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UNITED STATES REPORTS

VOLUME 120

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1886

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MORRISON REMICK WAITE, Chief Justice.
SAMUEL FREEMAN MILLER, Associate Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOSEPH P. BRADLEY, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.
WILLIAM BURNHAM WOODS, Associate Justice.*
STANLEY MATTHEWS, Associate Justice.
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.

AUGUSTUS HILL GARLAND, Attorney General.
GEORGE AUGUSTUS JENKS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN GEORGE NICOLAY, Marshal.

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* Mr. Justice Woods was ill and absent during the whole time covered by these decisions, and took no part in any of them.

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PROPERTY OF
UNITED STATES SENATE
LIBRARY.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1886.

WILDENHUS'S CASE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Argued December 7, 1886. — Decided January 10, 1887.[1]

A Circuit Court of the United States has jurisdiction to issue a writ of *habeas corpus* to determine whether one of the crew of a foreign vessel in a port of the United States, who is in the custody of the state authorities, charged with the commission of a crime, within the port, against the laws of the state, is exempt from local jurisdiction under the provisions of a treaty between the United States and the foreign nation to which the vessel belongs.

Unless exempted by treaty, a foreign merchant vessel, entering a port of the United States for purposes of trade, is subject to the local law, and the local courts may punish for crimes committed upon the vessel, within the port, by one foreigner upon another foreigner.

Article XI of the Convention between Belgium and the United States of March 9, 1880, 21 Stat. 781, conferring power upon Belgian consuls in the United States to take cognizance of differences between captains, officers, and crews of Belgian merchant vessels which are in ports of the United States, and providing that the local authorities shall not interfere except when a disorder arises of such a nature as to disturb tranquillity or public order on shore or in the port, does not apply to a case of

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[1] The docket title of this case was "No. 1288. Charles Mali, Consul of His Majesty the King of the Belgians, and Joseph Wildenhus, Gionviennie Gobnbosich, and John J. Ostenmeyer, Appellants, *v.* The Keeper of the Common Jail of Hudson County, New Jersey."

Statement of Facts.

felonious homicide committed on board of a Belgian merchant vessel in a port of the United States, and does not deprive the local authorities of the port of jurisdiction over such a crime so committed by one Belgian upon the person of another Belgian, both belonging to the crew of the vessel.

THIS appeal brought up an application made to the Circuit Court of the United States for the District of New Jersey, by Charles Mali, the "Consul of His Majesty the King of the Belgians, for the States of New York and New Jersey, in the United States," for himself as such consul, "and in behalf of one Joseph Wildenhus, one Gionviennie Gobnbosich, and one John J. Ostenmeyer," for the release, upon a writ of *habeas corpus*, of Wildenhus, Gobnbosich, and Ostenmeyer from the custody of the keeper of the common jail of Hudson County, New Jersey, and their delivery to the consul, "to be dealt with according to the law of Belgium." The facts on which the application rested were thus stated in the petition for the writ:

"*Second.* That on or about the sixth day of October, 1886, on board the Belgian steamship Noordland, there occurred an affray between the said Joseph Wildenhus and one Fijens, wherein and whereby it is charged that the said Wildenhus stabbed with a knife and inflicted upon the said Fijens a mortal wound, of which he afterwards died.

"*Third.* That the said Wildenhus is a subject of the Kingdom of Belgium and has his domicil therein, and is one of the crew of the said steamship Noordland, and was such when the said affray occurred.

"*Fourth.* That the said Fijens was also a subject of Belgium and had his domicil and residence therein, and at the time of the said affray, as well as at the time of his subsequent death, was one of the crew of the said steamship.

"*Fifth.* That at the time said affray occurred the said steamship Noordland was lying moored at the dock of the port of Jersey City, in said state of New Jersey.

"*Sixth.* That the said affray occurred and ended wholly below the deck of the said steamship, and that the tranquillity of the said port of Jersey City was in nowise disturbed or endangered thereby.

"*Seventh.* That said affray occurred in the presence of several witnesses all of whom were and still are of the crew of the said vessel, and that no other person or persons except those of the crew of said vessel were present or near by.

"*Eighth.* Your petitioner therefore respectfully shows unto this honorable court that the said affray occurred outside of the jurisdiction of the said state of New Jersey.

