as to which the judgment of the State court is final and not subject to review here.

The setting apart of the homestead to the bankrupt under § 5045 of the Revised Statutes did not relieve the property from the operation of liens created by contract before the bankruptcy. It is not the decree in this case which constitutes the lien on the property, but the conveyance of Long and wife before the bankruptcy.

The judgment is *Affirmed.*

DISTRICT OF COLUMBIA *v.* McELLIGOTT.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued March 4, 1886.—Decided March 29, 1886.

A supervisor of county roads in the District of Columbia was repairing them with a force of laborers, one of whom was at work on a bank of gravel. There was evidence tending to show that he discovered that the bank was in an unsafe condition, and asked the supervisor for a man to watch it, and received assurance that such assistance would be given; and that it was not given. The laborer continued to work there for half a day, when the bank fell upon, and seriously injured him. He brought suit against the District to recover damages for the injury. On the trial it was not alleged nor proved that the supervisor was incompetent. The court, after instructing the jury that the negligence of the supervisor was one of the risks which the laborer took upon himself, and that the District was not liable unless he was incompetent, and such incompetency was known or ought to have been known to it, added further, that if the jury found that the laborer notified the supervisor of the dangerous condition of the bank, he would be relieved from the imputation of negligence during the time necessary to provide a man to watch it. *Held:*

Statement of Facts.

(1.) That the latter instruction was inconsistent with the former, and calculated to mislead the jury.

(2.) That it was the duty of the laborer, having knowledge of the dangerous condition of the bank, to exercise diligence and care in protecting himself from harm, without regard to any assurances which he might have received from the supervisor that the assistance he had asked for would be given.

Hough v. *Railway Company*, 100 U. S. 213, explained.

Whether the District of Columbia is, in every case, exempt from liability for the negligence of its supervisor of roads, resulting in personal injury to those who labor under his direction on public work, is not decided.

Whether a supervisor of public roads and a laborer employed under him on the roads are fellow servants, within the meaning of the general rule that the common employer is not responsible to one employé for injuries caused by the negligence of a coemployé in the same branch of service, is not decided.

The declaration in this case was as follows:

"The plaintiff sues the defendant, a corporation duly organized in pursuance of law, for money due and payable to the plaintiff by the defendant, for that the plaintiff was employed as a laborer by the defendant to do certain work for the defendant, to wit, digging gravel from a gravel-bank and loading certain carts with the same; that the defendant well knew that in doing said work it was necessary to provide a sufficient number of men to enable those engaged as laborers on said work to observe the bank from which they were digging to prevent the untimely caving in thereof and the falling of gravel on them, and the said defendant also well knew that it was customary and necessary to have a person to watch said bank, and to give timely warning to those laboring under the same, to enable them to escape from the said bank when a portion or the whole of the same was about to fall, yet the said defendant neglected, and although requested by the plaintiff on the 12th day of June, 1878, in the District of Columbia, did not provide a sufficient number of laborers to enable this plaintiff, who was then and there employed by the defendant and laboring in its service in digging gravel from a high gravel-bank and loading the said gravel into carts, to observe the said bank, and also, although the said custom and necessity was well known to the defendant, through the negli-

gence and default of the defendant, no person at the said time and place was provided to watch the said bank and to give timely notice to the plaintiff in order that he might escape when a portion of said bank was about to fall. By reason of the premises a large portion of said gravel-bank, at the time and place aforesaid, fell upon this plaintiff, and thereby the plaintiff was thrown to the ground, his leg broken, his skull fractured, and he was permanently injured and crippled, and permanently rendered unfit for work, and was greatly bruised and injured, and incurred expense for medical attendance, to wit, the sum of $500, and was and is deprived of divers gains and profits, and was and is hindered from attending to his necessary and lawful business, to the great damage of the plaintiff in the sum of twenty thousand dollars ($20,000), and therefore he brings his suit." Plea: general issue. Judgment below for plaintiff, which was sustained in the General Term. Defendant below sued out this writ of error. The rulings of the court below and other facts which make the case are stated in the opinion of the court.

Mr. Henry E. Davis and *Mr. A. G. Riddle* for plaintiff in error.

Mr. Henry Wise Garnett and *Mr. Enoch Totten* for defendant in error.

This case is governed by the principles established in *Hough* v. *Railway Co.*, 100 U. S. 213. The rules which govern the relations of master and servant on the subject of negligence and personal injuries are the same, whether the master be a municipal or private corporation, or a natural person. *Cowley* v. *Sunderland*, 6 H. & N. 565; *Brower* v. *New York*, 3 Barb. 254; *Toledo* v. *Cone*, 41 Ohio St. 149; *Foreman* v. *Canterbury*, L. R. 6 Q. B. 214; *Grimes* v. *Keen*, 52 N. H. 330; *Brooks* v. *Somerville*, 106 Mass. 271; *Mersey Docks* v. *Gibbs*, L. R. 1 H. L. 93.

Municipal corporations, like individuals, are liable for the negligent and unskilful acts of their servants and agents, whenever those acts occasion special injury to the person or property of another. *Weightman* v. *City of Washington*, 1

Black, 39, 50; *Barnes* v. *District of Columbia*, 91 U. S. 540. In the latter case, this court, in speaking of the decisions of the New York courts on this subject, uses this language: "The struggle in the New York courts was between the dictates of that evident justice and good sense which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it." That the defendant had legal authority to make and repair roads, and to take and use this ground for that purpose, there can be no doubt. The Commissioners of the District of Columbia succeeded to all the power and duties of the Board of Public Works over streets and roads. 16 Stat. 419; 18 Stat. 116; *Barnes* v. *District of Columbia*, above cited; 20 Stat. 102; *District of Columbia* v. *Cluss*, 103 U. S. 705.

It is equally clear that Smallwood was the supervisor of roads and was acting under the authority and for the benefit of the defendant.

Mr. Justice Harlan delivered the opinion of the court.

This is a writ of error to reverse a judgment for the sum of $3000, which a jury found as damages for personal injuries sustained by McElligott, the defendant in error, who was plaintiff below, through the alleged negligence of the District of Columbia in its conduct of certain public work on which, at the time of such injuries, he was engaged as a laborer in its employment.

It appears that one Smallwood, the supervisor of county roads, undertook the repair of a public highway by the use of material obtained from a gravel bank. McElligott and one Meacham constituted a part of the force of laborers employed for that work. The special duty assigned to Meacham was to "prepare gravel" to be hauled away, while McElligott was to fill the carts in which the gravel was transported to the place where it was to be used by the supervisor. They reached the bank between eight and nine o'clock on the morning of June 12, 1878, observing, upon their arrival, that it had been under-

mined at one side for two or three feet, and a chamber cut into it—a condition which to some extent increased the chances of the bank's falling.

The plaintiff insists that there was evidence tending to show the following facts: That while Meacham and McElligott were at work, Smallwood was giving his attention to the repairing of the public road with the material brought from the gravel bank; that between nine and ten o'clock in the morning McElligott sent word to him to provide two additional men for the work at that place, one to watch the bank and the other to aid in filling the carts; that within a very short time an answer came to the effect that the request would be complied with; that plaintiff stopped work at noon for dinner, but before doing so sent a second message, which Smallwood received, to send more men, one to watch the bank and one to assist in loading the carts; that he resumed work about one o'clock, and about a half hour after that time—no men having been sent by Smallwood—the bank fell while he was at work five or six feet from it; that the falling bank caught him, despite his efforts to escape, burying him for a time beneath the gravel, and inflicting upon him injuries of a serious and permanent character; that—to use the language of the witness Meacham—"it is not safe to stand under a bank that has been undermined;" and that, although McElligott recognized from the outset that it was dangerous for him to do his work, without some one being present whose special duty was to give timely notice of the first indications of the bank's falling; he continued to work in reliance upon Smallwood's promise to send some one to watch the bank.

The District claims that there was evidence tending to show that Smallwood did not receive a message from McElligott to send men to watch the bank or to aid in loading the carts; that the former was not in the habit of providing men to watch a gravel bank, except when it was intended to have a "fall;" that there was no such intention on the day McElligott was injured; and that neither the latter nor Meacham had any instructions to make a "fall."

The point upon which the evidence was conflicting was as

to whether Smallwood, in fact, received notice that a man was needed to watch the bank while he and Meacham were at work. McElligott states that his first message was sent by Tracey, one of the drivers of the carts, and his second by Anderson, another driver. In his examination-in-chief by the plaintiff Tracey testified that McElligott told him "to tell Smallwood to send two men out there to help load the carts, and that the other might have the opportunity to watch the bank in case of danger," and that he "delivered the message to Smallwood, at Mr. Brown's, between nine and ten o'clock, and he said that he would send men, but he did not do it until after McElligott was hurt." He testified that he told McElligott what Smallwood said; also that "it is necessary to have a man to watch the bank when people are digging under a gravel bank; the bank was undermined that morning when we went there; it is not safe to work at a bank like that without having it watched."

But upon cross-examination the same witness, being asked to state what reason was given by McElligott for wanting men to watch the bank, said: "He wanted men to load the carts; *he did not say anything to me about watching the bank;* he simply sent a message to Smallwood to send two men to help load these carts, and that was all; *he did not at any time say he wanted a man to watch the bank;* I don't recollect his sending a message by any one to Smallwood that he wanted that he should send a man to watch the bank; *I don't recollect that I heard anything said about a man to watch the bank before this accident;* I told Mr. Smallwood that Mr. McElligott said, send a couple of men to help load the carts; I found Mr. Smallwood near Brown's; I delivered the message to Mr. Mahony; Smallwood said that he would send a man or two." Upon re-examination the same witness said: "I delivered the message to Smallwood, what McElligott told me; *I do not recollect* whether what McElligott told me to tell Smallwood was to send men to watch the bank *or* load the carts; McElligott told me to tell Smallwood to send a couple of men to help load the carts; to help them out; I delivered whatever message McElligott told me to tell Smallwood, no matter what it was."

Anderson, by whom the plaintiff claims to have sent the

second message, testifies that he did inform Smallwood, in the morning, of the former's wish, that men be sent "to help load the carts and watch the bank," and that Smallwood said "all right." He did not, however, notify McElligott of what Smallwood said, because he did not himself return to the gravel bank. There was no proof that plaintiff was informed, prior to his being injured, of what, it is claimed, passed between Smallwood and Anderson. The only evidence tending to show that the plaintiff continued to work at the bank, in reliance upon Smallwood's alleged promise or assurance that he would send some one to watch it, was in the testimony of Tracey.

At the instance of the District, the court gave numerous instructions to the jury. They embodied, among others, these propositions: That it was implied in the contract between the plaintiff and the District, that the former took the risk of the dangers which ordinarily attend or are incident to the business in which he voluntarily engaged for compensation, among which was the carelessness of those in the same work or employment, with whose habits, conduct and capacity he had, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he could take such precautions as his inclination or judgment suggested; that, although Smallwood was supervisor of the highways of the District, and as such employed and controlled the services of the plaintiff, the latter could not recover on account of any neglect or misconduct of the former in and about the work in which they were both engaged, unless it was shown that Smallwood was incompetent and unfit for the discharge of the duties of his position, of which the District had, or ought to have had, knowledge; that in contemplation of law the plaintiff took upon himself the risk arising from the negligence of his fellow-workmen, including Smallwood; and that, if the plaintiff, believing that the gravel-bed was in such condition as to make it dangerous for him to continue work there, without some one being appointed to watch the bank while he was so engaged, and deliberately exposed himself to the accident by which he was injured, he was guilty of contributory negligence and could not recover in this action.

To the granting of these instructions the plaintiff made no objection. The parties went to the jury agreeing, in effect, that the principles which those instructions announced should control the determination of their respective rights. We have, therefore, no occasion to consider the general question whether the District of Columbia is, in every case, exempt from liability for the negligence of its supervisor, resulting in personal injury to those who labor under his direction on public work, nor the narrower question whether Smallwood and McElligott were fellow-servants within the meaning of the general rule that the common employer is not responsible to one employé for injuries caused by the negligence of a coemployé in the same branch of service. No such questions arise upon the present hearing. We have only to deal with the assignments of error, relating to material matters not covered by the instructions which were given at the request of the defendant, without objection upon the part of the plaintiff. And those matters are to be found in the charge of the court to the jury.

After expressing its approval of the principles announced in those instructions, and referring to the precaution taken by the plaintiff to inform Smallwood of the necessity of providing some one to watch the bank while he and Meacham were engaged in the special work assigned to them, the court said to the jury:

"Now, it is said that if Mr. Smallwood still neglected, after such notice, it would still be a neglect of a fellow-servant for which no servant could ever recover any damage. But I have, for the purposes of this trial, instructed you that if the fact of the dangerous condition of that bank was communicated to Smallwood, and a request made of him to send a man there to watch it, and he gave assurance, in reply, that a man would be sent there for that purpose, the plaintiff here might labor without any imputation of any negligence on his part for such a length of time as within which that promise might be fulfilled—not to continue there and labor any longer than that, because it would be as much negligence after a reasonable period had expired after receiving this assurance, as if no assurance had been given. The law requires that he shall not needlessly expose himself to any danger, to any peril whatever.

"And if he has taken this precaution the decision [*Hough* v. *Railway Co.*, 100 U. S. 213] is to the effect that it would not be negligence for him to remain a sufficient length of time to give opportunity to have a man sent there.

"Now, this is about all that is necessary to say upon this point.

"The proposition, then, is, if the bank was in a dangerous condition, and the plaintiff sent a notice to that effect to Smallwood, and Mr. Smallwood gave, in reply, this assurance that a man would be sent there, then, until a sufficient length of time had expired within which that promise might be fulfilled, the plaintiff might remain there at his work, and if any injury happened to him by the falling of the bank during that time, the District might then be imputed with this negligence. If he remained a longer time than [that] within which the promise might be fulfilled, or if he gave no such notice at all, or no such notice was given to Smallwood, then the plaintiff is without any remedy, however serious that injury may be.

"I do not think that it makes any difference here whether Smallwood had any man he could send there or not.

"Now, the main question, therefore, is, and the one difficulty probably which the jury will have in determining anything in this case, will be as to this matter of notice. On that subject Mr. Smallwood has been examined, as also Mr. Tracey and Mr. Anderson.

"Now, the plaintiff names Tracey and Anderson as the persons by whom he sent this message, first by Tracey and then by Anderson.

"From Anderson he received no response, because Anderson did not return. He had, therefore, no assurance in reply to that message whatever, and I think, upon the whole, that he had no reason to expect any relief, unless he received assurance such as that given in the case in the Supreme Court. Beyond that I do not think that I ought to go, and I repeat that, without he received this assurance of assistance, he took the risk of the falling of the bank upon himself."

To so much of the charge as declared that, if plaintiff notified Smallwood of the dangerous condition of the bank, he

would be relieved from the imputation of negligence during such time as was sufficient for Smallwood to provide a man to watch the bank, and to so much of it as declared that the alleged notice by the plaintiff to Smallwood, and the latter's reply thereto, took the case out of the rule laid down in the instructions previously given, the District excepted in proper form.

We are of opinion that, upon the theory of the case declared in the special instructions given, the charge was erroneous. As the court, at the request of the District, instructed the jury that the negligence of Smallwood was one of the risks which the plaintiff took upon himself, and that it was not liable in this action unless he was incompetent for his position, and such incompetency was known, or ought to have been known, to the District; as it was neither alleged nor proved that he was incompetent; and as the only neglect complained of, or to which the evidence was directed, was his failure to provide a man to watch the bank after notice of the necessity therefor, it is difficult to perceive how it became important for the jury to inquire, whether McElligott continued at work longer than was reasonably sufficient for Smallwood to appoint some one to the duty of watching the bank while the plaintiff and his coemployé, Meacham, were at work. The time during which the plaintiff continued at work after giving the alleged notice, and after receiving an assurance that his request would be complied with, has no relation whatever to the only contingency in which the District, according to the special instructions, was liable, viz.: its negligence in employing as supervisor of roads one who was unfit for the place. If the principles embodied in those instructions are sound—upon which point we are not now required to express an opinion—the court would have been justified in directing a verdict for the District. The charge was inconsistent with the instructions previously given, and was calculated to mislead the jury, for it submitted to them a question which those instructions had, in effect, if not in terms, declared to be immaterial in the case.

We are also of opinion that the charge was erroneous in its statement of the grounds upon which the jury should de-

termine the particular point submitted to them. It involved a misapprehension of the decision in *Hough* v. *Railway Co.*, 100 U. S. 224, where the court had occasion to consider, among other questions, that of contributory negligence by the party who sues his employer for injuries resulting from the negligence of another employé in the same general service. That was an action against a railroad company by the representatives of a locomotive engineer. The negligence there complained of, and to which, as was claimed, was to be solely attributed the death of the intestate, was that of the company's officers in assigning to the intestate, for his use, an engine which, by proper diligence on the part of such officers might have been ascertained to be defective and unsafe. One of the defects there complained of was in the cow-catcher or pilot of the engine; the other was that the whistle was insecurely fastened to the boiler. By reason of the defect in the cow-catcher, the engine was thrown from the track, whereby the whistle fastened to the boiler was displaced, and, from the opening thus made, hot water and steam issued, fatally scalding the deceased. It was admitted that the engineer had knowledge of the defect in the cow-catcher, but it was not claimed that he was aware of the insufficient fastening of the whistle, or that the defect, if any, in that respect, was of such a character that he should have become advised of it while using the engine on the road. It was proved that he had given notice to the proper officers of the company of the defect in the cow-catcher, and they promised that it should be remedied. But the court of original jurisdiction, in effect, held that knowledge on the part of the engineer of the defect in the cow-catcher was itself sufficient to defeat the action, without reference to the assurances given that the defect in it should be remedied. In considering the question whether his use of the engine with that knowledge was such negligence as prevented a recovery, so far as that defect was the efficient cause of death, the court referred to the general rule upon the subject of contributory negligence, that where a master or his representative has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it

would be reasonable to allow for its performance, or for an injury suffered within any period which would not preclude a rational expectation that the promise might be kept. But to avoid misapprehension arising from the broad terms in which the general rule was frequently expressed, and that its application in that particular case might be clearly understood, the court said: "We may add that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, could have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part." That knowledge, it was held, was a fact to be considered by the jury, in connection with other facts, in determining whether the engineer exercised that caution which all the circumstances required.

These principles were not applied in the trial of the case now before us; for, in effect, the jury were instructed that, in determining the question of contributory negligence, they need only inquire whether plaintiff continued at his work longer than was reasonably sufficient to enable Smallwood to provide some one to watch the bank. If that question was solved in favor of the plaintiff, then they were at liberty, under the charge, to find that he was not guilty of contributory negligence, although they may have believed from the evidence that no man of ordinary prudence would have entered upon and continued in the work for any time, however brief, without some one being appointed to watch the bank; in other words, that if the plaintiff, in fact, relied upon the alleged promise of Smallwood, he was not chargeable with contributory negligence, although the jury may have believed that, under all the circumstances, he so acted as to show himself utterly careless of his safety. But such is not a sound exposition of the principles which regulate the

rights and obligations of employer and employé. Assuming that the District might be responsible under some circumstances for injuries resulting from the negligence of its supervisor, it certainly would not be liable if the danger which the plaintiff apprehended from the beginning was so imminent or manifest as to prevent a reasonably prudent man from risking it upon a promise or assurance by the proper authority that the cause from which the peril arose would be removed. The plaintiff had had experience in the kind of business in which he was engaged at the time of his injury. He recognized, from the beginning, the peril to which he was exposed while working at the gravel bank. There was no express undertaking, upon the part of the District, by its supervisor, that it would save him harmless as to any injury he might suffer prior to the designation of some one to watch the bank; and it was not implied in the contract between him and the District that he might needlessly or rashly expose himself to danger. On the contrary, if liability might come upon the District for the negligence of its officers controlling his services, he was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care; if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the District supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received.

Whether, therefore, we look at the case upon the theory embodied in the instructions given at the request of the District, or as depending upon the issue as to contributory negligence upon the part of the plaintiff, the judgment must be reversed and a new trial awarded.

Reversed.

Syllabus.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *v.* SCAMMON & Others.

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

Submitted March 12, 1886.—Decided April 12, 1886.