"*Ninth.* But, notwithstanding the foregoing facts, your petitioner respectfully further shows that the police authorities of Jersey City, in said state of New Jersey, have arrested the said Joseph Wildenhus, and also the said Gionviennie Gobnbosich and John J. Ostenmeyer, of the crew of the said vessel (one of whom is a quartermaster thereof), and that said Joseph Wildenhus has been committed by a police magistrate, acting under the authority of the said state, to the common jail of the county of Hudson, on a charge of an indictable offence under the laws of the said state of New Jersey, and is now held in confinement by the keeper of the said jail, and that the others of the said crew arrested as aforesaid are also detained in custody and confinement as witnesses to testify in such proceedings as may hereafter be had against the said Wildenhus."

Articles 8, 9, and 10 of a royal decree of the King of the Belgians, made on the 11th of March, 1857, relating to consuls and consular jurisdiction, were as follows:[1]

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[1] Art. 8. Nos consuls ont le droit de discipline sur les navires de commerce belges dans tous les ports et rades de leur arrondissement.

En matière de délits ou de crimes, ils font les actes d'instruction, conformément aux prescriptions du Code disciplinaire et pénal de la marine marchande.

Ils réclament, aux termes des conventions ou des lois en vigueur, le concours des autorités locales pour l'arrestation et la remise à bord des marins déserteurs.

Art. 9. Hors le cas où la tranquillité du port aurait été compromise par l'événement, le consul réclamera contre toute tentative que ferait l'autorité locale, de connaître des crimes ou délits commis, à bord d'un navire belge, par un homme de l'équipage envers un homme soit du même équipage, soit de l'équipage d'un autre navire belge.

Il fera les démarches convenables pour obtenir que la connaissance de l'affaire lui soit remise afin qu'elle soit ultérieurement jugée d'après les lois belges.

"ART. 8. Our consuls have the right of discipline on Belgian merchant vessels in all the ports and harbors of their district.

"In matters of offences or crimes they are to make the examination conformably to the instructions of the disciplinary and penal code of the merchant service.

"They are to claim, according to the terms of the conventions and laws in force, the assistance of the local authorities for the arrest and taking on board of deserting seamen.

"ART. 9. Except in the case where the peace of the port shall have been compromised by the occurrence, the consul shall protest against every attempt that the local authority may make to take cognizance of crimes or offences committed on board of a Belgian vessel by one of the ship's company towards one, either of the same company, or of the company of another Belgian vessel.

"He shall take the proper steps to have the cognizance of the case turned over to him, in order that it be ultimately tried according to Belgian laws.

"ART. 10. When men belonging to the company of a Belgian vessel shall be guilty of offences or crimes out of the ship, or even on board the ship, but against persons not of the company, the consul shall, if the local authority arrests or prosecutes them, take the necessary steps to have the Belgians so arrested treated with humanity, defended and tried impartially."

The application in this case was made under the authority of these Articles.

ARTICLE XI of a Convention between the United States and Belgium "concerning the rights, privileges, and immunities of consular officers," concluded March 9, 1880, and proclaimed by the President of the United States, March 1, 1881, 21 Stat. 776, 781, is as follows:

"The respective consuls-general, consuls, vice-consuls, and

ART. 10. Lorsque les hommes appartenant à l'équipage d'un navire belge se rendent coupables de délits ou de crimes hors du navire, ou même à bord du navire, mais envers des personnes étrangères à l'équipage, le consul, si l'autorité locale les arrête ou procède contre eux, fera les démarches nécessaires pour que les Belges ainsi arrêtés soient traités avec humanité, défendus et jugés impartialement. Réglements Consulaires, Bruxelles, 1857, page 70.

consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore, or in the port, or when a person of the country or not belonging to the crew, shall be concerned therein.

"In all other cases, the aforesaid authorities shall confine themselves to lending aid to the consuls and vice-consuls or consular agents, if they are requested by them to do so, in causing the arrest and imprisonment of any person whose name is inscribed on the crew list, whenever, for any cause, the said officers shall think proper."

The claim of the consul was, that, by the law of nations, and the provisions of this treaty, the offence with which Wildenhus was charged is "solely cognizable by the authority of the laws of the Kingdom of Belgium," and that the State of New Jersey was without jurisdiction in the premises. The Circuit Court refused to deliver the prisoners to the consul and remanded them to the custody of the jailer. 28 Fed. Rep. 924. To reverse that decision this appeal was taken.