A father owning in fee an equal undivided one third part of a lot of land, and having a life tenancy in the other equal undivided two third parts, and his two daughters each owning in fee an equal undivided one third part, subject to such life tenancy, the three executed a mortgage on the lot, for a loan of $30,000, in which the mortgagors agreed to keep the building on the lot insured against fire, in its fair insurable value, and assign the policy to the mortgagee, to be held by him "as collateral and additional security," with the right to collect the insurance money and apply it on the mortgage. On a partition of the lot between the father and the daughters, they paid $10,000 to the mortgagee, on the principal, and he released from the mortgage the part belonging to the father. The father, with the money loaned, had erected a building on the part of the lot allotted to the daughters, and he thereafter collected for his own use the rents, and paid the interest on the mortgage, and the taxes, and the fire insurance premiums. The building, being insured for $15,000 by a policy in the name of the father, the loss being made payable to the mortgagee, was destroyed by fire. The loss being more than that sum, the mortgagee received a draft for $15,000 on the insurance company, drawn by its agent, to the order of the mortgagee, and agreed in writing with the father, by an instrument which stated that the mortgagee held the policy as collateral security for the payment of the loan, that the right to apply the $15,000 on the debt was waived, and that the money should be deposited in a bank to be selected by the father, to his credit and at his risk, to be used in erecting a building on the lot, the money to be paid out on the father's checks, countersigned by the mortgagee, within six months, or the waiver to be of no effect, and the mortgagee to have the right to apply the money on the debt. Thereupon the mortgagee endorsed the draft to the order of the father, he designating as the bank of deposit a bank of which he was president, and taking the draft and collecting it, and depositing the money to his credit in the bank. The mortgagee countersigned no checks against the money, and no building was put up. The daughters had no knowledge of the transaction. In a suit to foreclose the mortgage, the daughters claimed that the $15,000 should be credited on the mortgage, as against them: *Held,*

(1.) Authority in the father, as representing his daughters, to make the agreement as to the $15,000, could not be implied from the general power he exercised over the property, in managing it, and procuring insurance and paying taxes, the daughters having themselves executed the mortgage;

(2.) The insurance was obtained in pursuance of the requirements of the mortgage, and must be presumed to have covered the interests of all the mortgagors, as an entirety ;

(3.) The mortgagee in fact dealt with the $15,000, not as the father's money, but as representing a further security furnished under the mortgage, and as something which concerned the rights of all the mortgagors, because the agreement with the father recognized the obligation either to credit the money on the mortgage or to see that it went to restore the building ;

(4.) The provision of the policy, that the loss should be payable to the mortgagee, placed him in the same position as if the policy had been in the name of all the mortgagors and been assigned to the mortgagee, and he was bound to apply the money in accordance with the provisions of the mortgage, for the benefit of all the mortgagors, unless all consented to a different disposition of the money ;

(5.) In any view, if the agreement with the father was valid, as against the daughters, the mortgagee was bound to see that the money was used to restore the building, or else credit it on the mortgage ;

(6.) That the transaction amounted to a collection of the $15,000 by the mortgagee, and as a satisfaction of the mortgage to that extent, as respected the estate of the daughters, leaving the mortgage a lien for $20,000, as regarded the life estate of the father.

It is proper to sell the estate in remainder and the life estate separately, and to apply the proceeds of the latter first to satisfy the amount for which it is the sole security, not applying any of such proceeds to pay costs, or taxes, or any part of the debt for which there is other security, till the full payment of the sum for which the life estate is the sole security.

This was a bill in equity to foreclose a mortgage. The case is stated in the opinion of the court.

Mr. Edward S. Isham and *Mr. Robert T. Lincoln* for appellant.

Mr. W. I. Culver and *Mr. Charles F. White* for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

On the 10th of September, 1866, J. Young Scammon, of Chicago, Illinois, and Florence A. D. Scammon and Arianna E. Scammon, his daughters, were the owners of a lot of land in Chicago, No. 90 Michigan Avenue, known as "lot number five (5), in block number eleven (11), in Fort Dearborn Addition to Chicago," the father being the owner in fee of an equal undivided one third part of the lot, and having a tenancy for life

in the other equal undivided two third parts, and his two daughters being each the owner in fee of an equal undivided one third part, subject to such tenancy for life of the father. The lot had descended to the two daughters and a brother of theirs from their mother, subject to the tenancy for life of the father, and he had purchased from the son the fee of his equal undivided one third part.

On the day above named, Scammon and his daughters executed to the Connecticut Mutual Life Insurance Company, a corporation of Hartford, Connecticut, a mortgage covering the above lot by the above description, to secure the payment of $30,000, in five years, with semi-annual interest at 8 per cent. per annum, according to the condition of a bond which they at the same time executed. The bond stated that it was given for an actual loan of money made by the obligee to the obligors on the day of its date.

The mortgage contained the following covenant on the part of the mortgagors: "And further, that they, their heirs, executors, and administrators, shall and will, at all times hereafter, until said principal sum of money, and all arrearages of interest thereon, shall be fully paid, keep all the buildings (outhouses excepted) now situate, or that hereafter may be erected, upon said premises, fully insured against loss or damage by fire, in some good and responsible insurance company or companies (satisfactory to the said party of the second part, its successors or assigns, or its or their authorized agent), in the fair insurable value of such buildings, and will legally and properly assign and deliver to the said party of the second part, its successors or assigns, each, all, and every, the policies of insurance therefor, as soon as and whenever such insurance shall be effected, and will also deliver to said party of the second part, its successors or assigns, or its or their authorized agent, all premium or renewal certificates received for the payment of the premium upon such policy or policies of insurance, as soon as and whenever such certificates shall be issued; and, in default of so doing, the said party of the second part, its successors or assigns, at its own or their option, may effect such insurance in its or their name or names, or otherwise, and the

premium money paid therefor shall be a charge upon said premises, and shall be secured by this instrument in the same manner as the said principal sum of money above mentioned is secured, and such premium money shall be paid by said parties of the first part, their heirs and legal representatives, to said party of the second part, its successors or assigns, on demand, and may be collected at any and all times after the same shall have been paid, with interest thereon at the rate of ten per centum per annum from the time the same shall be advanced, and the said party of the second part, its successors or assigns, shall hold each and all such policies of insurance so received, by assignment or otherwise, as collateral and additional security for said principal sum of money and interest, and shall have the right to collect and receive any and all money and sums of money that may at any time become collectible or receivable upon each, all, and every of such policies of insurance, and apply the same, when received, in the same manner, as far as possible, as is hereinafter provided for in case of a sale of said above described premises under the power of sale hereinafter contained. But nothing herein contained shall be construed as requiring the said party of the second part, its successors or assigns, to incur any expense, or make any effort, to collect any money that may become due on any of such policies of insurance; but, if it or they shall elect not to collect the same, they shall make such election within a reasonable time after such money shall become collectible, and, on demand of said parties of the first part, or their legal representatives, shall thereupon forthwith, after making such election not to collect, reassign and deliver such policy or policies of insurance to said parties of the first part, their executors, administrators, or assigns."

In the fall of 1867, by an arrangement between Scammon and his daughters, the south one third part of the lot was conveyed to his appointee by them, in fee, as representing his existing interest in fee in the lot, and the north two thirds part of the lot was conveyed by him to them as tenants in common, in fee, as representing their existing interest in fee in the lot, subject, as to such north two thirds part, to the life estate of

the father therein. Thereupon, the father and daughters paid or caused to be paid to the mortgagee $10,000, as a reduction of the principal of the mortgage, and it released, by deed, from the lien of the mortgage, such south one third of the lot.

With the money lent on the mortgage, Scammon erected a building on the north two thirds of the lot, and thereafter collected for his own use the rents from it, and paid the interest on the mortgage, and the taxes and the fire insurance premiums. Insurance against fire, covering the building, for $15,000, was effected by Scammon, by a policy issued by the Liverpool and London and Globe Insurance Company in his name, with a clause making the loss payable to the mortgagee. The building was destroyed by fire in October, 1871, and, the loss being adjusted at a sum greater than $15,000, a draft for $15,000 was drawn at Chicago, by the agents of the fire insurance company there, on that company, at New York, payable to the order of the mortgagee. The draft was handed to Scammon, and, at his request, the agent of the mortgagee at Chicago sent it to the mortgagee, at Hartford, with an application from Scammon to have the $15,000 paid to him, to enable him to rebuild the building. Thereupon the following instrument was executed in duplicate by the mortgagee and Scammon, a copy being retained by each:

"Memorandum of agreement made and entered into this fifth day of January, A.D. 1872, between the Connecticut Mutual Life Insurance Company, a corporation subsisting by the laws of the State of Connecticut, and located and doing business in the city of Hartford, in the State of Connecticut, of the one part, and J. Young Scammon, of the city of Chicago, in the county of Cook, and State of Illinois, of the other part, witnesseth: That whereas the said party of the second part did, on the tenth day of September, A.D. 1866, make, execute, and deliver to the said party of the first part a certain indenture of mortgage, bearing date on that day, on the following-described premises, situate and being in the city of Chicago aforesaid, to wit, lot number five (5), in block number eleven (11), in Fort Dearborn Addition to Chicago, for the purpose of securing the payment of the certain bond or obligation of the

said party of the second part, bearing even date with said mortgage, in the penal sum of sixty thousand dollars, conditioned for the payment to said party of the first part of the sum of thirty thousand ($30,000) dollars on the tenth day of September, A.D. 1871, with interest as therein stated, on which said mortgage has been paid ten thousand dollars of principal; and whereas, the building on said premises, known as No. 90 Michigan avenue, in said city of Chicago, was insured in the following company and in the following amount, to wit, the Liverpool and London and Globe, in the sum of fifteen thousand dollars, which said policy of insurance was held by said party of the first part as collateral security for the payment of said loan, any loss on said policy to be paid to said party of the first part; and whereas said building has been destroyed by fire and the insurance moneys to be received on said policy or policies are subject to be paid to said party of the first part, in accordance with the conditions of said mortgage; and whereas said party of the second part desires said party of the first part to permit and suffer said insurance money to be used in and upon said mortgaged premises in the reconstruction of said building or buildings thereon, and said first party is willing to have said insurance money so used, upon the terms and conditions hereinafter set forth, and to assist in the collection and receipt thereof by said second party from said fire insurance company or companies for the purposes aforesaid: It is, therefore, mutually agreed by and between the parties hereto, that said party of the first part waives, except as hereinafter provided, its right to apply on the said indebtedness the moneys that may be received on said policy or policies of insurance, and that any and all such sum or sums of money as shall be so collected from said fire insurance company or companies by either of the parties to this instrument shall be deposited in such bank or banks as shall be selected by the party of the second part and assented to by the said first party, to the credit and at the risk of said party of the second part, to be used in the erection of said building or buildings on said mortgaged premises.

"That said money shall be paid out and expended in the erec-

tion of said building or buildings, from time to time, on the drafts or checks of said party of the second part, countersigned by the said party of the first part, or its duly authorized agent or attorney, until said insurance money is fully expended, as herein provided, on said mortgaged premises. That said drafts or checks shall be so countersigned upon the presentation thereof to said party of the first part, its duly authorized agent or attorney, together with a certificate of a competent and credible architect, that the amount of said check or draft, together with all previous checks or drafts drawn or paid out on said account, has been actually expended in and upon said mortgaged premises, in the permanent improvements thereon, and that the work and material for which the amounts so expended have been paid are fully worth such sum.

"If, however, said buildings are being constructed without the supervision of an architect, the affidavit of said party of the second part to said facts may, at the option of said first party, be received in lieu of said architect's certificate. And it is further understood and agreed, that, so soon as said building or buildings shall be in a situation to be insured, said party of the second part shall cause the same to be insured in some good and responsible insurance company, in the fair insurable value thereof, and assign and deliver the same to said party of the second part, and, as soon as said building shall become so insurable, all the provisions contained in said above-described mortgage shall apply to said insurance, and said conditions are hereby made a part of this agreement.

"It is also expressly understood, that any receipt or acknowledgment given by said party of the first part, either alone or jointly with others, to any such insurance company or companies, for the purposes aforesaid of facilitating the collection by said second party of any insurance money intended to be placed back on said mortgaged premises as aforesaid, shall not be construed as a collection of said money by said first party under the conditions of said mortgage, wherein and whereby it is provided that said first party may collect and apply such insurance money upon the indebtedness secured to be paid thereby, but merely as enabling said second party to collect

said insurance moneys. Said moneys are not to be so applied, and said mortgage shall remain a lien on said mortgaged premises for the full amount of the principal money mentioned in said bond, with the interest thereon, as if said moneys had never been collected.

"It is also further expressly understood and agreed, that said insurance money shall be expended on said mortgaged premises as above provided, with all reasonable and proper dispatch; and that, in the event that, from any cause, whether the death or absence of any party or parties to this agreement, or any other cause, said money shall not have been so expended within six months from the date hereof, then this agreement of waiver shall thereupon become thenceforth null and of no effect, and the right of said second party to use and expend said moneys shall thereupon cease, and said first party shall have the right to draw from the said bank or banks, upon its own check or checks, or that of its authorized agent, said insurance moneys, or so much thereof as shall not then have been actually expended as provided in this agreement, and apply the same in payment *pro tanto* of the indebtedness secured by said mortgage, and such check or checks of said first party or its agent as aforesaid, drawn at any time after the expiration of six months from the date hereof, shall be a full discharge and acquittance to said bank or banks for any moneys paid thereon.

"It is expressly agreed, that time shall be of the essence of this agreement in all its parts, and that said agreement shall be binding upon the heirs, executors, administrators, successors, and assigns of the respective parties."

On the execution of this agreement, the mortgagee endorsed the draft, making it payable to Scammon or his order, and sent it to its agent at Chicago. Scammon signed on the agreement a written designation by him of "the Marine Company of Chicago," a banking institution of which he was then president, as the banking office in which to deposit the $15,000; and the draft was then delivered by the agent to Scammon, and collected, and its proceeds were deposited to his credit in the Marine Company. The transaction between Scammon and the agent took place at the banking company's office, and the

agent exhibited the copy of the agreement to Scammon, as president of the bank. No checks against the money were ever countersigned by or on behalf of the mortgagee, nor was any of it used in putting up any new building on the lot, nor was any such new building put up. Scammon's daughters had no knowledge or information as to any part of the transaction between their father and the mortgagee in regard to the $15,000.

Under that state of facts, the mortgagee, in June, 1876, filed a bill in equity, in the Circuit Court of the United States for the Northern District of Illinois, for the foreclosure of the mortgage, making as defendants Scammon and the two daughters, and Reed, the husband of one of them, and other persons. The bill credits the payment of the $10,000, in November, 1876, as one by Scammon and his daughters, in reduction of the principal of the mortgage, and sets forth the release of the south one third of the lot from the lien of the mortgage, but ignores any credit of the $15,000, and claims as due $20,000, with interest at 8 per cent. per annum from September 10, 1873, and moneys paid by the mortgagee for taxes and assessments.

Mrs. Reed and her sister answered the bill. The answer sets forth the transaction in regard to the $15,000, and avers that it took place without the knowledge, authority or consent of the daughters, and that the mortgagee, in consenting to the use of the $15,000 in any other way than in payment of the mortgage indebtedness, relied on the credit of Scammon and released the property of the daughters to that extent. It claims that Scammon's life estate in the north two thirds part of the lot should be first sold, and the proceeds be applied first in payment of the remaining $5000 and interest, and the property of the daughters be thereupon released from all further liability.

After issue, the court referred the cause to a master, to take proofs and report them, with the amount due to the plaintiff. He reported the testimony, and that there was due $20,000 of principal, and interest from September 10, 1873, and certain sums paid by the plaintiff for taxes and assessments, with

interest thereon. Mrs. Reed and her sister excepted to the report, and the case was heard on the exceptions. The court rendered a decision, 4 Fed. Rep. 263, in which it was ruled, (1) that authority in Scammon, as representing his daughters, to make the special agreement in regard to the $15,000, could not be implied from the general power he exercised over the property, in managing it, and procuring insurance and paying taxes, the daughters having themselves executed the mortgage; (2) that the insurance was obtained in pursuance of the requirements of the mortgage, and must be presumed to have covered the interests of all the mortgagors, as an entirety; (3) that the mortgagee in fact dealt with the $15,000 not as Scammon's money, but as representing a further security furnished under the mortgage, and as something which concerned the rights of all the mortgagors, because the agreement it made with Scammon recognized its obligation either to credit the $15,000 on the mortgage or to see that it went to restore the building; (4) that the provision of the policy, that the loss should be payable to the mortgagee, placed it in the same position towards all the mortgagors as if the policy had been taken out in the names of all, and assigned to the mortgagee, and it was bound to apply the $15,000, in accordance with the provisions of the mortgage, for the benefit of all the mortgagors, unless all consented to a different disposition of the money; (5) that, in any view, if the agreement with Scammon was valid, as against the daughters, the mortgagee was bound to see that the money was used to restore the building, or else credit it on the mortgage.

Under these views, the court referred the case back to the master, with directions to restate the account according to the principles thus laid down. He did so, and, the case being heard on his report, the court, on the 2d of October, 1882, rendered a decree, which, after setting forth the material facts above stated, contains the following clauses:

"The court further finds, that, when the complainant originally took the said mortgage, it, by its agent, knew the state of the title of the mortgaged premises; that, in the erection of the building on said premises, and causing it to be insured, and

in collecting rents and paying the insurance premiums and taxes, the defendant J. Y. Scammon held the property as if it was his own; that the entire business connected with the loan from the complainant, from the time of its original negotiations down to the time of the before-mentioned agreement in relation to the insurance, was transacted by J. Y. Scammon, who kept an account of the property in his bank ledger, in which rents by him received were credited, and the moneys paid out were also entered; that the defendants Florence A. D. Reed and Arianna E. Scammon knew nothing, at the time, of the insurance obtained upon the property, nor anything in relation to the agreement between their father and the complainant made in 1872; that the complainant entered into the agreement for the payment of the insurance money to Scammon to be by him used in rebuilding, in good faith; and that said Scammon received it in good faith for that purpose, and the officers of the bank where it was deposited understood that the money was deposited there as a special deposit, subject to said agreement.

"The court further finds, that Florence A. D. Reed and Arianna E. Scammon did not know that this insurance had been effected on the property, or of the payment of premiums thereon, and were never consulted about the disposition of the insurance money, and had no knowledge of, and gave no consent to, its payment to their father and its deposit in the bank, and have never asserted any rights in relation thereto until the commencement of this suit.

"The court further finds, that the acts of Florence A. D. Reed and Arianna E. Scammon were limited to the execution of the bond and mortgage and the making of the agreement for partition; that said insurance was furnished under the covenants of the mortgage, and pursuant to the requirements thereof, and was an additional security held by the complainant for the payment of the principal sum and interest secured by said mortgage, and that the covenants in the mortgage for insurance operated as an assignment of the insurance fund, when collected, to the mortgagee; that the acts of the complainant, its receipt of the draft for said insurance money, and its endorsement

thereof to the defendant J. Y. Scammon, by ordinary commercial endorsement, and its assumed control over the ultimate destiny and use of the proceeds thereof, were equivalent to a collection of the insurance by the complainant; that the receipt by the complainant of said insurance money operated as a satisfaction *pro tanto* of said mortgage, so far as the estate and interests of the defendants Florence A. D. Reed and Arianna E. Scammon are involved, but that, so far as the life estate of J. Young Scammon is concerned, said mortgage remains an equitable lien and encumbrance for the full amount thereof."

The decree then goes on to declare that there is due, at this date, from Scammon to the plaintiff, on the bond and mortgage, $20,000 of principal and $13,093.32 of interest, as reported, and $1404.44 for interest since the date of the report; and $3275.42 for moneys paid for taxes and to redeem from tax sales, and $490.73 for interest thereon, as reported, and $287.51 for interest since the date of the report; being, in all, $38,551.42; that that sum is a valid and first lien on the estate of Scammon, for his life, in the north two-thirds of the lot (excepting therefrom a strip from off its north side, hereinafter mentioned); that, of the $38,551.42, Mrs. Reed and her sister are personally liable for $5000 of principal, and $3273.33 interest thereon, as reported, and $351.11 interest on the $5000 since the date of the report, and for the above-named sums of $3275.42, $490.73, and $287.51, being in all $12,678.10, which is a valid and first lien on the estate in remainder of them and each of them, after the expiration of the life estate of Scammon, in the north two-thirds of the lot (excepting therefrom the strip above referred to); and that the $12,678.10 is a valid and first lien on said strip. The decree then provides for the sale at public auction of such estate in remainder, excepting the strip, and of such life estate, excepting the strip, and of the strip, each separately; and directs that the proceeds of the life estate be applied first to the satisfaction of the amount for the payment of which the life estate is decreed to be the sole security, and that no portion of the amount realized from the sale of the life estate shall be applied to pay the costs of the suit, or

any moneys found due for taxes, or on account of that part of the principal or interest of the bond for which there is other security, until the sum for which the life estate is the sole security shall have been fully paid. From this decree the plaintiff appealed to this court.

The plaintiff assigns for error that the Circuit Court erred in giving the daughters credit for the $15,000. But we are of opinion that the views of that court in its decision, as above set forth, and as embodied in the decree, were correct.

The policy of insurance was a collateral security for the joint debt of the mortgagors, furnished in compliance with the provisions of the mortgage, and the mortgagee was bound to apply the insurance money to the payment of the joint debt, according to the terms of the mortgage. In the agreement with Scammon, of January 5, 1872, the mortgagee declares that it held the policy "as collateral security for the payment" of the loan secured by the mortgage, and that the $15,000 is subject to be paid to it "in accordance with the conditions" of the mortgage. Although the policy was taken out in the name of Scammon, it was, under the mortgage, a part of the security covenanted for therein; and must be treated as having been furnished by, and for the benefit, of all the mortgagors. The insurance was on the building as a whole, and not on any particular interest in it, and was accepted and treated by the mortgagee as an insurance complying with the terms of the mortgage, and covering all the interests which the mortgage covered.

The mortgagee could not, without the consent of the daughters, surrender the proceeds of the collateral security to Scammon, or divert them from the purpose to which the mortgage devoted them. And, in any event, the mortgagee, if at liberty to use the money toward restoring the building, was bound to see that it was so applied, and took the risk of the diversion. The money not having been so applied, it must be credited in favor of the daughters. Their intention, declared by the mortgage, that the money should be credited on the mortgage, was never varied by them.

Three persons named Andrews, and the wives of two of

them, were defendants to the bill. It alleged that they had interests in the mortgaged lot subordinate to the lien of the mortgage. They answered the bill, setting up a prior lien in favor of the three, because they had erected a party wall on and along the north line of the lot, under a party-wall agreement made prior to the mortgage, and of which the mortgagee at all times had notice; and alleging that, if the mortgage was superior in lien, then the residue of the lot, not covered by the party wall, should be first sold to satisfy the mortgage. Issue was joined on the answer. In the taking of proofs, the plaintiff put in evidence a party-wall agreement made June 4, 1866, between Scammon and one Smith, by which it appears that Smith owned lot 4, next north of lot 5, and gave permission to Scammon to build one-half of the north wall of a building he was to erect on lot 5, to the northward of the dividing line between the two lots, and that Smith, on paying to Scammon one-half of the value of the wall, was to be entitled to use the north half of it as a party wall. On the 25th of February, 1867, Scammon and his daughters and Smith executed a supplemental paper, stating that the contemplated wall had been erected, and agreeing that such wall was to be considered as built on the dividing line between lots 4 and 5, and that the centre of such wall was such dividing line. There is not, in the record, any other testimony about any party wall or the strip of land, and none to support the Andrews answer, and there is no mention of the strip in either of the reports of the master. The decree, however, finds that the three Andrews defendants own in fee, subject to the lien of the mortgage, by title derived from Scammon and his two daughters, the strip of land before referred to, describing it as a strip from off the north side of lot 5, $6\frac{5}{8}$ inches wide in front, and $9\frac{3}{8}$ inches in the rear, and the depth of the lot. It also excepts that strip in declaring that the mortgage is a first lien on the life estate of Scammon in the north two-thirds of the lot, and in declaring that it is a first lien on the estate in remainder of the daughters therein, and declares that the $12,678.10 is a valid and first lien on that strip, and excepts the strip from the estate in remainder, and from the life estate, in describing the premises

Statement of Facts.

to be sold, and directs it to be sold by itself, after those estates are sold.

The appellant objects to the adjudication in regard to the strip, on the ground that there is not in the record either pleading or evidence to support it. This is true. The decree must, therefore, be reversed in that respect. It is accordingly

Affirmed, except as to the strip, and reversed as to that, and the case is remanded to the Circuit Court, with a direction to strike out of the decree everything relating to the strip. The costs of the appeal are awarded to the daughters.

GIVEN & Others Relators *v.* WRIGHT Collector.

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

Argued March 5, 1886.—Decided April 12, 1886.

An exemption from taxation granted by the government to an individual is a franchise, which can be lost by acquiescence under the imposition of taxes for a period long enough to raise a conclusive presumption of a surrender of the privilege; and such acquiescence for a period of sixty years (and, indeed, for a much shorter period) raises such a presumption.

This was a writ of error directed to the Supreme Court of New Jersey to review a judgment rendered by the Court of Errors and Appeals of that State, affirming a judgment of the Supreme Court, and remitted thereto. The case arose upon a *certiorari* issued in the name of the State, on the relation of certain tax-payers of the township of Shamong, in the county of Burlington, directed to Henry Wright, collector of said township, for the purpose of examining the legality of a certain assessment of taxes, for the year 1876. The taxes complained of were laid upon lands of the prosecutors lying within the bounds of a tract known as the Indian Reservation. According to the New Jersey practice, reasons were filed for setting aside the assessment, and evidence was taken before a commissioner of the court.

Statement of Facts.

The reasons assigned were:

1st. That the lands were not liable to be assessed for taxes under the Constitution and laws of New Jersey.

2d. That, by virtue of a contract with the State of New Jersey, contained in the act of the legislature, entitled "An Act to empower certain persons to purchase the claims of the Indians to land in this colony," the lands were expressly exempted from taxation.

The lands on which the assessment was laid were the same lands which were held to be exempt from taxation by this court in the case of *New Jersey* v. *Wilson*, reported in 7 Cranch, 164, where a succinct history of the transactions out of which the claimed exemption grew is given. That decision was made in February Term, 1812. Since that time, for about sixty years before the assessment in question was laid, taxes have been regularly assessed on the lands, and paid without objection. The Supreme Court of New Jersey sustained the assessment, holding that the uninterrupted acquiescence in the imposition of taxes for so long a time raised a conclusive presumption that, by some convention with the State, the right to exemption was surrendered. The Court of Errors and Appeals affirmed this decision, and the case was brought here for review, on the allegation of the plaintiffs in error that the obligation of the contract of exemption had been impaired by the laws of New Jersey under which the tax was imposed.

The alleged contract was contained in a law of the New Jersey Colonial Legislature, passed August 12, 1758. There remained at that time within the colony a remnant of the Delaware Indians, who claimed certain lands in different parts of the colony, which they alleged had never been sold by them. In consequence of a convention had with them, the legislature passed the law in question, entitled "An Act to empower certain persons to purchase the claims of the Indians to land in this colony." The act appointed five commissioners, with authority to lay out any sum not exceeding £1600 proclamation money, to purchase the right and claims of the Indians. The second section of the act was as follows:

"*And whereas* the Indians south of Raritan River, have

represented their inclination to have part of the sum allowed them laid out in land whereon they may settle and raise their necessary subsistence: In order that they may be gratified in that particular, and that they may have always in their view a lasting monument of the justice and tenderness of this colony toward them: *Be it enacted by the authority aforesaid*, That the commissioners aforesaid, or any three of them, with the approbation and consent of his excellency the governor, or the governor or commander-in-chief for the time being, shall purchase some convenient tract or tracts of land, for their settlement, and shall take a deed or deeds in the name of his said excellency or commander-in-chief of this colony for the time being, and of the commissioners, and their heirs, in trust for the use of the said Indian natives, who have or do reside in this colony, south of Raritan, and their successors, forever: *Provided, nevertheless*, That it shall not be in the power of the said Indians, or their successors, or any of them, to lease or sell to any person or persons, any part thereof. And if any person or persons, Indians excepted, shall attempt to settle on the said tract or tracts, it shall and may be lawful for any justice of the peace to issue his warrant to remove any such person or persons from such land. And if any person or persons, Indians excepted, shall fell, cut up, or cart off, any cedar, pine, or oak trees, such person or persons shall forfeit and pay, for each tree so felled, cut up or carted off, the sum of forty shillings, &c."

The 7th section was as follows:

"*And be it further enacted by the authority aforesaid*, That the lands to be purchased for the Indians, as aforesaid, shall not hereafter be subject to any tax, any law, usage, or custom to the contrary thereof in anywise notwithstanding."

In pursuance of this law a tract of about 3000 acres of land, situate in the township of Evesham, in Burlington County, (now in the township of Shamong aforesaid), was purchased by the commissioners for the sum of £740, and conveyed to "His said Excellency, Francis Bernard, Esquire, Governor and Commander in Chief of the Province of New Jersey, and to them the said Andrew Johnston, Richard Salter, Charles Read, John Stevins, William Foster and Jacob Spicer,

Esquires, and their heirs forever: In trust, nevertheless, that they shall permit such Indian natives as have resided or do reside in this colony south of Raritan, and their successors forever, to cultivate and inhabit the same to and for such uses as are declared in an act of general assembly of the Colony of New Jersey, entitled an Act to empower certain persons to purchase the claims of the Indians to lands in this colony."

The tract purchased included a cedar swamp and saw-mill, and was surrounded by wild lands which furnished good hunting ground, and they were sufficiently near the coast for fishing.

The Indian beneficiaries of this trust, who were but a small band (about sixty in all, as stated by the historian Smith), removed to the settlement purchased (which received the name of Brotherton), and remained there until the latter part of the century, when they desired a change in the mode of managing their lands. The old commissioners having died, they desired new ones appointed to take charge of the lands and mill, and to let or lease the same for their use and benefit.

Accordingly, on their petition, an act was passed on the 17th of March, 1796, which appointed three commissioners to take charge of the lands "and lease out the same, from time to time, on such terms, and in such manner as should most conduce to the advantage of said Indians." The commissioners were directed to apply the moneys arising from the lands unto the Indians, or the value thereof in necessaries, such as provisions and clothing, or to such of them as should stand most in need. They were to account annually to the Court of Common Pleas of Burlington County, which court was invested with power to remove them for misconduct, and in case of a vacancy to appoint new commissioners. It was expressly provided, however, that nothing in the act should prevent the Indians from residing on the lands, or cutting wood or timber for their own use.

It was not long after this before the Indians desired to have their lands sold, and to join their brethren at New Stockbridge in the State of New York. The legislature complied with their wishes, and on the 3d of December, 1801, passed an act ap-

pointing commissioners to sell the lands, and to appropriate the money thence arising for the benefit of the Indians. The act directed the tract to be divided up into lots not exceeding a hundred acres in each, and to give notice of the time and place of sale; all of which was done. The lands were sold and deeds of conveyance in fee simple were given to the purchasers; but neither in the law nor in the deeds was anything said about exemption from taxes.

After the sale the assessors of the township in which the lands lay proceeded to assess the same for taxes; but, on a *certiorari* from the Supreme Court of New Jersey, the assessment was set aside in September, 1804. On the 1st of December, 1804, the legislature repealed the 7th section of the act of 1758, which contained the exemption from taxes. Another assessment was then made, and the matter was brought before the Supreme Court a second time in the case of *New Jersey* v. *Wilson*, reported in 1 Pennington, 300. The assessment was now sustained. Judges Rossell and Pennington delivered quite elaborate opinions, arguing that, by the act of 1758, and the purchase under the same, the lands were intended as a permanent possession of the Indians as a home, protected against their natural improvidence by being made inalienable by sale or lease, or by the imposition of taxes; that the exemption from taxes was one of the incidents of the Indian tenure, and had no congruity with absolute ownership of citizens, and that when, at the request of the Indians, the land was sold to other parties in fee simple absolute, the abnormal qualities of the Indian tenure were extinguished, and all the conditions which rendered exemption from taxes requisite and proper ceased to exist. Judge Pennington added that the fee was not in the Indians; that the purchasers could not claim title from or under them; that the commissioners were not authorized to sell the interests or rights of the Indians, but to sell the land, the fee of which was in trustees who were agents of the State, and that the State in selling the land was under no obligation to continue the exemption from taxes, and did not do so. On writ of error from this court, however, this judgment was reversed, the act of 1758 was held to be a contract, and the act

of 1804, repealing the exemption, was held to impair the obligation of that contract, and was, therefore, void. *New Jersey* v. *Wilson*, 7 Cranch, 164.

Mr. P. L. Voorhees for plaintiff in error, as to the effect of the sixty years' acquiescence in taxation, contended as follows: The statute granting the exemption was an act of sovereign authority, and can only be changed by an equally solemn act. "*Jura eodem modo destituuntur quo constituuntur*," or as translated in Bouvier's Law Dictionary, "Laws are only abrogated or repealed by the same means by which they are made." Broom's Legal Maxims, 877. Potter's Dwarris, 154.

A statute cannot be repealed by nonuser. Nothing short of a statute can repeal a statute. Sedgwick Stat. and Const. Law, page 121, edition 1857. Smith's Stat. & Const. Construction, page 908, § 790. Potter's Dwarris, 122, 153, 154. 1 Kent Com. [467] 527. 10th edition. *White* v. *Boot*, 2 T. R. 274. *Leigh* v. *Kent*, 3 T. R. 362. *The India*, Brown. & Lush. 221. 4 Fisher's Dig., 8223. 6 Mew's Fisher's Dig., 2038. There has not been any constitutional act done by the legislature repealing the act of August 12, 1758, or repealing, changing or annulling the contract in the said act contained. There has not been any agreement or contract between the State, or the legislature of the State, and the said Indians or their successors, in any way changing the contract in the act of August 12, 1758, exempting the lands purchased for the Indians from taxation.

Nor can this statute or contract be repealed or made of none effect by presumption. A presumption is an inference affirmative or disaffirmative of the truth or falsehood of any proposition or fact drawn by a process of probable reasoning in the absence of actual certainty of its truth or falsehood, or until such certainty can be ascertained. Best on Presumptions. Bouvier's Law Dict. Presumption. As above shown a statute can only be repealed by a statute, and cannot be repealed by a nonuser. A statute cannot alter by reason of time; the common law may. Dwarris' Maxims in Potter's Dwarris, 122. Presumption is against the repeal of a statute by implication. *The India*, 1 Brown. & Lush. 221. 6 Mew's Fisher's Dig., 2038.

Argument for the State.

Nor is this a case in which a presumption can arise. The cases referred to in the opinion of the Supreme Court of New Jersey in deciding this case will be found to depend upon the proof of title by custom or usage, ripening into prescriptive rights under the laws of England; and in all the cases where it was shown that such rights existed, or a grant had been made before the time of legal memory, the limitation under the laws of England, the grants were sustained and the rights then granted were sustained and enforced. Such cases can be of but little authority in this country, where there are no such prescriptive rights. This country was not discovered or settled until after the time "whereof the memory of man runneth not to the contrary," the limitation of prescriptive rights in England. In New Jersey it has been decided by its Supreme Court that there can be no title by prescription. *Ackerman* v. *Shelp*, 3 Halst. (8 N. J. L.) 125, 2d ed. 153. The effect of such citations is stated in 1 Dillon Municp. Corp., § 324; Cooley Const. Lim., 197; *Commonwealth* v. *Stodder*, 2 Cush. 562, 565, 569.

Mr. Charles E. Hendrickson for defendant in error.

Mr. John P. Stockton, Attorney-General of New Jersey, on behalf of the State, showed to the court that the case of *New Jersey* v. *Wilson*, 7 Cranch, 164, had been decided without argument, and on an incomplete statement of facts: that in 1796 a new contract had been made with the Indians in place of that of 1758, and that the new contract was not then before the court, and was now here for the first time for construction. He added: Respect for the decisions of this court as well as the doctrine of *stare decisis*, may prevent us from questioning the decision in the case of *New Jersey* v. *Wilson;* but it cannot close our eyes to the fact that the contract presented to and quoted by Chief Justice Marshall in *New Jersey* v. *Wilson*, differed materially from the actual document; nor to the equally important fact that that contract was, at that time, superseded and extinguished by another, then in existence, but undiscovered. The decision of Chief Justice Marshall, upon the facts stated in his

opinion, we do not question; but we insist that it cannot be possible that any maxim of law or reverence for authority compels this court to perpetuate an accidental error, which would make its ancient decisions and the opinion of its most distinguished jurists declare the law, on vital and constitutional questions, to be the reverse of the uniform rulings of the court since 1830.

Mr. Justice Bradley, after stating the case as above reported, delivered the opinion of the court.

It appears from the record of the case of *New Jersey* v. *Wilson*, preserved in our files, that the act of 1796, authorizing the lands to be leased out, was not brought to the attention of this court. Whether, if it had been, it would have affected the judgment of this court is uncertain. It probably would not have done so; and we must assume it to be *res judicata* that in 1805 (when the case of *New Jersey* v. *Wilson* arose), the lands remained exempt from taxation in the hands of the purchasers.

We do not feel disposed to question the decision in *New Jersey* v. *Wilson*. It has been referred to and relied on in so many cases from the day of its rendition down to the present time, that it would cause a shock to our constitutional jurisprudence to disturb it now. If the question were a new one we might regard the reasoning of the New Jersey judges as entitled to a great deal of weight, especially since the emphatic declarations made by this court in *Providence Bank* v. *Billings*, 4 Pet. 514, and other cases, as to the necessity of having the clearest legislative expression in order to impair the taxing power of the State. See the cases collected in *Vicksburg* &c. *Railroad Co.* v. *Dennis*, 116 U. S. 665, 668.

The question, then, will be, whether the long acquiescence of the land owners under the imposition of taxes, raises a presumption that the exemption, which once existed, has been surrendered.

This question, by itself, would be a mere question of State municipal law, and would not involve any appeal to the Constitution or laws of the United States. But where it is charged

that the obligation of a contract has been impaired by a State law, as in this case by the general tax law of New Jersey as administered by the State authorities, and the State courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection. *Murdock* v. *Memphis*, 20 Wall. 590, 636, Proposition 6.

We have carefully read the evidence in this case, and are satisfied that the lands were regularly assessed for taxes, and that the taxes were paid without objection from 1814, or about that time, down to 1876, the time of the assessment complained of—a period of sixty years. If an exemption from taxation can be lost in any case, by long acquiescence under the imposition of taxes, it would seem that an acquiescence of sixty years, and, indeed, a much shorter period, would be amply sufficient for this purpose, by raising a conclusive presumption of a surrender of the privilege. An easement may be lost by nonuser in twenty years, and even in a less time if it is affected by positive acts of invasion. A franchise may be lost in the same way, nonuser being one of the common grounds assigned as a cause of forfeiture. 3 Bl. Com. 262. Exemption from taxation being a special privilege granted by the government to an individual, either in gross, or as appurtenant to his freehold, is a franchise. Nonuser for sixty, or even thirty years, may well be regarded as presumptive proof of its abandonment or surrender. The present case is a strong one. The nonuser consists of acquiescence in actual taxation, or an actual invasion of the franchise, year by year, for a period of years reaching almost beyond the memory of man. It is not merely a case of nonuser, but one of disaffirmance of the privilege for this long period.

If the franchise were one which affected adversely the rights of other individuals, they might not be able to question its validity in a collateral proceeding. But it is set up against the government itself, whilst exercising one of its most important prerogatives. We see no reason why, in such a case, the government may not claim the benefit of lapse of time as a

ground of presumption of the surrender of the franchise, though the same period of nonuser would be a ground of forfeiture in a direct proceeding on the part of the State to revoke the franchise. We think the reasoning of the Supreme Court of New Jersey in this case is entirely satisfactory.

The judgment is affirmed.

DAVIESS COUNTY *v.* DICKINSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Argued March 22, 1886.—Decided April 12, 1886.