Mr. F. R. Coudert and *Mr. Edward K. Jones* for appellants.

I. The offence in question in this case is exclusively cognizable by the authority of the Kingdom of Belgium. (1) Under the general rules of international law, to which the practice of the United States conforms; and (2) By virtue of treaties between the United States and Belgium.

Mr. Wheaton, in his work on International Law, says: "International law, as understood among civilized nations, may be defined as consisting of *those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations*, with such definitions and modifications as may be established by general con-

sent." Wheat. Int. Law (Dana's ed.), § 14; see also Halleck, Int. Law, 42; 1 Kent Com. 3. The *sources* and *evidence* of international law, aside from written conventions and treaties, are the *text-writers of authority*, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent. Wheat. Int. Law (Dana's ed.), § 15; 1 Kent Com. 18, 19. This "law of nations" is a part of the law of the land, and is obligatory upon the courts of the United States. *The Amelia*, 1 Cranch, 1; *S. C.* 4 Dall. 34; *The Charming Betsy*, 2 Cranch, 64, 118; *The Nereide*, 9 Cranch, 388; *The Estrella*, 4 Wheat. 298; *Holmes* v. *Jennison*, 14 Pet. 540, 569; *Henfield's Case*, Whart. St. Tr. 49–66. The general rule is well established, that the vessels of a nation are to be considered as a part of its territory, and the persons on board of them are deemed to be within the jurisdiction of such nation, and are protected and governed by the laws of the country to which such vessel belongs. Vattel Law of Nations, Book 1, c. 19, § 216; Wheat. Int. Law, 3d ed. 157; Wheat. Int. Law (Dana's ed.) § 106; 1 Kent Com. 26; *Crapo* v. *Kelly*, 16 Wall. 610; *In re Ah Sing*, 13 Fed. Rep. 286; Polson Int. Law, 25; 1 Massé Droit Commercial, 421, 423; 1 Ortolan Diplomatie de la Mer, 4th ed., Paris, 1864, 252, 292; Halleck Int. Law, 172, 173; 1 De Clerq et de Vallat Guide Pratique des Consulats, 366; 2 De Clerq Formulaires des Chancelleries, 65; 1 Requelmo Derecho Internacional, 243, 245.

The doctrine of the general international law is also in accordance with the established practice of the United States.

In commenting on the cases of *The Newton* and *The Sally* referred to by M. Massé, M. Ortolan very forcibly and pertinently observes: "These two cases are interesting from another point of view, which shows that the Americans, contrary to the opinion of one of their writers on international law, Mr. Wheaton, claim national jurisdiction of offences committed on board of their merchant vessels in a foreign port, when these offences have taken place only between the men of the crew, and the tranquillity of the port has not been broken; *in other words, this maritime power adopts the same principles that we do.*"

The action of our government, through its consuls at Antwerp and Marseilles, in the cases of *The Newton* and *The Sally*, in 1806, was soon afterwards followed by legislation affirming the principle of international law, declared and assented to by the two nations in those cases. The Crimes Act of March 3, 1825, c. 65, 4 Stat. 115, 116, after defining certain crimes committed at sea and other places within the admiralty jurisdiction of the United States, proceeds as follows:

"Sec. 5. And be it further enacted, that if any offence shall be committed on board of any ship or vessel, belonging to any citizen or citizens of the United States, *while lying in a port or place within the jurisdiction of any foreign state or sovereign*, by any person belonging to the company of said ship, or any passenger, on any other person belonging to the company of said ship, or any other passenger, the same offence shall be cognizable and punishable by the proper Circuit Court of the United States, in the same way and manner, and under the same circumstances, as if said offence had been committed on board of such ship or vessel on the high seas, and without the jurisdiction of such foreign sovereign or state; *provided, always*, That if such offender shall be tried for such offence, and acquitted or convicted thereof, in any competent court of such foreign state or sovereign, he shall not be subject to another trial in any court of the United States."

The act of 1825 is carried into the present Revised Statutes, and the section here referred to reproduced in §§ 730, 5339, and 5345. [Quære de hoc.] Since the passage of the act of 1825, numerous convictions have been had in Federal courts for crimes committed on board American vessels in foreign ports.