A statute of Kentucky authorized a county court to subscribe to such an amount as it might determine in the stock of a railroad company, and to levy the taxes necessary to pay for the stock so subscribed, or to issue bonds of the county for the amount, the bonds to be in such sums and payable at such times as the county court might determine; but provided that a proposition to subscribe for stock to an amount to be suggested and fixed by commissioners named in the statute should be first submitted to the voters of the county, and approved by a majority of the votes cast. The county court, upon the suggestion of those commissioners, submitted to the voters a proposition to subscribe for $250,000 of the stock, and, in obedience to their vote, ordered that the county court subscribe that amount, and that bonds to that amount, for sums and payable at times specified in the order, with the signatures of the presiding judge and the clerk of the county court and the seal of the county, should be sold or disposed of by a committee appointed for the purpose, and a list of them entered upon the records of the county. The presiding judge and clerk issued such bonds for a greater amount, so signed and sealed, and with a certificate on the back of each, signed by the judge only, that it was issued as authorized by the statute and by an order of the county court in pursuance thereof. All the bonds as they were delivered were entered upon the records of the county court, in a register open to public inspection. *Held*, That the county court had power to issue bonds to the amount of $250,000 only; that the bonds issued in excess of that amount were unlawful and void, even as against a purchaser before maturity, for value, and without notice of the over-issue; that the bonds to that amount, which were first delivered, were the valid ones, and that the county was not estopped to deny the validity of the others, either by the certificate endorsed thereon by the judge, or by payment of interest on all the bonds.

Statement of Facts.

This was an action brought April 3, 1879, in the Circuit Court of the United States for the District of Kentucky, by Dickinson against the County of Daviess, on bonds and coupons, alleged to have been issued under the statute of Kentucky of February 27, 1867, ch. 1505, incorporating the Owensboro and Russellville Railroad Company, the material provisions of which were as follows:

By § 1, five persons named in Daviess County, and certain other persons named in each of four other counties, are "appointed commissioners, under the direction of whom, or any three of whom, in each of said counties, subscription may be received to the capital stock of the Owensboro and Russellville Railroad Company hereby incorporated."

By § 2, "The capital stock of said Owensboro and Russellville Railroad Company shall be one million dollars, in shares of twenty-five dollars each."

By § 19, "The county courts of Daviess," and those four other counties, "shall have power, and are hereby authorized, to subscribe to the capital stock of said company in such number of shares as may be determined by said county courts respectively, and to levy upon the taxpayers of such counties respectively such taxes as may be necessary to pay the stock so by them respectively subscribed; and said county courts may, if they shall deem it prudent, issue the bonds of said counties respectively for the amount of stock subscribed, or any part thereof; said bonds to be in such sums, and payable at such times, as said county courts may determine upon. But before such stock shall be subscribed by said county courts, the said county courts shall submit to the voters of said counties the proposition to subscribe stock and the amount thereof, (to be suggested and fixed by the commissioners named herein in each of said counties,) at an election to be held on the third Monday in April, 1867, in each of the counties aforesaid, due notice of which shall be given by the sheriffs in each of said counties, by written advertisements posted in each of the voting precincts thereof for at least thirty days before said day of election; and said stock shall not be subscribed unless a majority of all the votes cast at said election be in favor of such proposition; and

said county courts shall have power to appoint suitable and necessary officers to conduct such election, and to provide for the collection of the tax aforesaid, if a majority of the votes cast at such election is in favor of the proposition aforesaid."

At the trial the following facts were admitted:

At March Term, 1867, of the Daviess County Court, upon the suggestion of the five commissioners named in the charter of the railroad company, that court ordered to be submitted to the voters of the county, on the third Monday in April, 1867, this proposition: "Shall or shall not the County Court of Daviess County subscribe ten thousand shares, being the sum of two hundred and fifty thousand dollars, to the capital stock of said Owensboro and Russellville Railroad Company?"

At April Term, 1868, George W. Triplett, presiding judge, and a majority of the justices of the peace of the county being present, the county court, upon motion of Edward C. Berry, one of those justices, adopted the following order: "In obedience to the will of the majority of the voters and taxpayers of this county, as expressed and recorded in the poll-book at the election held on the 15th day of April, 1867, it is now ordered that this court do subscribe two hundred and fifty thousand dollars to the capital stock of the Owensboro and Russellville Railroad Company, and George W. Triplett, presiding judge of this court, is ordered and directed to make said subscription of said stock in manner and form as prescribed by the charter incorporating said company."

At July term, 1868, of the county court, "It is ordered, that George W. Triplett, presiding judge of Daviess County Court, William B. Tyler [who was the treasurer of the railroad company] and E. C. Berry be and are hereby appointed a committee on behalf of the County Court of Daviess County, to have bonds executed and prepared of a sufficient amount to satisfy and pay off the subscription on the part of the county of Daviess to the Owensboro and Russellville Railroad Company; that said bonds be executed and made payable as follows, viz.:

"Fifty thousand dollars, five years from date.

"Fifty thousand dollars, ten years from date.

"Seventy-five thousand dollars, fifteen years from date.

"Seventy-five thousand dollars, twenty years from date.

"The county reserving the right to pay at any time after five years; the interest on the same, at the rate of six per cent. per annum, to be due and payable semi-annually at such place or places as the committee may determine upon; and that said bonds shall be of such denominations as said committee shall deem best, with interest coupons attached, and said bonds shall be signed by the presiding judge of Daviess County and the clerk of the County Court of Daviess County, and have the seal of the county impressed on each; and said committee, or a majority of the same, may sell and dispose of said bonds, either to the Owensboro and Russellville Railroad Company, or to individuals or other corporations, on such terms as said committee may deem best and most advisable to the interests of the county of Daviess in paying the subscription of said county to the said Owensboro and Russellville Railroad Company; and they are hereby authorized to raise funds from said bonds, either by sale to individuals or corporations, or by contract with said railroad company, so as to pay off and meet all calls made by the Owensboro and Russellville Railroad Company by reason of the subscription of stock on behalf of the county of Daviess to said railroad company.

"It is further ordered, that whenever any bond shall be sold or otherwise disposed of by said committee for the purposes aforesaid, that a list of said bonds shall be made, giving the amount, number and denomination of same, with the amount of coupons attached to each at the time of their disposal; and said list so furnished shall be entered upon the records of the County Court of Daviess by the clerk of same."

George W. Triplett, the presiding judge, and Thomas C. Jones, the clerk of the County Court, claiming to act under the authority of this order, signed as such judge and clerk bonds of the county, and under the seal of the county court, as follows:

Bonds payable in five years, to the amount of.....	$51,250
Bonds payable in ten years, to the amount of.....	65,200
Bonds payable in fifteen years, to the amount of.....	76,500
Bonds payable in twenty years, to the amount of....	127,500
	$320,450

Statement of Facts.

The bonds of each class had distinct letters and were numbered in a series; and each bond, omitting the letter and number, the sum and the time of payment, and the coupons annexed, was as follows:

"United States of America,
"County of Daviess, State of Kentucky:

"On account of stock subscribed in the Owensboro and Russellville Railroad Company ——— years after date the County of Daviess in the State of Kentucky promise to pay to bearer the sum of ——— dollars, with interest thereon at the rate of six per cent. per annum, payable semi-annually, upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Deposit Bank, Owensboro, and to secure the payment of which the property and credit of the county are pledged.

"In testimony whereof, the judge of the County Court of Daviess County has hereunto set his hand and affixed the seal of the said court, and caused the same to be countersigned by the clerk of the said court, who has also signed the coupons hereto attached, this — day of ———, 18—.

[SEAL.] "GEORGE W. TRIPLETT,
"Judge of County Court.

"T. C. JONES, County Clerk."

Each bond had the following certificate, plainly printed on the back thereof: "This bond is issued as authorized by an act of the Kentucky legislature, approved February 27, 1867, entitled 'An Act to charter the Owensboro and Russellville Railroad Company,' and by an ordinance of the County Court of Daviess in pursuance thereof;" and signed "George W. Triplett, Judge of the County Court of Daviess."

All the bonds so issued (except bonds to the amount of $800, payable in five years, and of $200, payable in ten years, which were sold and delivered to individuals by Triplett, Tyler and Berry, committee as aforesaid, in September, 1879) were delivered by Triplett to the railroad company in various amounts on different days from June 5, 1869, to March 22, 1870. The

last two deliveries were as follows: On February 17, 1870, were delivered bonds payable in ten years, to the amount of $12,500, like bonds to the amount of $53,700 having been delivered previously. On March 22, 1870, were delivered bonds payable in twenty years, to the amount of $92,500, the amount of like bonds previously delivered being $35,000, and the amount of all bonds previously delivered being $227,950. Of the bonds delivered to the railroad company before February 17, 1870, there were afterwards returned by the company, and cancelled and destroyed by the county, bonds payable in five years to the amount of $100, and bonds payable in fifteen years to the amount of $3000, leaving the excess issued $67,350.

Among the records of the county court was a register, open to public inspection, in which were registered all the bonds as they were delivered.

The coupons on all the bonds were paid by the county up to and including January 1, 1877. The county also paid, before July 1, 1877, all or nearly all the bonds payable in five years, as well as five bonds of $100 each payable in ten years. The other bonds have not been paid.

The court, against the defendant's objection, admitted testimony of the plaintiff that at various dates from February 1, 1870, to July 9, 1875, he purchased, before maturity and for value, the bonds and coupons sued on. These consisted mostly of bonds payable in ten years to the amount of $9000, being some of those delivered to the railroad company on February 17, 1870, and the unpaid coupons annexed; and of coupons for $1380, detached from some of the bonds payable in twenty years, which had been delivered to the railroad company on March 22, 1870. Payment of the bonds and coupons held by the plaintiff was demanded by him on January 1, 1879, and refused by the county.

Upon a bill filed May 12, 1875, by taxpayers of the county against the county court, the railroad company, and various bondholders by name (not including the present plaintiff), the Circuit Court of the county, on January 24, 1876, adjudged that the issue of bonds beyond $250,000 was unlawful and void, and that the county court be restrained by injunction

from levying any tax to pay the excess of $67,350, or interest thereon; and on March 30, 1876, the decree was affirmed by the Court of Appeals. *Daviess County Court* v. *Howard*, 13 Bush, 101.

The defendant moved the court to instruct the jury to find for the defendant. But the court overruled the motion; and, at the plaintiff's request, instructed the jury that if they believed that the plaintiff purchased the bonds and coupons sued on, before their maturity and for value, and without notice that more than $250,000 of bonds had been issued by the defendant, the law was for the plaintiff; and that the plaintiff, before purchasing the bonds, was not bound to examine the records of the county court, and cannot be presumed to have known what the records contained when he made the purchase. The defendant excepted to these rulings and instructions, and, after verdict for the plaintiff, sued out this writ of error.

Mr. J. D. Atchison for plaintiff in error. *Mr. George W. Jolly* filed a brief.

Mr. J. Hubley Ashton for defendant in error. *Mr. James Speed* and *Mr. P. B. Muir* were with him on the brief.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

The county court has no power to subscribe for stock in the railroad corporation, or to issue bonds therefor, except as authorized by statute. The statute authorized the county court to subscribe for such an amount of stock only, as should be fixed and proposed by the commissioners named in the statute, and be approved by the vote of a majority of the voters of the county; and the authority of the county court, either to levy taxes, or to issue bonds, was limited to the amount so proposed and voted. That amount was $250,000. The county court therefore had no authority to issue bonds for a greater amount, and any bonds issued in excess of that amount were unlawful and void.

By the statute, the bonds were to be in such sums, and pay-

able at such times, as the county court should determine. The county court ordered that the bonds should be executed and made payable, $50,000 in five years, $50,000 in ten years, $75,000 in fifteen years, and $75,000 in twenty years, and that the bonds should be signed by the judge and the clerk of the county court, and have the seal of the county impressed on each. Notwithstanding this, bonds so signed and sealed were issued of each class to a larger amount, amounting in all to $320,450, showing, after deducting bonds returned and cancelled, an excess of $67,350. To the extent of this excess, the bonds were invalid, and the county is liable upon bonds to the amount of $250,000 only. It does not deny its liability to that amount.

Then comes the question which of the bonds are valid and which invalid. We can have no doubt that the test is which were first delivered, if that can be ascertained, and without regard to the classification of bonds according to times of payment in the order of the county court; for, as the county court was authorized to determine at what time the bonds should be payable, any one, taking a bond signed by the presiding judge and the clerk and bearing the seal of the county, had the right to presume that it was valid, provided the county court had not already issued bonds to the amount limited by the statute and by the vote.

The certificate of the judge of the county court upon the back of each bond, that it was issued as authorized by the statute and by an order of the county court in pursuance thereof, cannot estop the county to deny that the particular bond is void because the county court, at the time of issuing it, had exhausted the power conferred by the act of the legislature and the vote of the people. The certificate is not a recital in the bond. It is not the act of the county court, is not under its seal, nor signed by its clerk; but is simply the certificate of the person holding the office of judge of that court. Neither the statute, nor the vote of the people, nor the order of the county court, empowered him to make such a certificate, or to determine the question whether the county court had exceeded the power conferred upon it. An officer's certificate

of a fact which he has no authority to determine is of no legal effect. *Dixon County* v. *Field*, 111 U. S. 83.

Nor can the payment of interest on all the bonds have the effect of ratifying bonds issued beyond the lawful limit; for a ratification can have no greater force than a previous authority, and the county cannot ratify what it could not have authorized. *Marsh* v. *Fulton County*, 10 Wall. 676.

The necessary consequence is that the court below erred in instructing the jury that the plaintiff was entitled to recover on all the bonds and coupons sued on, if he purchased them before their maturity and for value, and without notice that more than $250,000 of bonds had been issued by the defendant. *Merchants' Bank* v. *Bergen County*, 115 U. S. 384.

The judgment must therefore be reversed, and the case remanded, with directions to set aside the verdict and order a new trial. What part of his bonds and coupons the plaintiff may enforce against the county may depend upon further evidence of the exact dates of the delivery and the purchase of the several bonds, that may be introduced upon another trial of this case, or perhaps in some other suit to which all the bondholders may be made parties, and therefore no opinion is expressed upon that question.

Judgment reversed.

PHILLIPS & Another, Executors, *v.* NEGLEY.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued March 25, 26, 1886.—Decided April 12, 1886.

Final judgments at law cannot, by proceedings taken after the close of the term at which they were entered, be reversed or annulled for errors of fact or law by the court which rendered them; except that clerical mistakes, and such mistakes of fact not put in issue or passed upon as may be corrected by writ of error *coram vobis* (or on motion in place of that writ where such practice prevails), and a mistake in the dismissal of a cause, may be corrected after that time: the same rule applies in equity, excepting, further, the right to take jurisdiction of bills for review.

Statement of Facts.

The appropriate remedy to set aside or enjoin the execution of judgments at law, wrongfully obtained, is by bill in equity.

So far as the rule prevails in Maryland that judgments may, at a term subsequent to that at which they were entered, be amended in essential matters, reversed, or annulled by the court which rendered them, that rule, whether founded on a construction of the Maryland statute of 1787 by the highest court of the State, or on an interpretation of the common law, is not binding on the courts of the United States in the District of Columbia.

Error to review an order vacating a judgment. After the cause was docketed here plaintiff in error died, and his executors were admitted to prosecute the writ of error.

The facts material to a determination of the questions arising in the cause were as follows:

Philip Phillips sued the defendant Negley, in the Supreme Court of the District of Columbia, on August 29, 1874, to recover $4368, alleged to be due upon a certain order in writing, signed by Simon Witkowski and by the defendant, as attorney for Mrs. Witkowski, addressed to Charles F. Peck and Charles E. Hovey, and by them accepted, payable out of money received by them from the United States, arising from a judgment in the Court of Claims in favor of Witkowski. A copy of the order was attached to the declaration.

Process was served personally on the defendant on the same day.

On October 26, 1874, Negley filed an affidavit of defence, denying his liability, on the ground that the order was signed by him only as the agent and on behalf of Mrs. Witkowski; alleging that the plaintiff was not in fact holder of the same for value; and denying notice of nonpayment, and any indebtedness whatever.

On May 3, 1877, the plaintiff joined issue on these pleas; and on April 3, 1879, the defendant not appearing, a jury was called, who found a verdict for the plaintiff for the sum demanded, with interest, and judgment was rendered thereon.

On September 4, 1882, the defendant filed his motion "to vacate the judgment and set aside the verdict entered herein *ex parte* on the 3d day of April, 1879, because of irregularity, surprise, fraud and deceit in the procurement of said verdict and judgment, and the negligence of defendant's attorney, the

particulars of which appear in the affidavit of the defendant filed herewith and in the record and papers on file in this case."

In support of this motion the affidavits of the defendant Negley and of Richard Harrington were filed. In that of the defendant he denied his personal liability on the order, and said that when served with process in the cause he was temporarily in Washington, being at the time and always since a resident of Pittsburgh; that he employed Harrington as his attorney and filed his affidavit of defence, and received no further notice or information in reference to the suit from the fall of 1874 until about July 26, 1882, when he was served with process in a suit brought on the judgment in Allegheny County, Pennsylvania; that after he filed his affidavit of defence in the original suit, that is, from October 26, 1874, the plaintiff "seemed to have abandoned the case, and thereby to mislead affiant's attorney;" that the plaintiff took no notice of the plea until May 3, 1877, when he joined issue, but gave no notice of trial; that in the meantime, without defendant's knowledge, Harrington had removed from the city of Washington, as was well known to the plaintiff and his counsel, leaving the defendant without an attorney; that on April 3, 1879, without any notice to the defendant, the case was called for trial, and in his absence the plaintiff, with knowledge that the defendant was ignorant of the proceedings, called for a jury, and without other proof than the production of the order sued on, procured the verdict and obtained the judgment thereon, and that by reason of the premises the said proceedings and judgment are a fraud upon him.

Harrington stated in his affidavit that he understood that the plaintiff had abandoned his suit, and that he believed he so informed his client, the defendant, and that he, Harrington, removed from the District of Columbia in March, 1875, and had not since resided or practised law therein, and that on such removal he undertook to notify all his clients, but having considered this cause at an end by reason of the plaintiff's failure to join issue or take action on the plea therein, as required by the rules of the court, he did not notify the defendant, and that the plaintiff and his attorney well knew, when said cause was

set down for trial, that the affiant had removed to Dover, Delaware.

Notice of this motion was served upon the plaintiff in the judgment, who appeared and filed counter affidavits of himself and of his attorney, William F. Mattingly. The latter stated that he mailed notices of the trial of the issues in the action for the May Term, 1877, in due time, to what he understood to be the post-office address both of Harrington and of the defendant, and that the cause stood for trial from thence until the January Term, 1879. The plaintiff, in his affidavit, denied all charges of fraud, and said that on the trial of the action the verdict was taken upon testimony showing that, after the delivery to the plaintiff of the order sued on, the defendant obtained possession of the fund out of which the same was to have been paid, and failed to make the proper application of the same.

On December 2, 1882, the Supreme Court of the District, holding a special term and Circuit Court, entered the following order:

"Philip Phillips, Pl'ff,
v.
James S. Negley, Def't. } At Law. No. 12,890.

"This cause coming on to be heard upon the defendant's motion to vacate the judgment and set aside the verdict entered herein *ex parte* on the 3d day of April, 1879, because of irregularity, surprise, fraud, and deceit, and the same having been argued by counsel on both sides, and duly considered, it is considered by the court that said verdict and judgment be, and the same are hereby, vacated, set aside, and for nothing held, and a new trial granted."

From this order an appeal was taken to the court in general term, December 9, 1882, and on February 15, 1883, the defendant moved the court to dismiss the appeal, on the ground that an appeal would not lie from such an order made at the Circuit Court or special term.

The proceedings in general term resulted in the following order entered February 19, 1883:

Argument for Defendant in Error.

"Now come here as well the plaintiff as the defendant, by their respective attorneys, whereupon, because it appears to the court here that there is no error in the record and proceedings of the special term, therefore, the court remands the case to the special term, there to be proceeded with as if no appeal had been taken from its order of December 2, 1882, which appeal is hereby dismissed with costs, to be taxed by the clerk. The plaintiff gives notice that he will prosecute a writ of error, and the penalty of his supersedeas bond is fixed at $500."

To reverse these proceedings and orders this writ of error was prosecuted.

Mr. John Selden and *Mr. W. Hallett Phillips* for plaintiff in error.

Mr. Job Barnard for defendant in error. *Mr. James S. Edwards* was with him on the brief.

A writ of error will not lie to review an order granting a new trial. *Ins. Co.* v. *Barton*, 13 Wall. 603; *Newcomb* v. *Wood*, 97 U. S. 581; *Railway Co.* v. *Heck*, 102 U. S. 120. If the order is subject for review it was one within the jurisdiction of the court and proper to be made. *Harris* v. *Hardeman*, 14 How. 334; *Herbert* v. *Rowles*, 30 Maryland, 271, 278; *Stacker* v. *Cooper County*, 25 Missouri, 401; *Millspaugh* v. *McBride*, 7 Paige, 509. It was entirely irregular under the rules of the Supreme Court of the District to file a joinder of issue and note of issue, in the absence of defendant and his attorney, and knowing of such absence; with no permission from the court, and in the absence of a notice of trial. We desire to call the attention of the court to these rules.*

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* 31. *Replication, &c.*—"After the plea filed and served, the plaintiff shall reply, and after replication filed, the defendant shall rejoin, and so on till issue is joined, within ten days after the last pleading filed, excluding the day of such filing; otherwise, on motion and notice thereof the suit may be dismissed, or judgment taken by default, according as the failure is by the plaintiff or defendant."

42. *Notice of trial.*—"At any time after issue joined, and at least ten days before the sitting of the court at which the cause stands for judgment or trial, either party may give notice of trial."

Argument for Defendant in Error.

The action of the court below was in accordance with what we understand to be the settled law and practice of this court. *Bronson* v. *Schulten*, 104 U. S. 410, when taken in connection with the facts in that case, is no authority against it: and the whole current of previous authority sustains the jurisdiction. *Walden* v. *Craig*, 9 Wheat. 576; *Boyle* v. *Zacharie*, 6 Pet. 648; *Pickett* v. *Legerwood*, 7 Pet. 144, 147; *Harris* v. *Hardeman*, above cited. The rulings in the Circuit Courts are the same. *Sheepshanks* v. *Boyer*, Baldw. 462; *Den* v. *McAllister*, 4 Wash. C. C. 393; *Albree* v. *Johnson*, 1 Flippin, 341; *Dawson* v. *Daniel*, 2 Flippin, 301. In any event the courts of the District of Columbia possess such power. The laws of Maryland previous to the cession are in force in the District, and among those laws was the act of 1787, ch. 9, § 6, which, as construed by the courts of Maryland, undoubtedly conferred upon the courts of Maryland the jurisdiction exercised in this case. See *Tiernan* v. *Hammond*, 41 Maryland, 548. The courts of the District so understood, and practised upon it. *Sherburne* v. *King*, 2 Cranch, C. C. 205; *McCormick* v. *Magruder*, 2 Cranch, C. C. 227; *Union Bank* v. *Crittenden*, 2 Cranch, C. C. 238; *Ault* v. *Elliott*, 2 Cranch, C. C. 372; *Ring-*

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52. "If the defendant fail to appear when the cause is called for trial, the plaintiff may have him called, and take a judgment by default."

60. *Motions for a new trial.*—"Motions for a new trial, which are designed to set aside a verdict and procure a new trial of a case, are of two kinds, to wit:

"1. Those which are grounded upon alleged error of law by the justice presiding, &c.

"2. Those which are grounded upon the following, and similar allegations:

1. "That the party moving for the new trial had no notice, and did not appear at the trial;

2. "Misbehavior of the successful party;

* * * * * *

6. "That the verdict was obtained by surprise, &c."

"These motions are addressed to the discretion of the Justice presiding at the trial, and are not appealable."

90. *Motion to vacate judgment.*—"This motion will not be entertained, if made after the defendant has taken any fresh step after the knowledge of the irregularity, or surprise, or fraud, or deceit complained of; nor can it be made after the execution executed, unless defendant had no notice of the judgment," &c.

gold v. *Elliott*, 2 Cranch, C. C. 462; *Reiling* v. *Bolier*, 3 Cranch, C. C. 212.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

There appears to be an ambiguity, if not an inconsistency, in the terms of the order or judgment of the general term. It affirms that there is no error in the record and proceedings of the special term, but does not affirm its order, which was appealed from, but in fact dismisses the appeal, as though it had no jurisdiction either to affirm or reverse the order brought up by the appeal. Interpreting the judgment of the general term by the opinion of the learned judge, who spoke for the court, *Phillips* v. *Negley*, 2 Mackey, 236, we must infer that it was intended to dismiss the appeal for want of jurisdiction to entertain it, on the ground that the order of the special term, vacating its own judgment, rendered at a previous term, was not only within the power of that court, but was so purely discretionary that it was not reviewable in an appellate court. The same consideration is urged upon us as a ground for dismissing the present writ of error for want of jurisdiction in this court, it being alleged that the order of the Supreme Court of the District at special term is one not only within the discretion of that court, but that, as it merely vacates a judgment for the purpose of a new trial upon the merits of the original action, it is not a final judgment, and, therefore, not reviewable on writ of error. If, properly considered, the order in question was an order in the cause, which the court had power to make at the term when it was made, the consequence may be admitted, that no appellate tribunal has jurisdiction to question its propriety; for, if it had power to make it, and it was a power limited only by the discretion of the court making it, as in other cases of orders setting aside judgments at the same term at which they were rendered, and granting new trials, there would be nothing left for the jurisdiction of an appellate court to act upon. The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on

the other hand, the order made was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court. The question of the jurisdiction of this court to entertain the present writ of error, therefore, necessarily involves the jurisdiction of the Supreme Court of the District, both at special and general term, and the nature and effect of the order brought into review, so that the question of our jurisdiction is necessarily included in the question of the validity of the proceeding itself.

The legal proposition involved in the judgment complained of, and necessary to maintain it, is, that the Supreme Court of this District at special term has the same discretionary power over its judgments, rendered at a previous term of the court, without any motion or other proceeding to that end made or taken at that term, to set them aside and grant new trials of the actions in which they were rendered, which it has over judgments, when such proceedings are taken during the term at which they were rendered; and that this being true, the proceeding and order of the court, in the exercise of this jurisdiction and discretion, cannot be reviewed on appeal or writ of error.

This proposition, it is argued, may be deduced from the inherent and implied powers of all courts of record, according to the course of the common law; and, if that fails, is supplied by the law of Maryland, as to the Supreme Court in the District of Columbia, adopted by the act of Congress of 27th February, 1801. 2 Stat. 103.

The first branch of this proposition is conclusively negatived for this court, in regard to the powers of the courts of the United States, by the decision in *Bronson* v. *Schulten*, 104 U. S. 410, 415, which is an authority directly upon the point. It was there said by Mr. Justice Miller, speaking for the court:

"In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be

exceptions in the State courts they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court. But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding, by a writ of error or appeal, as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court."

The opinion then notices an exception to this rule founded upon the common law writ of error *coram vobis*, by which errors of fact might be corrected, limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert*, and the like, or error in the process through the fault of the clerk; for which writ, as was said in *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144, in practice, a motion is now substituted, heard in a summary manner upon affidavits. And it is then added, that this remedy by motion has been extended in some States so as to embrace some of the cases where equitable relief had been administered by courts of chancery. "This practice," it was said, "has been founded in the courts of many of the States on statutes which conferred a prescribed and limited control over the judgment of a court after the expiration of the term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the

court over its own judgments, and to avoid the expense and delay of a formal suit in chancery." But it is added: "The question relates to the *power* of the courts, and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts." 104 U. S. 417. Although the opinion also shows that, upon the facts of that case, the action of the Circuit Court in vacating its judgment after the term could not be justified upon any rule authorizing such relief, whether by motion or by bill in equity, nevertheless the decision of the case rests upon the emphatic denial of the power of the court to set aside a judgment upon motion made after the term and grant a new trial, except in the limited class of cases enumerated as reached by the previous practice under writs of error *coram vobis*, or for the purpose of correcting the record according to the fact, where mistakes have occurred from the misprision of the clerk. We content ourselves with repeating the doctrine of this recent decision, without recapitulating previous cases in this court, in which the point has been noticed, for the purpose of showing their harmony. It has been the uniform doctrine of this court. "No principle is better settled," it was said in *Sibbald* v. *The United States*, 12 Pet. 488, 492, "or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes; *Cameron* v. *McRoberts*, 3 Wheat. 591; *Bank of Kentucky* v. *Wistar*, 3 Pet. 431; or to reinstate a cause dismissed by mistake; *The Palmyra*, 12 Wheat. 1; from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error *coram vobis* at law, are exceptions which cannot affect the present motion." And see *Bank of the United States* v. *Moss*, 6 How. 31, 38; *Schell* v. *Dodge*, 107 U. S. 629.

It is equally well established by the decisions of this court

that the appropriate remedy for relief against judgments at law, wrongfully obtained, is by a bill in equity, and the cases in which that remedy is applicable have been clearly defined. That rule was formulated by Chief Justice Marshall in a case arising in this District, of *Marine Insurance Company of Alexandria* v. *Hodgson*, 7 Cranch, 332, and more tersely stated by Mr. Justice Curtis in *Hendrickson* v. *Hinckley*, 17 How. 443, 445, as follows: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defence of which he could not avail himself at law, because it did not amount to a legal defence, or had a good defence at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents." This rule was supported by *Creath* v. *Sims*, 5 How. 192, and *Walker* v. *Robbins*, 14 How. 584, and was followed in *Crim* v. *Handley*, 94 U. S. 652; in *Brown* v. *County of Buena Vista*, 95 U. S. 157; and in *Embry* v. *Palmer*, 107 U. S. 3; where it was considered and applied in a case in which the Supreme Court of Errors of Connecticut, having enjoined proceedings in that State upon a judgment of the Supreme Court of this District for causes not sufficient in law to have authorized the latter to set it aside, the judgment of the Connecticut Court was reversed, although no question was made of the right of that court to entertain the jurisdiction to enjoin proceedings upon the judgment in question, equally with that of the court by which it was rendered. This independent jurisdiction in equity over judgments at law, by implication, negatives the remedy at law in the same courts where they are rendered, for the same causes, because that equitable jurisdiction is resorted to only because there was no adequate remedy at law, the jurisdiction of the courts of law over the cause and the parties having been exhausted when the judgment became final.

But it is argued that the power exercised in the present instance is vested in the Supreme Court of this District by virtue of the laws of Maryland in force February 27, 1801, adopted by the act of Congress of that date.

The statute of Maryland supposed to confer this power is an

act of 1787, ch. 9, 2 Kilty Laws, Thomp. Dig. 173, relating to continuances, the sixth section of which is as follows:

"In any case where a judgment shall be set aside for fraud, deceit, surprise, or irregularity in obtaining the same, the said courts respectively may direct the continuances to be entered from the court when such judgment was obtained, until the court such judgment shall be set aside, and may also continue such cause for so long a time as they shall judge necessary for the trial of the merits between the parties, not exceeding two courts after such cause has been reinstated, unless, &c."

This statutory provision, it will be observed, is entirely silent as to the mode according to which a judgment may be set aside at a subsequent term, whether by a writ of error *coram vobis* or *coram nobis*, bill in equity, or other procedure, and does not, either in express terms or by any necessary implication, provide that it may be done by a motion and summary proceedings thereon; and also, that it seems to proceed upon the idea that continuances should regularly be entered to show that the proceeding, if at law, to set a judgment aside, in theory at least, ought to originate at the same term at which the judgment was rendered.

The remedy by writ of error *coram nobis* continued in force and in use in Maryland. *Hawkins* v. *Bowie*, 9 G. & J. 428, 437; *Bridendolph* v. *Zeller's Executors*, 3 Maryland, 325. And in the first of these cases it was held that a reversal of a judgment upon such a writ was a final judgment from which an appeal would lie. The court said: "Now, if reversing the original judgment and awarding costs to the plaintiff in error in this proceeding in error *coram nobis*, was not so far final as to fall within that class of judicial acts from which an appeal will lie to this court, we cannot see the reason, nor can we well conceive of any remedy the parties would have if the county courts were to undertake to vacate and annul all the judgments in their records." This remark equally applies whether the result is reached by this writ or by the more summary mode of a motion. It was so decided in *Graff* v. *Merchants' & Miners' Transportation Co.*, 18 Maryland, 364, and *Craig* v. *Wroth*, 47 Maryland, 281. In the last-named case, it was said by the

court: "The power to set aside judgments upon motion for fraud, deceit, surprise, or irregularity in obtaining them, is a common law power *incident* to courts of record in this State, and was not *conferred* upon them by the act of 1787, ch. 9, sec. 6, which is partially but not fully embodied in section 38, art. 75 of the Code. This legislation *assumes* that the power resides in the courts, and provides for the entering of continuances when it is put in force. In deciding such motions made after the term is past, the court acts in the exercise of its *quasi* equitable powers, and will, therefore, properly consider all the facts and circumstances of the case, and require that the party making the application shall appear to have acted in good faith and with ordinary diligence; relief will not be granted when he has knowingly acquiesced in the judgment complained of, or has been guilty of *laches* and unreasonable delay in seeking his remedy." This seems to be the settled doctrine of the Maryland courts, as shown by a series of decisions, all of which, however, have been made since the cession of the present territory within the District of Columbia. *Kemp* v. *Cook*, 18 Maryland, 130; *Montgomery* v. *Murphy*, 19 Maryland, 576. In *Kemp* v. *Cook*, the court said: "The power of setting aside judgments upon motion is a common law power incident to courts of record, and exercised usually under restraints imposed by their own rules and rarely after the term in which the judgment was rendered." "The judgment records of the State are the highest evidences of debt known to the law; they are presumed to have been made up after the most careful deliberation, upon trial or hearing of both parties. To permit them to be altered or amended without the most solemn forms of proceeding would be contrary to law and good policy."

It appears also from the case of *Kearney* v. *Sascer et al.*, 37 Maryland, 264, that the jurisdiction of the Court of Chancery, upon a bill in equity, to grant relief against a judgment on equitable grounds, constitutes part of the remedial system in that State, notwithstanding the practice to set aside judgments on motion made after the term; and in that case the court quoted and adopted the rule regulating the measure of relief, and the circumstances justifying the court in granting it, as

declared by Chief Justice Marshall in *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332, 336.

It thus appears that in Maryland, prior to 1801, the only statute in existence referring to the subject, while it assumes the existence of a power in the courts to set aside their judgments, after the term in which they were rendered, for certain causes, does not specify the modes in which that relief may be administered, and does not enumerate a summary proceeding by motion as one of them; that the cases in which that relief has been administered in that way have all arisen and been decided since the date of the cession to the United States of the territory constituting the District of Columbia; that these decisions are based, not upon the statute as creating or conferring such power, but upon an interpretation of the common law by which all courts of record are assumed to be possessed of it, as adherent in and incident to their constitution as courts of justice; that, in whatever form, the proceedings are regarded, not as interlocutory steps in the original cause, but as independent applications to a legal discretion governed by fixed rules, and, therefore, terminating in final judgments, subject as in other cases to review or error in a court of appeal; and that the jurisdiction of chancery by a plenary suit in equity is not excluded, but is maintained and exercised in conformity with the general principles of equity jurisprudence.

It follows from this statement that these decisions of the Maryland courts, being founded upon general principles, and made since the organization of the District of Columbia, are not binding upon the courts of the District as authorities, though entitled to all the respect due to the opinions of the highest court of the State; a rule acted upon in this court in *Ould* v. *Washington Hospital*, 95 U. S. 303, and approved in *Russell* v. *Allen*, 107 U. S. 163, 171. We feel at liberty, therefore, to follow our own convictions as to the power of the courts of the District over their judgments; and are of opinion, and so decide, that, after the term at which they were rendered, the power of the court over the parties and over its record remains only in the excepted cases already noticed, when, on motion, it may be purged of clerical errors, or the judgment reversed by

proceedings for errors in fact, in analogy to the practice in cases of writs of error *coram vobis*, unless it is invoked by a formal bill in equity upon grounds recognized as furnishing a title to relief. We are, therefore, of opinion that the Supreme Court of the District, both at special and general term, in entertaining and granting the motion to set aside the judgment in the present case, committed error, and the proceedings and judgment thereon are

Reversed, and the cause remanded, with directions to dismiss the motion of the defendant, but without prejudice to his right to file a bill in equity.

JACKSON & Another *v.* LAWRENCE & Others.

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

Submitted April 1, 1886.—Decided April 12, 1886.

L made and delivered to W his promissory note for $1300 payable in ninety days, and a deed of a tract of land absolute on its face. It was orally agreed between them that the deed was executed as security for the payment of the note, and that, if the note was not paid at maturity, W was authorized to sell the land. The note not being paid at maturity W, with the knowledge and assent of L, sold and conveyed the land to T and applied the proceeds to the payment of the debt. After the completion of the contract and execution of the deed, but before its delivery to T, a creditor of L who had recovered judgment against him, levied on this tract of land to satisfy the judgment, and caused it to be sold. The purchaser at the sheriff's sale after receiving his deed, filed a bill in equity against the heirs and devisees of T, praying to be admitted to redeem the land on payment of the note. *Held:* (1) That the transaction was in equity a mortgage: (2) That parol evidence was admissible to show when the power of sale in the mortgage became absolute: (3) That W had an absolute power of sale when the conveyance was made to T, the execution of which carried the land free from the mortgage.

Bill in equity to redeem from a mortgage. The case is stated in the opinion of the court.

Mr. Aaron S. Everest, *Mr. T. J. Johnston*, and *Mr. H. M. Jackson* for appellants.

Mr. B. F. Lucas for appellees.

Mr. Justice Woods delivered the opinion of the court.

The appellants filed the bill in the Circuit Court. The following facts are shown by the record. One Alvin N. Lancaster being the owner in fee simple of certain lands in Worth, Nodaway and Atchison Counties, in the State of Missouri, conveyed them on September 15, 1875, to Edward L. Wells by deed absolute on its face. At the time the deed was executed Lancaster made and delivered to Wells his promissory note for $1300, payable in ninety days. There was at the time a verbal understanding between them that the deed was made as security for the payment of the note, and that if the note was not paid at maturity Wells should have the right to sell the land to whom he pleased. The note was not paid at maturity. Wells pressed Lancaster for payment, and on his failure to pay, about January 5, 1876, contracted to sell the lands to George C. Tallman, and executed to him a quit-claim deed of that date therefor, which, however, was not delivered until January 20, 1876.

On January 15, 1876, the plaintiffs in this suit began, by attachment, in the Circuit Court of Worth County, Missouri, an action against Lancaster, in which the lands in controversy were seized, and on October 24, 1876, they recovered judgment against him for $895. On February 21, 1878, executions were issued on the judgment to the sheriffs of the counties where the lands lay, and the lands were sold by virtue thereof, and purchased by the plaintiffs, to whom deeds therefor were made. George C. Tallman, the vendee of Wells, died on May 5, 1880, and the defendants in the present suit were his devisees of the lands above mentioned. Afterwards, on January 31, 1882, the plaintiffs filed a bill in this case, in which they alleged that the deed of Lancaster to Wells was in effect a mortgage executed to secure the note made by the former to the latter. They tendered to the defendants the amount due on the note, with

all the taxes paid by the latter on the lands, and prayed for a decree permitting them, as purchasers of Lancaster's equity of redemption, to redeem the lands, and for general relief.

The defendants answered, that at the time George C. Tallman purchased the lands, and at the time of the delivery of said deed, which they averred to be on January 5, 1876, he had no notice of any claim of the plaintiffs against Lancaster, or that the title of Wells to the lands in controversy was other or different from the absolute title which the deed from Lancaster to him purported to convey, and that Tallman intended to purchase, and did purchase, the absolute title thereto, for which he paid a full and valuable consideration.

On final hearing the Circuit Court dismissed the bill, and the plaintiffs appealed.

There is no conflict in the testimony, or disagreement between the parties touching the terms on which Lancaster conveyed the lands in controversy to Wells. Lancaster, Wells, and one Jordan, who acted as agent for Wells in the transaction, all give the same account. The deed was executed to secure the payment of the note made by Lancaster to Wells for $1300, due in ninety days, with the distinct agreement that if the note was not paid when due, Wells should be authorized to sell the land. No other account is given of this transaction by any witnesses.