See, among others, *United States* v. *Stevens*, 4 Wash. C. C. 547; *United States* v. *Seagrist*, 4 Blatchford, 420; *United States* v. *Bennett*, 3 Hughes, 466. In the case last cited, the rule is explicitly asserted that "the law of the United States follows an American vessel wherever she may be on navigable waters, so that an offence committed on board such vessel is an offence against the United States, *though the vessel be in a harbor or river of a foreign country*."

The act of 1825 was followed in 1833 by the following in-

structions issued by Mr. Livingston, as Secretary of State, to the consuls of the United States in foreign countries. "Art. 36. Where piracy, mutiny, or any other offence against the laws of the United States shall have been committed on board of any vessel of the United States coming into the consular district, it is the duty of the consul, after taking the depositions necessary to establish the facts, to apply to the local authorities for means of securing the offenders while they remain in port, and to provide the means of sending them, without delay, to the United States for trial; and in all such cases where the vessel, on board which the offence was committed, is not bound to the United States, the consul is directed to procure two of the principal witnesses to be sent home with the person accused; and he is, at the same time, to transmit certified copies of all the depositions he has taken in relation to the offence; an exact detail of all its circumstances; and such information as may be necessary to secure the conviction of the offenders." Consular Regulations of March 2, 1833. See also for the Diplomatic action of the government, Mr. Webster to Lord Ashburton, August 1, 1842.

II. The offence in question is exclusively cognizable by the authority of Belgium by virtue of treaties existing between that country and the United States. The provision of the treaty under which this proceeding is brought is as follows:

"Article XI. — The respective consuls-general, consuls, vice-consuls, and consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore, or in the port, or when a person of the country or not belonging to the crew, shall be concerned therein."

As the Kingdom of Belgium, in its language, laws, and political history, is so intimately connected with the late Kingdom and present Republic of France, it may be useful, in

order to arrive at a proper interpretation of the meaning of this article of the Belgian treaty, to recur to similar provisions to be found in the treaties of France with the United States. The earliest provision upon the subject in question in a treaty to which the United States was a party, is to be found in the 8th Article of the treaty, between this country and France, of November 14, 1788. That Article is as follows:

"ARTICLE VIII. — The consuls or vice-consuls shall exercise police over all the vessels of their respective nations, and shall have on board the said vessels all power and jurisdiction in civil matters in all the disputes which may there arise; they shall have an entire inspection over the said vessels, their crew, and the changes and substitutions there to be made; for which purpose they may go on board the said vessels whenever they may judge it necessary. Well understood that the functions hereby allowed shall be confined to the interior of the vessels, and that they shall not take place in any case which shall have any interference with the police of the ports where the said vessels shall be."

The same provision was in substance reënacted by the treaty between the United States and France, of February 23, 1853, in the 8th Article. In every substantial respect these treaties correspond with the Belgian. In commenting upon the French treaties relative to the subject in question, M. Ortolan says:

"Various public treaties contain special clauses relative to the right of police, and of jurisdiction on French merchant vessels in foreign ports. Notwithstanding differences in the wording, the most important and recent are drawn in accordance with the spirit of the preceding principles; that is to say, in the sense of a distinction to be made between crimes or offences which do not extend beyond the interior and between men of the crew of the vessel, and those which concern the police of the port and compromise its tranquillity. Such was already in 1788 the convention of the 14th November between France and the United States." Ortolan Diplomatie de la Mer, 4th ed., p. 278.

M. Massé, in the passage above referred to, says: "A dis-

tinction is to be made between crimes and offences which disturb the order of the place where the foreign vessel is, and those which disturb only *the internal order of the ship* — [et ceux qui ne portent atteinte qu'à *l'ordre intérieur du bâtiment*]. The former belong to the territorial jurisdiction; the latter are cognizable only by the nation to which belongs the vessel or the flag." Further on, in speaking of the cases of *The Newton* and *The Sally*, after referring to crimes that affect the police of the port, he says: "It is otherwise in case of offences committed on board of the foreign vessel by a man of the crew against another man of the same crew, because it concerns *the internal discipline of the vessel* — [parce qu'il s'agit alors *de la discipline intérieure du vaisseau*] — in which the local authority should not interfere when its assistance is not called for, or the tranquillity of the port is not broken." See also Dana's Note to Wheaton, §§ 95, 153; and for the principles for construing treaties see *United States* v. *Payne*, 8 Fed. Rep. 883; *Hauenstein* v. *Lynham*, 100 U. S. 483.

Since this class of treaties has been concluded, some modifications have been made in the instructions to consuls. See Consular Regulations of 1874, §§ 172–175, 194–196. These show that the rule of general international law, originally laid down in the cases of *The Newton* and *The Sally*, and asserted in this case, is considered by the United States as being embodied in all the recent treaties with foreign nations, in which the present treaty with Belgium is included.

If this be not so, then the United States has receded from its position in the cases of *The Newton* and *The Sally*, and repudiated the act of 1825, and Article 36 of the Consular Regulations of 1833. There is no evidence to show such recession and repudiation. On the contrary, the tendency of the whole history of the government has been in the direction of enlarging and extending the immunities and exemptions of its citizens from the authority of foreign nations.

The attitude and action of the executive department of the government upon questions of foreign relations furnishes a rule for observance by the judicial department, and in all cases that may arise with regard to questions of international

law it is the duty of the courts to adopt the determination of the other branch of the government upon such questions as the basis of their decisions. *United States* v. *Palmer*, 3 Wheat. 610, 634; *The Divina Pastora*, 4 Wheat. 52, 63; *The Santissima Trinidad*, 7 Wheat. 283, 337; *Foster* v. *Neilson*, 2 Pet. 253, 307. See also the able review of the decision of the Supreme Court of New York in the McLeod case, written by Judge Tallmadge and published in the Appendix to 26 Wendell, 663, 684.

Mr. Coudert and *Mr. Jones* also argued that the Federal courts had power to release the prisoners by writ of *habeas corpus*.

Mr. C. H. Winfield for appellee.

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

By §§ 751 and 753 of the Revised Statutes the courts of the United States have power to issue writs of *habeas corpus* which shall extend to prisoners in jail when they are in "custody in violation of the Constitution or a law or treaty of the United States," and the question we have to consider is, whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." *United States* v. *Diekelman*, 92 U. S. 520; 1 Phillimore's Int. Law, 3d ed. 483, § 351; Twiss' Law of Nations

in Time of Peace, 229, § 159; Creasy's Int. Law, 167, § 176; Halleck's Int. Law, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina* v. *Cunningham*, Bell C. C. 72; *S. C.* 8 Cox C. C. 104; *Regina* v. *Anderson*, 11 Cox C. C. 198, 204; *S. C.* L. R. 1 C. C. 161, 165; *Regina* v. *Keyn*, 13 Cox C. C. 403, 486, 525; *S. C.* 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.

Opinion of the Court.

The first of these conventions entered into by the United States after the adoption of the Constitution was with France, on the 14th of November, 1788, 8 Stat. 106, "for the purpose of defining and establishing the functions and privileges of their respective consuls and vice-consuls," Art. VIII of which is as follows:

"The consuls or vice-consuls shall exercise police over all the vessels of their respective nations, and shall have on board the said vessels all power and jurisdiction in civil matters, in all the disputes which may there arise; they shall have an entire inspection over the said vessels, their crew, and the changes and substitutions there to be made; for which purpose they may go on board the said vessels whenever they may judge it necessary. Well understood that the functions hereby allowed shall be confined to the interior of the vessels, and that they shall not take place in any case which shall have any interference with the police of the ports where the said vessels shall be."

It was when this convention was in force that the cases of *The Sally* and *The Newton* arose, an account of which is given in Wheaton's Elements of International Law (3d ed.) 153, and in 1 Phillimore's International Law (3d ed.) 484 and (2d ed.) 407. *The Sally* was an American merchant vessel in the port of Marseilles, and *The Newton* a vessel of a similar character in the port of Antwerp, then under the dominion of France. In the case of *The Sally*, the mate, in the alleged exercise of discipline over the crew, had inflicted a severe wound on one of the seamen, and in that of *The Newton* one seaman had made an assault on another seaman in the vessel's boat. In each case the proper consul of the United States claimed exclusive jurisdiction of the offence, and so did the local authorities of the port; but the Council of State, a branch of the political department of the government of France to which the matter was referred, pronounced against the local tribunals, "considering that one of these cases was that of an assault committed in the boat of the American ship *Newton*, by one of the crew upon another, and the other was that of a severe wound inflicted by the mate of the American ship *Sally* upon

one of the seamen for having made use of the boat without leave." This was clearly because the things done were not such as to disturb "the peace or tranquillity of the port." Wheaton's Elements Int. Law, 3d ed. 154. The case of *The Sally* was simply a quarrel between certain of the crew while constructively on board the vessel, and that of *The Newton* grew out of a punishment inflicted by an officer on one of the crew for disobedience of orders. Both were evidently of a character to affect only the police of the vessel, and thus within the authority expressly granted to the consul by the treaty.