The deed from Lancaster to Wells was, therefore, in effect a mortgage, for it is settled that an absolute deed intended by the parties as a security for a debt is in equity a mortgage. *Hughes* v. *Edwards*, 9 Wheat. 489; *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201; *Morris* v. *Nixon*, 1 How. 118; *Peugh* v. *Davis*, 96 U. S. 332; *Teal* v. *Walker*, 111 U. S. 242; *Brant* v. *Robertson*, 16 Missouri, 129; *Worley* v. *Dryden*, 57 Missouri, 226; *O'Neill* v. *Capelle*, 62 Missouri, 202. Is is also settled that evidence written or oral may be admitted to show the real character of the transaction. *Russell* v. *Southard*, 12 How. 139; *Babcock* v. *Wyman*, 19 How. 289; *Peugh* v. *Davis*, *ubi supra*; *Brick* v. *Brick*, 98 U. S. 514.

There being no dispute, therefore, in relation to the terms of the agreement between Lancaster and Wells, on which the

deed of the former to the latter was executed and delivered, it is to be read in equity precisely as if the agreement were set out therein, and is to be considered a mortgage to secure the payment of the note made by Lancaster to Wells according to its tenor, with power to Wells in default of payment to sell the mortgaged premises.

This condition must be taken as a whole; no part of it can be rejected. The authority to Wells to sell the premises, in default of payment of the note, was just as much an element in the condition as the right of Lancaster to a reconveyance upon payment of the note. The right of Wells to sell the premises in default of payment was a right of property which he had bought and paid for, which could not be impaired by an attachment levied on the property by Lancaster's creditors. Their attachment was as much subject to the right of Wells to sell in default of payment of the note, as it would have been to his right to foreclose a mortgage made in the usual form. After the attachment was levied Wells exercised the right to sell. He sold, as the record abundantly shows, with the knowledge and concurrence of Lancaster. The property brought enough to pay the debt, and no more. It is not disputed that the sale was fair and *bona fide*. It, therefore, cut up by the roots all title of Lancaster, and all claim of the plaintiffs acquired by their attachment upon the lands in question, and left neither in them nor Lancaster any right to redeem. The vendee of Wells stands upon the same ground as if he had bought the premises at a foreclosure sale, and his title is indefeasible.

This conclusion does not depend upon the fact whether or not Tallman purchased with or without notice of the verbal condition under which the deed from Lancaster to Wells was executed. The rights of Lancaster and those claiming under him are not strengthened by the fact that the condition was a verbal one. They are in no better position than if the condition had been incorporated in the deed and put upon the public records, thereby giving constructive notice to all the world. In the latter case it is clear that Wells, having power to sell, could sell to whomsoever he chose. Therefore, whether

the vendee had notice of the condition would be immaterial. But the proof in the record that Tallman had no knowledge or notice of the condition, and that when he bought he supposed the deed was what it purported to be, an absolute conveyance, is clear and positive.

The case, therefore, in all its elements, falls within the rule laid down by the Supreme Court of Missouri in *Wilson* v. *Drumrite*, 21 Missouri, 325. In that case a deed absolute on its face was executed by Wilson to Drumrite, but was in fact given as a security for a debt. There was a verbal agreement between Wilson and Drumrite that the latter should reconvey if the debt was paid when due; in case of default Drumrite was authorized to sell the land to enforce payment of his debt. Wilson failed to pay the debt when due, and Drumrite sold part of the land to a purchaser without notice. The court, laying stress upon the fact that the vendee had no notice of the condition, held that the sale was valid, but that Drumrite must account to Wilson for the land sold, and must reconvey the residue.

In the present case, even under the rule laid down by the Supreme Court of Missouri, there is no right of redemption.

Upon the whole record, therefore, the decree of the Circuit Court dismissing the bill was right.

Decree affirmed.

ZEIGLER *v.* HOPKINS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Submitted March 1, 1886.—Decided April 12, 1886.

A statute of California authorized the opening of a street in San Francisco, to be known as Montgomery Avenue, the cost and expenses to be assessed on certain specified lots in proportion to the benefits accruing therefrom; and provided that when a majority in frontage of the owners of these benefited lots should petition certain officials for the opening, those officials should

organize into a board and proceed to open it and to apportion the cost in the manner pointed out by the statute. A petition being presented to the designated officials, they organized, and certified that the petition had been subscribed by the owners of the requisite amount of frontage, and proceeded to lay out the street and apportion the costs and expenses among those benefited in the manner provided by the statute. They reported their action to the county court as required by the statute, and the report was confirmed by the court. A tax was thereupon levied in the ordinary way in 1878–9 to meet the portion of the costs and expenses payable that year by the terms of the statute. H, an owner of a lot thus assessed and levied on, declining to pay, the land was seized and sold for the default to Z, who thereupon brought ejectment to recover possession. *Held:* That on the trial of this action H was not estopped by the acceptance of the petition by the officials and their certificate upon it, or by the judgment of the county court confirming their report, from showing that the petition for the opening was not signed by the owners of the requisite amount of frontage.

Mulligan v. *Smith*, 59 Cal. 206, approved and applied.

The court below having found that the property in dispute is worth $5000, this court, on motion to dismiss, disregards affidavits that it is worth less, although, taken by themselves, the affidavits show that it may be worth less than that sum.

Ejectment. Motion to dismiss. The case is stated in the opinion of the court.

Mr. Samuel Shellabarger, *Mr. Jeremiah M. Wilson*, *Mr. Daniel Rogers*, *Mr. E. F. Preston* and *Mr. Philip G. Galpin*, for plaintiff in error.

Mr. D. M. Delmas and *Mr. A. H. Garland* for Rosenbaum.

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

This was an action of ejectment brought by Henry Zeigler for a lot in the city and county of San Francisco, and his right to recover depends on the validity of a sale of the property for nonpayment of a tax levied and assessed under "an act to open and establish a public street in the city and county of San Francisco, to be called 'Montgomery Avenue,' and to take private lands therefor," approved April 1, 1872. Stat. Cal. 1871–2, 911. By that act a strip of land, particularly described, was taken for Montgomery Avenue, and the cost and expenses "incidental to the taking and opening of said avenue" were

to be assessed on certain "lots, pieces and subdivisions of land," particularly described, "in proportion to the benefits accruing therefrom to said several lots, subdivisions and pieces of land respectively, which said lands" were "declared to be benefited by the opening of said avenue." By § 5, it was provided that "whenever the owners of a majority in frontage" of the property declared to be benefited, "as said owners are or shall be named on the last preceding annual assessment-roll for the state, city and county taxes," should "petition the mayor of said city and county in writing for the opening of Montgomery Avenue," a "board of public works," to be composed "of the mayor, the tax collector, and the city and county surveyor of the city and county of San Francisco," should "proceed to organize by the election of a president." This board was to ascertain and "set down in a written report . . . the description and actual cash value of the several lots and subdivisions of land included in the land taken for said Montgomery Avenue, and the amount of damage that will be occasioned to the property along the line and within the course of said avenue." The same board was also to ascertain and "set down in a written report a description of the several subdivisions and lots of land included" in those which by the law were to be assessed, and the amount which, in the judgment of the board, "the said lot or subdivision has been or will be benefited by reason of the taking and opening of said avenue relatively to the benefits therefrom accruing to the other lots or subdivisions respectively." This report when completed was to be kept at the office of the board for thirty days open for inspection by all parties interested, and notice thereof given by publication. Any person interested who felt himself aggrieved "by the action or determination of said board, as shown in said report," was permitted to apply to the county court of the city and county of San Francisco within a limited time for a review, and from the action of the county court on such a petition an appeal could be had to the Supreme Court. If no application for review was filed in the court within the time fixed, it was made the duty of the board to submit the report to the county court with a petition that it be approved and confirmed.

The court was authorized to make or cause to be made alterations or modifications, if in its opinion necessary, and, when completed to its satisfaction, "to approve and confirm said report." When the report was approved and the action thereon had become final, the board was required to prepare and issue coupon bonds, to be known and designated as "Montgomery Avenue bonds," payable in thirty years from their date, with interest at six per cent. per annum, to the amount necessary to pay and discharge the damages, costs, and expenses incident to the taking and opening of the avenue. These bonds could be taken by the parties interested in payment of the amounts due to them respectively, or the bonds could be sold by the board and the proceeds used for that purpose. By an express provision of the act, the city and county of San Francisco was not, in any event whatever, to be liable for the payment of these bonds, and any person purchasing them, or otherwise becoming the owner thereof, was to take them "upon that express stipulation and understanding." It was, however, provided that "there shall be levied, assessed and collected, annually, at the same time and in the same manner as other taxes are levied, assessed, and collected in said city and county, a tax upon the lands," which had been declared to be benefited by the opening of the avenue, "sufficient to pay the interest upon said bonds" as it matured, and also "a tax of one per cent. upon each hundred dollars' valuation, which shall constitute a sinking fund for the redemption of said bonds." The money arising from these taxes was to be paid to the treasurer of the city and county, and by him used for the purposes intended. These taxes were to be assessed upon the "values of the respective parcels of land as fixed in the said . . . report of said board."

The case was tried in the court below without a jury, and comes here on a finding of facts, which shows that a petition, regular in form, for the opening of the avenue, was presented to the mayor of the city and county in the month of April, 1872, but which was not in fact subscribed by the owners of a majority in frontage of the land declared to be benefited "as said owners" were "named in the last preceding annual as-

sessment-roll for the state, city, and county taxes," although it purported on its face to have been so signed. After the filing of this petition, the persons at that time filling the offices respectively of mayor of the city and county, tax collector, and surveyor, annexed thereto their several certificates that the petition had been subscribed by the owners of the requisite amount of frontage. This being done, the board of public works, consisting of the mayor, tax-collector, and surveyor, organized, opened the avenue, and assessed the benefits conferred on the property declared to be benefited, for the purposes of taxation. Their report, after being left at their office for thirty days, and the requisite notice thereof given, was filed with and confirmed by the county court. The lot now in question was among those declared by the law to be benefited, and was assessed by the board for the purposes of taxation. A tax levied for the year 1878–9 upon this assessed value, to meet the annual obligations under the law, was not paid by the owner, and for this default the sale was made under which Zeigler now claims title. Upon these facts the court below gave judgment against him, and to reverse that judgment this writ of error was brought.

There is in reality but a single question presented for our consideration in this case, and that is whether, in an action of ejectment brought to recover the possession of lands sold for the nonpayment of taxes levied to defray the expenses of opening Montgomery Avenue generally, and not in obedience to an order of a court of competent jurisdiction to meet some particular liability which had been judicially established, the landowner is estopped from showing, by way of defence, that the petition for the opening presented to the mayor was not signed by the owners of the requisite amount of frontage; and this depends on whether the owner is concluded, (1), by the acceptance of the petition by the mayor and his certificate as to its sufficiency and the action of the board of public works thereunder; or, (2), by the judgment of the county court confirming the report of the board of public works.

This precise question was most elaborately considered by the Supreme Court of California in *Mulligan* v. *Smith*, 59 Cal. 206,

and decided in the negative, after full argument. With this conclusion we are entirely satisfied. It is supported by both reason and authority. The opinions of Justices M'Kee, Sharpstein, and Ross, which are found in the report of the case, leave nothing further to be said on the subject. "A petition from the owners of a majority in frontage of the property to be charged with the cost of the improvement was necessary to set the machinery of the statute in motion," and "no step could be taken under the provisions of the statute until the requisite petition had been presented." Neither the mayor nor the county court was "authorized to enter into any investigation of the frontage as represented by the petition, or to adjudicate its sufficiency, or to make any record in reference to it." "The only powers which the county court, as a court of limited jurisdiction, was authorized to exercise," were such as related to the matters contained in the report of the board of public works, and this did not include the petition.

The case has been argued here as though it was between the taxpayers and *bona fide* holders of negotiable securities issued by them or for their account; but nothing of that kind is presented by the record. It does not appear affirmatively that a bond was ever issued. But if we are to presume from the finding that after the presentation of the petition the "mayor, tax collector, and surveyor proceeded to perform the duties imposed upon the board of public works," bonds of some kind were put out, it does not appear either that they were in such a form as to make them valid in the hands of *bona fide* holders if they were in fact issued without authority, or that there are any such holders. No other questions are now to be considered than such as would arise if it appeared affirmatively on the face of the record that the tax was levied simply to raise the means to pay the members of the board their own salaries as specially provided for in the act. All we are now called on to decide is whether the presentation to the mayor of a petition, signed by the owners of less than a majority in frontage of the property to be assessed, as they were named in the last preceding annual assessment-roll, was sufficient to authorize the levy of the tax for which the lots in controversy were sold, and we have no

hesitation in saying it was not. It will be time enough to consider the rights of *bona fide* holders of "Montgomery Avenue bonds," if there be any, when a case arises which involves such questions.

It remains only to dispose of a motion which has been made by or on behalf of Albert S. Rosenbaum, who claims to be a holder of Montgomery Avenue bonds, to dismiss the case; (1), because the value of the matter in dispute does not exceed $5000; and (2), because the suit is colorable only, and got up by collusion so as to preclude a decision favorable to the holders of Montgomery Avenue bonds. Without deciding how far it is allowable for persons not parties to a suit to intervene with a motion of this kind, it is sufficient to say that we see no evidence of any improper collusion in this case. We are entirely satisfied that the suit was instituted in good faith, by real parties, for the determination of a substantial right, and that it fairly presents the questions involved. The court below found as a fact that the value of the premises in dispute exceeds $6000, and this appears on the face of the record. While the affidavits as to value presented by Rosenbaum, taken by themselves, show that possibly the property may be worth less than $5000, they are not enough to overcome the finding of the court below that it was actually worth more than that sum.

Affirmed.

CANTRELL & Another *v.* WALLICK.

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

Argued March 30, 1886.—Decided April 12, 1886.

Two patents may be valid when the second invention is an improvement on the first, and if the second includes the first, neither patentee can lawfully use the invention of the other without his consent; but a stranger, sued for infringing the second patent, cannot defend by setting up the existence of the first patent.

Two machines or devices are substantially identical when they perform substantially the same thing in substantially the same way, to obtain the same result; and they differ from each other in the sense of the patent law, when they perform different functions, or in a different way, or produce substantially different results.

Machine Co. v. *Murphy*, 97 U. S. 120, affirmed and applied.

The defendant in a suit for the infringement of a patent for an invention, who sets up prior use and want of novelty as a defence, has the burden of proof upon him to establish the facts set up beyond all reasonable doubt; and in this case the defendants have failed to show the alleged prior use even by preponderance of proof.

This was a bill in equity to restrain the infringement of letters patent. The case is stated in the opinion of the court.

Mr. John Walker Shortlidge for appellants.

Mr. Charles Howson for appellee.

Mr. Justice Woods delivered the opinion of the court.

This was a bill in equity filed by Wallick, the appellee, to restrain the infringement by Cantrell and Petty, the appellants, of letters patent granted to Wallick, dated May 25, 1875, for an "improvement in apparatus for enamelling mouldings," on an application filed October 16, 1874.

The specification stated the object of the invention to be "a rapid and economical production of enamelled mouldings." It appears from the record that the mouldings referred to are those which, after being enamelled, are gilded and used for picture and mirror frames and other like purposes. In order to prepare the moulding to receive and retain the gilding it is necessary to enamel the surface to be gilded with a composition made of glue and whiting. Long before the date of the plaintiff's application the method of doing this was by passing the moulding through a vessel containing the enamelling material, the vessel having at its opposite sides and in the same line apertures of the shape of a section of the moulding, and large enough to permit the moulding to pass through and leave a proper quantity of the enamel to pass out with and adhere to it. As early as October, 1851, a patent had been granted to Robert Marcher for an improvement in machinery

for enamelling mouldings. In Marcher's contrivance the bottom of the box or hopper which contained the enamelling composition was left open. The opposite sides of the box were made with apertures of suitable size and shape for receiving the end of the moulding, and when the end of the moulding was thrust through both the apertures the moulding formed the bottom of the box. The result was that on passing a moulding through the box its face was enamelled, but its back, which did not come in contact with the composition in the box, was not.

The means used to drive the mouldings through the box were not covered by this patent; but this was done sometimes by hand and sometimes by passing them between revolving feed-rollers. The latter became the more common method. In order to give a good enamel it was necessary to pass the moulding through the box several times.

According to the contention of the plaintiff, this was the state of the art when he invented the device covered by his patent.

The specification of the plaintiff's patent stated that in enamelling certain forms of moulding, for instance the mouldings shown in figures 2 and 3 of the drawings [page 692], feed-rollers could not be used for passing the mouldings through the Marcher box without disturbing the coats of enamel on which the upper feed-roller must bear. It then proceeded thus:

"The main aim of my invention has been to so construct an enamelling box and so form the strips of wood that feed-rollers may be employed to pass the strips through the reservoir containing the enamelling composition.

"For enamelled mouldings like Figs. 1 and 2, for instance, I prepare a strip of wood, Fig. 5, with a groove, *x*, above for receiving the upper feed-roller, and a groove, *y*, below for receiving the lower feed-roller, and then pass the strip through an enamelling box of peculiar construction, so that the rounded edges only are coated, and when these edges have received the proper number of coats I sever the strip, so as to produce either of the mouldings, Figs. 1 and 2.

"For making mouldings like Fig. 3 I prepare a strip of the

form shown by Fig. 6, so that upper and lower feed-rollers may be used to force the strip through the enamelling box.

"After the edges of the strip have been properly enamelled I

Fig. 8.

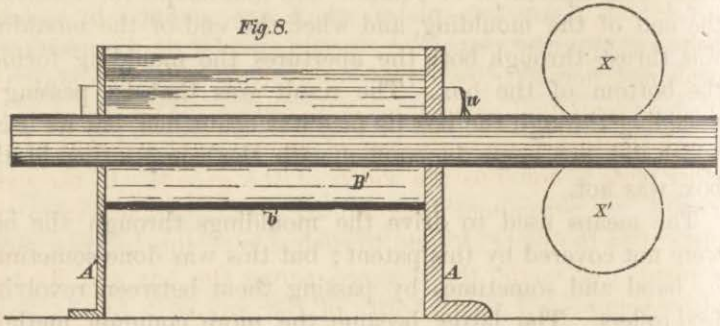

Fig. 9.

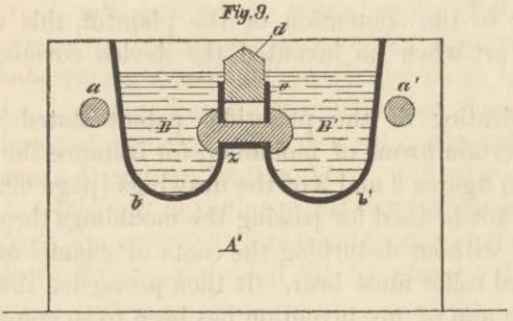

Fig. 1.

Fig. 2.

Fig. 5.

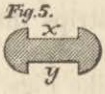

Fig. 7.

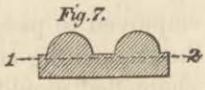

Fig. 3.

Fig. 6.

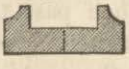

Fig. 4.

sever it in the middle, thereby producing two mouldings, like Fig. 3.

"The box by which the enamel is applied to these strips is

illustrated in the vertical section, Fig. 8, and transverse vertical section, Fig. 9, of the accompanying drawing, the box being, in the present instance, arranged for enamelling the strip, Fig. 5.

"*A* and *A'* are two plates, which are confined by suitable bolts *a a'*, two bent plates, *b b'*, forming, under the circumstances explained hereafter, two reservoirs, *B B'*, for containing the fluid or semi-fluid enamelling composition. The distance between the turned up portion, *z*, of one plate, *b*, and that of the other plate is equal to the width of the groove *y* of the strip, Fig. 5. A permanent longitudinal bar, *d*, extends from the plate *A* to the plate *A'*, and to each side of this bar is secured a plate, *e*, of metal, the distance across the bar and its two plates being equal to the width of the groove *x* of the strip, Fig. 5, against the edges of which groove the said plates bear.

"In each of the plates *A A'* there is an opening, conforming in shape and dimensions to that of the strip, Fig. 5, and these openings bear such relations to the turned up edges of the plates *b b'* and to the bar *d* that the strip, when introduced into the box, will be in the position shown in Fig. 9, so that no parts of the strip, excepting the rounded edges, are exposed to the enamelling composition. After thus passing the end of the strip of moulding through the openings in the plates *A A'* the composition may be introduced into the reservoirs *B B'*, for all avenues for the escape of the fluids are cut off by the strip itself.

"Feed-rollers *X X'* (shown in dotted lines) may be used for forcing strip after strip through the enamelling box, the said rollers in no way interfering with the different coatings of enamel, because they are never in contact with the enamelled surfaces.

"In other words, the enamelling box is separated into two reservoirs, partly by a permanent partition and partly by the strip, which is passed through the box so that the edges only of the strip are exposed to the enamelling composition, one edge to the composition in one compartment and the other edge to that in the other compartment."

The claim was as follows:

"An enamelling box divided into two compartments by a slotted partition, and having openings at the ends in a line with the slot in the partition, all substantially as and for the purpose set forth."

The defences relied on were that the specification was too broad and embraced and appropriated the Marcher box; non-infringement; and prior use by Frederick W. Werner and T. C. Ladd & Co., of Brooklyn.

The first defence is based on the theory that a patent cannot be valid unless it is new in all its elements as well as in the combination, if it is for a combination. But this theory cannot be maintained. If it were sound no patent for an improvement on a known contrivance or process could be valid. And yet the great majority of patents are for improvements in old and well known devices, or on patented inventions. Changes in the construction of an old machine which increase its usefulness are patentable. *Seymour* v. *Osborne*, 11 Wall. 516. So a new combination of known devices, whereby the effectiveness of a machine is increased, may be the subject of a patent. *Loom Co.* v. *Higgins*, 105 U. S. 580; *Hailes* v. *Van Wormer*, 20 Wall. 353. Two patents may both be valid when the second is an improvement on the first, in which event, if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent. *Star Salt Caster Co.* v. *Crossman*, 4 Cliff. 568.

Therefore, letters patent for an improvement on a patented invention cannot be declared void because they include such patented invention. Much less does it lie in the mouth of a party who is infringing both the improvement and the original invention to set up the existence of the first patent as an excuse for infringing the improvement. It is only the patentee of the original invention who has the right to complain of the use made of his invention. We are, therefore, of opinion that the first defence to the suit must fail.

On the question of infringement, a comparison of the model of the plaintiff's patent with the model of the device shown to be in use by the defendants, makes it clear that the defendants have adopted substantially the invention of the plaintiff. It

would baffle the ingenuity of the most skilled expert to show a substantial difference between the invention claimed by the plaintiff and that which it is conceded that the defendants use. It may be true, as contended by the defendants, that the device used by them is in some respects better than that of the plaintiff, but this cannot relieve them from the charge of infringement, if the devices are substantially alike. The rule was well stated by Mr. Justice Clifford, in delivering judgment in the case of *Machine Company* v. *Murphy*, 97 U. S. 120, 125, where he said that, "in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do or what office or function they perform, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way, to obtain the same result; always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result."

Tested by this rule the charge of infringement made against the defendants is clearly made out.

It remains to inquire whether prior use and want of novelty have been shown. The prior use and consequent want of novelty alleged by the defendant was the making in 1866, and the use from that date until 1871, by Frederick W. Werner, of a box for enamelling mouldings in which the invention described in the patent of the plaintiff was embodied. Werner testified to this making and use, and to the further fact that, in 1874, he sold the box to Ladd, who some time afterwards began using it.

The burden of proof is upon the defendants to establish this defence. For the grant of letters patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty. *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486; *Lehnbeuter* v. *Holthaus*, 105 U. S. 94. Not only is the burden of proof to

make good this defence upon the party setting it up, but it has been held that "every reasonable doubt should be resolved against him." *Coffin* v. *Ogden*, 18 Wall. 120, 124; *Washburn* v. *Gould*, 3 Story, 122, 142.

The proof of prior use in this case depends on the testimony of Werner and T. C. Ladd. The contrivance to which the testimony of these witnesses refers is not produced nor any model of it. It is merely represented in a drawing made by Werner six years after he had sold the box to Ladd.

These two witnesses are contradicted by four others who were engaged in the factory where the box was used, and who had frequently seen the box referred to when in use and the mouldings enamelled by its use. Their testimony shows that the distinctive element in Wallick's contrivance was not used in the box, but that it was substantially the old Marcher box. The defendants have, therefore, failed to show by preponderance of proof, much less beyond reasonable doubt, the prior use on which they rely. On the contrary the weight of the evidence is against this defence.

Decree affirmed.

APPENDIX.

I.

GORDON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Decided December Term, 1864.

This cause was submitted on the 18th December, 1863. On the 4th of April, 1864, the court ordered it to be argued on the second day of the following December Term. Mr. Chief Justice Taney had prepared an opinion expressing his views upon the question of jurisdiction. This he placed in the hands of the clerk in vacation, to be delivered to the judges on their reassembling in December. Before the judges met he died. The clerk complied with his request. It is the recollection of the surviving members of the court, that this paper was carefully considered by the members of the court in reaching the conclusion reported in 2 Wall. 561; and that it was proposed to make it the basis of the opinion, which, it appears by the report of the case, was to be subsequently prepared. The paper was not restored to the custody of the clerk, nor was the proposed opinion ever prepared. At the suggestion of the surviving members of the court, the reporter made efforts to find the missing paper, and, having succeeded in doing so,* now prints it with their assent. Irrespective of its intrinsic value, it has an interest for the court and the bar, as being the last judicial paper from the pen of

* The following account of the paper is furnished by the gentleman from whom the copy was received. "This copy was made by the late David M. Perine, the life-long friend of Chief Justice Taney, and one of his executors. It was kept by Mr. Perine until his death, a couple of years ago, and since then by his only son and executor, from whom I get it. The original we cannot find; but the copy bears the mark of Mr. Perine as having been 'Ex'd,' and can be relied upon absolutely."

Mr. Chief Justice Taney.

This case comes before the court upon appeal from the judgment of the Court of Claims. The appeal is taken under the act of March 3, 1863, entitled "An Act to amend an Act to establish a court for the investigation of claims against the United States."

The 5th section of this act provides that either party may appeal to the Supreme Court of the United States from any final judgment or decree which may thereafter be rendered in any case by the Court of Claims wherein the amount in controversy exceeds $3000, under such regulations as the Supreme Court may direct; *Provided*, that such appeal be taken within ninety days after the rendition of such judgment or decree, and *Provided*, further, that when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any Executive Department of the government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding Justice of the Court of Claims, the Supreme Court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy.

The 7th section provides that in all cases of final judgment by the Court of Claims, or, on appeal by the said Supreme Court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the said Court of Claims, and signed by the Chief Justice, or in his absence by the presiding Judge of the court.

The 14th section provides that no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims, till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

It will be seen by the sections above quoted that the claimant whose claim has been allowed by the Court of Claims, or upon appeal by the Supreme Court, is to be paid out of any general appropriation made by law for the payment and satisfaction of private claims: but no payment of any such claim is to be made until the claim allowed has been estimated for by the Secretary of the Treasury, and Congress, upon such estimate, shall make an appropriation for its payment. Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion

to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment; and whether it is paid or not, does not depend on the decision of either court, but upon the future action of the Secretary of the Treasury, and of Congress.

So far as the Court of Claims is concerned we see no objection to the provisions of this law. Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the Executive Departments. In this respect the authority of the Court of Claims is like to that of an Auditor or Comptroller—with this difference only; that in the latter case the appropriation is made in advance, upon estimates, furnished by the different Executive Departments, of their probable expenses during the ensuing year; and the validity of the claim is decided by the officer appointed by law for that purpose, and the money paid out of the appropriation afterwards made. In the case before us the validity of the claim is to be first decided, and the appropriation made afterwards. But in principle there is no difference between these two special jurisdictions created by acts of Congress for special purposes, and neither of them possesses judicial power in the sense in which those words are used in the Constitution. The circumstance that one is called a court and its decisions called judgments cannot alter its character nor enlarge its power.

But whether this court can be required or authorized to hear an appeal from such a tribunal, and give an opinion upon it without the power of pronouncing a judgment, and issuing the appropriate judicial process to carry it into effect, is a very different question, and rests on principles altogether different. The Supreme Court does not owe its existence or its powers to the Legislative Department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropri-

ate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other.

The 3d Article of the Constitution, Section 1, provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." And the last clause of the same article, after giving this court original jurisdiction in the cases therein specified, provides that in all other cases "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The existence of this Court is, therefore, as essential to the organization of the government established by the Constitution as the election of a president or members of Congress. It is the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States. No appeal is given from its decisions, nor any power given to the legislative or executive departments to interfere with its judgments or process of execution. Its jurisdiction and powers and duties being defined in the organic law of the government, and being all strictly judicial, Congress cannot require or authorize the court to exercise any other jurisdiction or power, or perform any other duty. Chancellor Kent says: "The judicial power of the United States is in point of origin and title equal with the other powers of the government, and is as exclusively vested in the court created by or pursuant to the Constitution, as the legislative power is vested in Congress, or the executive power in the President." 1 Kent Com. 290–291, 6th ed. See also Story Const., pp. 449–450.

The position and rank, therefore, assigned to this Court in the Government of the United States, differ from that of the highest judicial power in England, which is subordinate to the legislative power, and bound to obey any law that Parliament may pass, although it may, in the opinion of the court, be in conflict with the principles of Magna Charta or the Petition of Rights.

The reason for giving such unusual power to a judicial tribunal is obvious. It was necessary to give it from the complex character of the Government of the United States, which is in part National and in part Federal: where two separate governments exercise certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action,

and where there was, therefore, an absolute necessity, in order to preserve internal tranquillity, that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers in the common territory. The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured.

In No. 38 of the Federalist, written by Mr. Madison, the necessity and object of this provision is clearly stated. In that number, after explaining with great perspicuity the complex character of the government, being partly National and partly Federal, he proceeds to say (page 265 Towson's Ed.): "In this relation, then, the proposed government cannot be deemed a *national* one, since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution, and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact."

It was to prevent an appeal to the sword and a dissolution of the compact that this Court, by the organic law, was made equal in origin and equal in title to the legislative and executive branches of the government: its powers defined, and limited, and made strictly judicial, and placed therefore beyond the reach of the powers delegated to the Legislative and Executive Departments. And it is upon the principle of the perfect independence of this Court, that in cases where the Constitution gives it original jurisdiction, the action of Congress has not been deemed necessary to regulate its exercise, or to prescribe the process to be used to bring the parties before the court, or to carry its judgment into execution. The jurisdiction and judicial power being vested in the court,

it proceeded to prescribe its process and regulate its proceedings according to its own judgment, and Congress has never attempted to control or interfere with the action of the court in this respect.

The appellate power and jurisdiction are subject to such exceptions and regulations as the Congress shall make. But the appeal is given only from such inferior courts as Congress may ordain and establish to carry into effect the judicial power specifically granted to the United States. The inferior court, therefore, from which the appeal is taken, must be a judicial tribunal authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the appropriate process of execution may be issued by the court to carry it into effect. And Congress cannot extend the appellate power of this Court beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the authority or duty of hearing and determining an appeal from a Commissioner or Auditor, or any other tribunal exercising only special powers under an act of Congress; nor can Congress authorize or require this Court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect.

The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction: yet it is the whole power that the Court is allowed to exercise under this act of Congress.

It is true the act speaks of the judgment or decree of this Court. But all that the Court is authorized to do is to certify its opinion to the Secretary of the Treasury, and if he inserts it in his estimates, and Congress sanctions it by an appropriation, it is then to be paid, but not otherwise. And when the Secretary asks for this appropriation, the propriety of the estimate for this claim, like all other estimates of the Secretary, will be opened to debate,

and whether the appropriation will be made or not will depend upon the majority of each House. The real and ultimate judicial power will, therefore, be exercised by the Legislative Department, and not by that department to which the Constitution has confided it.

This precise point was decided by this Court as long ago as 1792, in *Hayburn's Case*, 2 Dall. 409, and this decision has ever since been regarded as a constitutional law, and followed by every department of the government: by the legislative and executive branches as well as the Judiciary. It is referred to and recognized as authority in *United States* v. *Ferreira*, 13 How. 40. The case of Hayburn arose under an Act of Congress of March, 1792, which required the Circuit Courts of the United States to examine into the claims of the officers, soldiers and seamen of the Revolution, to the pensions granted to invalids by that act, and to determine the amount of pay that would be equivalent to the disability incurred, and to certify their opinion to the Secretary of War. And it authorized the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the Court, and to report the case to Congress at its next session. But every judge of the Supreme Court (except Thomas Johnson of Maryland, who does not appear to have had the question before him) was of opinion that the law was unconstitutional and void, and that when the decision of the court was subject to the revision of a Secretary and Congress, it was not the exercise of a judicial power, and could not therefore be executed by the court. These opinions were all communicated to General Washington, who was then President of the United States, and the law was repealed at the next session.

The case of the *United States* v. *Ferreira*, 13 How. 40, hereinbefore referred to, was decided on the same principle, and the distinction taken between judicial power in the sense in which these words are used in the Constitution, and a power given by law to examine a particular class of cases, and to certify an opinion as to their respective merits to an officer of the Executive Department, who might or might not act on it. Speaking of the laws under which the judge acted, the Court say, p. 48, "The powers conferred by these acts of Congress upon the judge, as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a com-

missioner appointed to adjust claims to land or money under a treaty ; or special powers to inquire into or decide any other particular class of controversies, in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as on a Commissioner. But it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the Courts of the United States."

And it is very clear that this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court.

Indeed no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated — that is, that this Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term ; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.

It was upon this principle that the case of *Hunt* v. *Pallas*, 4 How. 589, was decided. That case was originally decided in the territorial court of Florida. When the Territory became a State, Congress omitted to make provision for the transfer of the records to a tribunal of the United States, or to provide any tribunal to which a mandate might be directed, if any of the judgments of the territorial court should be affirmed or reversed. A motion was made here for a writ of error to be directed to the judges of the State court. But the motion was overruled, and the court said : "It would be useless and vain for this Court to issue a writ of error, and bring up the record and proceed to judgment upon it, when, as the law now stands, no means or process is authorized, by which our judgment could be executed."

The decision in *Hunt* v. *Pallas* was recognized and the principle again affirmed in the case of *McNalty* v. *Batty*, 10 How. 72, 79, and in a multitude of cases which have occurred since the present troubles began. The court has uniformly refused to take jurisdiction where there was not a court of the United States in existence, in possession of the original record, to which we were authorized by law to send a mandate to carry into effect the judgment of this court. The mandate is the form in which the judgment of this court is given, upon an appeal from an inferior court,

West v. *Brashear*, 14 Pet. 51; and the court can give no judgment, and award no execution, unless there is an inferior court of the United States, in possession of the original record, over which this court has appellate power, and which it may compel to execute its judgments. If no such court exists, it could merely express an opinion, which, as we have said before, binds no one, is no judgment in the legal sense of the term, and may or may not be carried into effect at the pleasure of Congress. In relation to appeals from a State court, there is a special provision in the act of 1789, authorizing, in certain contingencies, a judgment and execution by this court.

The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits. By the second section of Article VI., the laws of Congress are made the supreme law of the land only when they are made in pursuance of the legislative power specified in the Constitution; and by the Xth amendment the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people. The reservation to the States respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument. And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so. For whether an act of Congress is within the limits of its delegated power or not is a judicial question, to be decided by the courts, the Constitution having, in express terms, declared that the judicial power shall extend to all cases arising under the Constitution.

This power over legislative acts is not possessed by the English courts. They cannot declare an act of Parliament void, because in the opinion of the court it is inconsistent with the principles of Magna Charta or the Petition of Rights. They are bound to obey it and carry it into execution. Yet, in that country, the independence of the Judiciary is invariably respected and upheld by the King and the Parliament as well as by the courts; and the courts are never required to pass judgment in a suit where they cannot carry it into execution, and where it is inoperative and of no value,

unless sanctioned by a future act of Parliament. The judicial power is carefully and effectually separated from the executive and legislative departments. The language of Blackstone upon this subject is plain and unequivocal. 1 Bl. Com. 268, 269.

"In this distinct and separate existence (says Blackstone) of the judicial power in a peculiar body of men, nominated indeed but not removable at pleasure by the crown, consists one main preservative of public liberty, which cannot subsist long in any State unless the administration of common justice be in some degree separated from the legislative and executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, the union might soon be an overbalance for the legislative. For which reason, by Stat. Car. I. c. 10, which abolished the Court of Star Chamber, effectual care is taken to remove all judicial power out of the hands of the King's Privy Council, which it was then evident, from recent instances, might soon be inclined to pronounce that for law which was most agreeable to the Prince or his officers."

These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this Court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers entrusted to it, the Court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution.

For the reasons above stated we are of opinion that this appeal cannot be sustained, and it is therefore

*Dismissed for want of jurisdiction.**

* The judgment of the Court dismissing *Gordon* v. *United States* for want of jurisdiction was announced March 9, 1865. On the 17th March, 1866, Congress passed an act repealing § 14 of the act of March 3, 1863, 14 Stat. 9, and giving an appeal to the Supreme Court from all judgments of the Court of Claims theretofore rendered of the character mentioned in the 5th section of that act, except in cases where the judgment hadbeen paid at the Treasury: the appeal to be taken within ninety days from the passage of the act. The court thereupon promulgated the rules found in 3 Wall. VII.–VIII., and the first case decided under them was *De Groot* v. *United States*, 5 Wall. 419.

II.

THOMAS A. HENDRICKS.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

MONDAY, November 30, 1885.

MR. ATTORNEY-GENERAL GARLAND addressed the court as follows :

May it please the Court : Since the adjournment of this court on last Wednesday, the heart of the nation has been sorely touched by the death of the Vice-President, THOMAS A. HENDRICKS.

This is not a proper occasion to pronounce a eulogy upon the useful life and splendid character of Mr. Hendricks, but he has been so long conspicuous in the public service—has filled thoroughly and admirably so many places of high trust, including the second in rank in the gift of the people, and he has been a prominent member of this bar for so many years, I deem it becoming to request the court to lay aside its docket and pause before this sad event that now overshadows the whole country, and out of respect for the memory of this "good and faithful servant," to cease its labors until after the last funeral rites are performed on to-morrow ; and I therefore suggest the court do now adjourn until Thursday next.

The CHIEF JUSTICE replied as follows :

The court heartily concurs in your remarks, Mr. Attorney-General, and in the suggestion which you make. Justices MATTHEWS and BLATCHFORD are now on their way to represent the court at the funeral in Indianapolis to-morrow, and as a further mark of respect to the memory of the deceased, we will now adjourn until Thursday next.

III.

AMENDMENT TO RULES.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

Ordered, That the following regulations be established under section 765 of the Revised Statutes:

RULE 34.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

(Promulgated March 29, 1886: and, as amended, May 10, 1886.)

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ers, without proper supervision of the clerk's conduct in the examination, he does not so discharge his duty to the bank as to protect himself from loss, if it turns out that without his knowledge the clerk committed forgery in raising the amounts of some of those checks, and thereby misled the bank to its prejudice, in spite of due care on the part of its officers. *Ib.*

3. In this case it was held that the question whether the depositor exercised in regard to such examination the degree of care required of him in the circumstances disclosed by the evidence, including the relations of the parties, and the established usages of business, and the question whether the endorsement of a particular check was, under the evidence, an endorsement in blank or one for deposit to the credit of the depositor, were for the jury to determine, under proper instructions as to the law. *Ib.*

BANKRUPTCY.

1. A discharge in bankruptcy is no bar to an action on a judgment, recovered against the bankrupt after the discharge in a suit against him founded on a contract, provable in the bankruptcy proceedings, which suit was commenced before the bankruptcy and was pending when the discharge was granted. *Dimock* v. *Revere Copper Co.*, 559.
2. A discharge in bankruptcy does not release real estate of the bankrupt assigned to him as a homestead under the provisions of Rev. Stat. § 5045 from the lien of a mortgage created by him before the bankruptcy, to secure a debt against him which is not proved nor released under the provisions of Rev. Stat. § 5075. *Long* v. *Ballard*, 617.

See Local Law, 2.

CASES AFFIRMED OR APPROVED.

1. *Ackley School District* v. *Hall*, 113 U. S. 135, affirmed and applied. *New Providence* v. *Halsey*, 336.
2. *Bernard Township* v. *Stebbins*, 110 U. S. 341, affirmed and applied. *Ib.*
3. *Bostwick* v. *Brinkerhoff*, 106 U. S. 4, affirmed. *Johnson* v. *Keith*, 199.
4. *Coe* v. *Errol*, 116 U. S. 517, cited and applied. *Turpin* v. *Burgess*, 504.
5. The true rule for damages in this case is stated in *Cook* v. *South Park Commissioners*, 61 Ill. 116. *Kerr* v. *South Park Commissioners*, 379.
6. *Elgin* v. *Marshall*, 106 U. S. 578, affirmed. *Bruce* v. *Manchester & Keene Railroad*, 514.
7. *Gibson* v. *Bruce*, 108 U. S. 561, affirmed and applied. *Akers* v. *Akers*, 197.
8. *Jerome* v. *McCarter*, 21 Wall. 17, affirmed and applied to this case. *Harwood* v. *Dieckerhoff*, 200.
9. *Louisiana* v. *Jumel*, 107 U. S. 711, affirmed and applied. *Ib.*

10. *Machine Co.* v. *Murphy*, 97 U. S. 120, affirmed and applied. *Cantrel* v. *Wallick*, 689.
11. *Marye* v. *Parsons*, 114 U. S. 325, and *Williams* v. *Hagood*, 98 U. S. 72, affirmed. *Hagood* v. *Southern*, 52.
12. *Mason* v. *Sargent*, 104 U. S. 689, applied. *Sturges* v. *United States*, 363.
13. *Mulligan* v. *Smith*, 59 Cal. 206, approved and applied. *Zeigler* v. *Hopkins*, 683.
14. *Pace* v. *Burgess*, 92 U. S. 372, reaffirmed. *Turpin* v. *Burgess*, 504.
15. *Pirie* v. *Tvedt*, 115 U. S. 41, affirmed and applied. *Sloane* v. *Anderson*, 275.
16. *Stebbins* v. *Duncan*, 108 U. S. 32, affirmed. *Applegate* v. *Lexington Mining Co.*, 255.

CASES DISTINGUISHED OR EXPLAINED.

1. *Hough* v. *Railway Company*, 100 U. S. 213, explained. *District of Columbia* v. *McElligott*, 621.
2. *Insurance Co.* v. *Wilkinson*, 13 Wall. 222, and *Insurance Co.* v. *Mahone*, 21 Wall. 152, distinguished. *New York Life Ins. Co.* v. *Fletcher*, 519.
3. *Wilson* v. *Boyce*, 92 U. S. 320, distinguished. *Alabama* v. *Montague*, 602.
4. *Winona & St. Peter Railroad Co.* v. *Barney*, 113 U. S. 618, explained. *Barney* v. *Winona & St. Peter Railroad Co.*, 228.

CHAMPERTY.

See PROMISSORY NOTE, 3.

CHEROKEE INDIANS.

1. By treaties with the Cherokees the United States have recognized them as a distinct political community, so far independent as to justify and require negotiations with them in that character. *The Cherokee Trust Funds*, 288.
2. The Cherokees in North Carolina dissolved their connection with the Cherokee Nation when they refused to accompany the body of it on its removal, and have had no separate political organization since; though fostered and encouraged, they have not been recognized by the United States as a nation, in whole or in part; and as now organized, they are not the successor of any organization recognized by any treaty or law of the United States. *Ib.*
3. The claim of the Cherokees of North Carolina to a share of the commuted annuity fund of $214,000, and of the fund created by sales of lands west of the Mississippi ceded to the Cherokee Nation, has no substantial foundation; those funds and that property being dedicated by the Constitution of the Cherokees and intended by their treaties with the United States for the benefit of the united nation, and

CONTRACT.

3. O & H, partners, contracted with the District of Columbia to put down a water main. They notified the agent of the District that they authorized C to perform the work and receive the money, and the agent accepted the arrangement. C performed the work, and receipted from time to time for payments on the contract. On a suit in his own name for extra work: *Held*, That he was bound by the terms of the contract in that respect, and by receipts given in accordance therewith. *Campbell* v. *District of Columbia*, 615.

See INSURANCE, 3, 4;
MUNICIPAL BOND, 1, 2;
PARTNERSHIP, 1, 2;
RAILROAD, 3, 4.

CORPORATION.

See TAX AND TAXATION, 2, 3.

COSTS.

1. In order to avail to stop costs, an offer to submit to entry of judgment should be made in open court, and the court be asked to act thereon, after due notice to the other party. *New Providence* v. *Halsey*, 336.
2. Each one of the two principal appellants having succeeded in part on his appeal, no costs were allowed in this court for or against any party, and the expense of printing the record was charged equally on such two appellants. *Union Trust Co.* v. *Illinois Midland Railway*, 434.

See PARTNERSHIP, 2, (6);
PATENT FOR INVENTION, 6.
TRUST, 2, 3.

COURT AND JURY.

When, after giving a party the benefit of every inference that can fairly be drawn from all the evidence, it is insufficient to authorize a verdict in his favor, it is proper for the court to give the jury a peremptory instruction for the other party. *Marshall* v. *Hubbard*, 415.

See DOMICIL, 2.

COURT OF CLAIMS.

See UNION PACIFIC RAILWAY COMPANY, 1;
APPENDIX, 697.

CUSTOMS DUTIES.

Under § 2504, Schedule M, of the Revised Statutes, p. 480, 2d ed., "Henry's Calcined Magnesia," imported in glass bottles, is liable to a duty of 50 per cent. *ad valorem*, as being a medicinal preparation,

DESCRIPTION.

See DEED.

DILIGENCE.

See NEGLIGENCE.

DISTRICT OF COLUMBIA.

Whether the District of Columbia is, in every case, exempt from liability for the negligence of its supervisor of roads, resulting in personal injury to those who labor under his direction on public work, is not decided. *District of Columbia* v. *McElligott*, 621.

See CONTRACT, 3.
JUDGMENT, 3;
NEGLIGENCE.

DOMICIL.

1. A citizen of one State who in good faith gives up his residence there, goes to another State, and takes up a permanent residence therein, loses his former citizenship and acquires citizenship in the new place of domicil. *Chicago & N. W. Railway* v. *Ohle*, 123.
2. On the facts in this case the court properly left it to the jury, and by proper instructions, to decide whether the defendant in error had acquired a citizenship in Illinois, and if so when that citizenship was acquired. *Ib.*

See EVIDENCE, 1.

EJECTMENT.

See EVIDENCE, 7, 8;
JURISDICTION, B, 3;

EMINENT DOMAIN.

See EVIDENCE, 6.

EQUITY.

1. A jury being empanelled on the law side of the court below to settle an issue sent from the chancery side, rendered a verdict which was certified by the clerk to the chancery side, and thereupon a decree was entered in conformity with it. At the next succeeding term the court ordered a transcript of the evidence on the trial of the issue, together with the charge of the court, to be filed on the chancery side. *Held*, that this order *nunc pro tunc* was proper in order to prevent

EVIDENCE.

EXCEPTION.

The record recited the substance and effect of plaintiffs' evidence, a motion for nonsuit by defendant on the ground that there was no case in law for the jury, that the motion was granted and judgment ordered to be entered in favor of defendant, and that the plaintiffs then and there excepted to this ruling of the court. *Held*, That the exceptions applied to the whole facts in the record to which the ruling of law that was excepted to applied. *Kleinschmidt* v. *McAndrews*, 282.

EXECUTION.

See FRAUD, 3, 4.

EXPRESS COMPANIES.

See RAILROAD, 1, 2.

FLORIDA INTERNAL IMPROVEMENT FUND.

On the facts: *Held*, That the bonds in controversy should be surrendered to the Trustees of the Internal Improvement Fund of the State of Florida, and should be applied by them in accordance with the prayer of their answer. *Littlefield* v. *Trustees of Internal Improvement Fund of Florida*, 419.

FRANCHISE.

See TAX AND TAXATION, 9.

FRAUD.

1. A judicial sale of real estate will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness. *Graffam* v. *Burgess*, 180.
2. Great inadequacy of price at a judicial sale of real estate requires only slight circumstances of unfairness in the conduct of the party benefited by the sale, to raise a presumption of fraud. *Ib.*
3. If the inadequacy of price paid for the purchase of real estate at a sale on an execution be so gross as to shock the conscience, or if in addition to gross inadequacy the purchaser has been guilty of unfairness or has taken any undue advantage, or if the owner of the property or the party interested in it has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, and the party injured will be permitted to redeem the property sold. *Ib.*
4. Looking at the whole facts in this case the court finds traces of design on the part of plaintiff in error to mislead defendant in error, to lull

HABEAS CORPUS.

HENDRICKS, THOMAS A.

HUSBAND AND WIFE.

See INSURANCE, 4.

INFAMOUS CRIME.

See CONSTITUTIONAL LAW, A, 6.

INSOLVENT LAWS.

A State insolvent statute, passed at a time when an act of Congress establishing a uniform system of bankruptcy is in force, is inoperative, so far as in conflict with that act, while the act is in force ; but on its repeal, the State statute becomes operative. *Tua* v. *Carriere*, 201.

See LOCAL LAW, 2.

INSURANCE.

1. The right, by way of subrogation, of an insurer, upon paying for a total loss of the goods insured, to recover over against third persons, is only that right which the assured has. *Phœnix Ins. Co.* v. *Erie & Western Transportation Co.* 312.
2. A common carrier may lawfully obtain insurance on the goods carried against loss by the usual perils, though occasioned by the negligence of his own servants. *Ib.*
3. In a bill of lading, which provides that the carrier shall not be liable for loss or damage of the goods by fire, collision, or dangers of navigation, a further provision that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods, is valid, as between the carrier and the shipper ; and therefore, in the absence of any misrepresentation or intentional concealment by the shipper in obtaining insurance upon the goods, or of any express stipulation on the subject in the policy, limits the right, by way of subrogation, of the insurer, upon paying to the shipper the amount of a loss by stranding, occasioned by the negligence of the carrier's servants, to recover over against the carrier. *Ib.*
4. A policy of insurance, made to a wife on the life of her husband, contained this clause : "This policy of insurance, after two annual premiums shall have been paid thereon, shall not be forfeited or become void by reason of the non-payment of premiums ; but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit : The net value of the policy when the premium becomes due and is not paid shall be ascertained according to the combined experience or actuaries' rate of mortality, with interest at four per cent. per annum. Four fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined ac-

JURISDICTION.

A. Jurisdiction of the Supreme Court.

B. Jurisdiction of Circuit Courts of the United States.

MASTER AND SERVANT.

MONEY.

MORTGAGE.

1. A father owning in fee an equal undivided one-third part of a lot of land, and having a life tenancy in the other equal undivided two-third parts, and his two daughters each owning in fee an equal undivided one-third part, subject to such life tenancy, the three executed a mortgage on the lot, for a loan of $30,000, in which the mortgagors agreed to keep the building on the lot insured against fire, in its fair insurable value, and assign the policy to the mortgagee, to be held by him "as collateral and additional security," with the right to collect the insurance money and apply it on the mortgage. On a partition of the lot between the father and the daughters, they paid $10,000 to the mortgagee, on the principal, and he released from the mortgage the part belonging to the father. The father, with the money loaned, had erected a building on the part of the lot allotted to the daughters, and he thereafter collected for his own use the rents, and paid the interest on the mortgage, and the taxes, and the fire insurance premiums. The building, being insured for $15,000 by a policy in the name of the father, the loss being made payable to the mortgagee, was destroyed by fire. The loss being more than that sum, the mortgagee received a draft for $15,000 on the insurance company, drawn by its agent, to the order of the mortgagee, and agreed in writing with the father, by an instrument which stated that the mortgagee held the policy as collateral security for the payment of the loan, that the right to apply the $15,000 on the debt was waived, and that the money should be deposited in a bank to be selected by the father, to his credit and at his risk, to be used in erecting a building on the lot, the money to be paid out on the father's checks, countersigned by the mortgagee, within six months, or the waiver to be of no effect, and the mortgagee to have the right to apply the money on the debt. Thereupon the mortagee endorsed the draft to the order of the father, he designating as the bank of deposit a bank of which he was president, and taking the draft and collecting it, and depositing the money to his credit in the bank. The mortgagee countersigned no checks against the money, and no building was put up. The daughters had no knowledge of the transaction. In a suit to foreclose the mortgage, the daughters claimed that the $15,000 should be credited on the mortgage, as against them. *Held*,

   (1.) Authority in the father, as representing his daughters, to make the agreement as to the $15,000, could not be implied from the general power he exercised over the property, in managing it, and procuring insurance and paying taxes, the daughters having themselves executed the mortgage;

   (2.) The insurance was obtained in pursuance of the requirements of the mortgage, and must be presumed to have covered the interests of all the mortgagors, as an entirety;

(3.) The mortgagee in fact dealt with the $15,000, not as the father's money, but as representing a further security furnished under the mortgage, and as something which concerned the rights of all the mortgagors, because the agreement with the father recognized the obligation either to credit the money on the mortgage or to see that it went to restore the building;

(4.) The provision of the policy, that the loss should be payable to the mortgagee, placed him in the same position as if the policy had been in the name of all the mortgagors and been assigned to the mortgagee, and he was bound to apply the money in accordance with the provisions of the mortgage, for the benefit of all the mortgagors, unless all consented to a different disposition of the money;

(5.) In any view, if the agreement with the father was valid, as against the daughters, the mortgagee was bound to see that the money was used to restore the building, or else credit it on the mortgage;

(6.) That the transaction amounted to a collection of the $15,000 by the mortgagee, and as a satisfaction of the mortgage to that extent, as respected the estate of the daughters, leaving the mortgage a lien for $20,000, as regarded the life estate of the father. *Connecticut Mut. Life Ins. Co.* v. *Scammon*, 634.

2. It is proper to sell the estate in remainder and the life estate separately, and to apply the proceeds of the latter first to satisfy the amount for which it is the sole security, not applying any of such proceeds to pay costs, or taxes, or any part of the debt for which there is other security, till the full payment of the sum for which the life estate is the sole security. *Ib.*

3. L made and delivered to W his promissory note for $1300 payable in ninety days, and a deed of a tract of land absolute on its face. It was orally agreed between them that the deed was executed as security for the payment of the note, and that, if the note was not paid at maturity, W was authorized to sell the land. The note not being paid at maturity W, with the knowledge and assent of L, sold and conveyed the land to T and applied the proceeds to the payment of the debt. After the completion of the contract and execution of the deed, but before its delivery to T, a creditor of L who had recovered judgment against him, levied on this tract of land to satisfy the judgment, and caused it to be sold. The purchaser at the sheriff's sale after receiving his deed, filed a bill in equity against the heirs and devisees of T, praying to be admitted to redeem the land on payment of the note. *Held:* (1) That the transaction was in equity a mortgage: (2) That parol evidence was admissible to show when the power of sale in the mortgage became absolute: (3) That W had an absolute power of sale when the conveyance was made to T, the exe-

MUNICIPAL BOND.

PATENT FOR INVENTION.

PRACTICE.

See APPEAL ;
COSTS, 1, 2 ;
COURT AND JURY ;
EQUITY, 1, 2 ;
EQUITY PLEADING ;
JURISDICTION, A, 2, 3.

PRESUMPTION.

See EVIDENCE, 5.

PRINCIPAL AND AGENT.

See MORTGAGE 1, (1).

PROMISSORY NOTE.

the bonded and floating indebtedness " of the other companies. In November, 1874, it changed its name to that of the Illinois Midland Company, and in January, 1875, issued bonds secured by a mortgage covering all its property, original and purchased, with the view of exchanging them, dollar for dollar, for the bonds of the sectional roads. In September, 1875, the owner of a majority of the stock of the companies, with judgment creditors of the Paris and Decatur Company, brought a suit in equity in a State court in Illinois against the Illinois Midland Company, to have a receiver of all its property appointed, and an account taken of all the claims and liens of its stockholders and creditors, and of those of the sectional companies, and to have them paid and adjusted according to equity. Such a receiver was immediately appointed, with power to run the road. In December, 1876, the Union Trust Company, trustee in the mortgages on the Paris and Decatur road, the Paris and Terre Haute road, and the Illinois Midland road, filed a bill in the proper Circuit Court of the United States in Illinois to foreclose those three mortgages ; and in September, 1877, it was made a defendant in the State court suit, on its own petition, alleging a default by October 1, 1875, in the payment of interest on the bonds embraced in all three of the mortgages. In February, 1878, it filed two bills in the same Federal court, each for the foreclosure of one of the two sectional road mortgages held by it. In April, 1878, it removed into that court the State court suit. In August, 1881, holders of Paris and Decatur bonds filed a bill in the same Federal court to foreclose the Paris and Decatur mortgage. By an order made in June, 1882, that court consolidated all the suits. Successive receivers, each displacing the prior one, were appointed by the State court in August, 1876, and by the Federal court in December, 1878, and April, 1882. In June, 1882, a special commissioner was appointed to report as to the certificates of indebtedness issued by the receivers. He made his report in April, 1883, and, on exceptions to it, an interlocutory decree was made in June, 1884, making specific adjudications as to various receiver's certificates and other receiver's debts, and directing the commissioner to report as to other matters. He did so in January, 1885, and exceptions were filed to the report. A final decree in June, 1885, disposed of the litigated questions, and provided for a sale of the mortgaged property and the distribution of the proceeds. Holders of Paris and Decatur bonds appealed because the decree gave to sixteen receiver's certificates priority over those bonds. When the first order was made under which six of the certificates were issued, neither any of the Paris and Decatur bondholders, nor their trustee, were parties to the suit, but before any other order was made under which any of the certificates were issued, the trustee was made a party, and the Paris and Decatur interest had been in default for ten months when such first order was made: *Held*,

(1.) Certificates issued for necessary repairs must be allowed priority;

REBELLION.

See MONEY, 1, 2.

RECEIVER.

See RAILROAD, 7, 10, 11, 13.

REMAINDER.

See MORTGAGE, 1, 2.

REMOVAL OF CAUSES.

1. A suit cannot be removed from a State court under the act of March 3, 1875, unless the requisite citizenship for removal existed when the suit was begun, as well as when the application for removal was made. *Akers* v. *Akers*, 197.
2. A removal of a cause from a State court on the ground of local prejudice can only be had where all the parties to the suit on one side are citizens of different States from those on the other. *Jefferson* v. *Driver*, 272.
3. The provision as to the removal of a separable controversy under the second subdivision of Rev. Stat. § 639 has no application to removals under the third subdivision ; and the similar provision in the act of March 3, 1875, applies only to removals under that act. *Ib.*
4. A purchaser *pendente lite* of real estate who becomes party to the suit is subject to the disabilities of the parties at the time he comes in, in respect of removing the cause from a State court to a Circuit Court of the United States. *Ib.*
5. The filing of separate answers by several defendants, sued jointly in a State court, on an alleged joint cause of action in tort, in which each avers that he acted separately on his own account and not jointly, in the acts complained of, does not divide the suit into separate controversies so as to make it removable into the Circuit Court of the United States. *Sloane* v. *Anderson*, 275.
6. A creditor's bill to subject encumbered property to the payment of his judgment, by sale and distribution of the proceeds among lien-holders according to priority, creates no separate controversy, within the meaning of the removal acts, as to the separate lien-holders parties respondent, although their respective defences may be separate *Fidelity Ins. Co.* v. *Huntington*, 280.
7. A bill for the assignment of dower brought in a State court alleged that A, one of the defendants, in purchasing the property, acted as agent and trustee of B, and took and held title to the joint use and benefit of himself and B. The complainant and B were citizens of the same State ; A was a citizen of a different State. The answers took no

C. STATUTES OF STATES AND TERRITORIES.

STATUTE OF FRAUDS.

SUBROGATION.

SUPREME COURT.

TAX AND TAXATION.

TRUST.

VIRGINIA COUPONS.

See REMOVAL OF CAUSES, 18.

WILL.

WITNESS.

See PARTNERSHIP, 2, (4).