No other treaty or convention bearing on this subject, to which our attention has been called, was entered into by the United States until a treaty with Sweden and Norway, on the 4th of September, 1816, 8 Stat. 232, where it was agreed, by Art. 5, that: "The consuls and their deputies shall have the right, as such, to act as judges and arbitrators in the differences which may arise between the captains and crews of the vessels of the nation whose affairs are intrusted to their care. The respective governments shall have no right to interfere in matters of this kind, except the conduct of the captain or crew shall disturb the peace and tranquillity of the country in which the vessel may be, or the consul of the place shall feel himself obliged to resort to the interposition and support of the executive authority to cause his decision to be respected and maintained. It being, nevertheless, understood that this kind of judgment or award shall not deprive the contending parties of the right which they have, on their return, to recur to the judicial authorities of their own country."

Substantially the same provision is found in treaties or conventions concluded with Prussia in 1828, Art X, 8 Stat. 382; with Russia in 1832, Art. VIII, id. 448; with Greece in 1837, Art. XII, id. 504; with Hanover in 1840, Art. VI, id. 556; with Portugal also in 1840, Art. X, id. 564; with the Grand Duchy of Mecklenburg-Schwerin in 1847, Art. IX, 9 Stat. 916; with Oldenburg in 1847, id. 868; with Austria in 1848, Art. IV, id. 946; with the Hanseatic Republics in 1852, Art. I, 10 Stat. 961; with the Two Sicilies in 1855, Art. XIX, 11 Stat.

650; with Denmark in 1861, Art. I, 13 Stat. 605; and with the Dominican Republic in 1867, Art. XXVI, 15 Stat. 487.

In a convention with New Grenada concluded in 1850 the provision was this:

"They [the consuls, &c.] may cause proper order to be maintained on board of vessels of their nation, and may decide on the disputes arising between the captains, the officers, and the members of the crew, unless the disorders taking place on board should disturb the public tranquillity, or persons not belonging to the crew or to the nation in whose service the consul is employed; in which case the local authorities may interfere." Art. III, clause 8, 10 Stat. 903.

Following this was a convention with France, concluded in 1853, 10 Stat. 996, Art VIII of which is as follows:

"The respective consuls-general, consuls, vice-consuls, or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls."

The same provision in substantially the same language was embraced in a convention with Italy in 1868, Art. XI, 15 Stat. 609; and in another with Belgium, also in 1868, Art. XI, 16 Stat. 761. This convention with Belgium continued in force until superseded by that of 1880–81, under which the present controversy arose.

The form of the provision found in the present convention with Belgium first appeared in a convention with Austria concluded in 1870, Art. XI, 17 Stat. 827, and it is found now in substantially the same language in all the treaties and conventions which have since been entered into by the United States on the same subject. See the conventions with the German Empire in 1871, Art. XIII, 17 Stat. 927; with the Netherlands in 1878, Art. XI, 21 Stat. 668; with Italy in 1881, Art. I, 22 Stat. 832; with Belgium in 1881, as stated above; and with Roumania the same year, Art. XI, 23 Stat. 714.

It thus appears that at first provision was made only for giving consuls police authority over the interior of the ship and jurisdiction in civil matters arising out of disputes or differences on board, that is to say, between those belonging to the vessel. Under this police authority the duties of the consuls were evidently confined to the maintenance of order and discipline on board. This gave them no power to punish for crimes against the peace of the country. In fact, they were expressly prohibited from interfering with the local police in matters of that kind. The cases of *The Sally* and *The Newton* are illustrative of this position. That of *The Sally* related to the discipline of the ship, and that of *The Newton* to the maintenance of order on board. In neither case was the disturbance of a character to affect the peace or the dignity of the country.

In the next conventions consuls were simply made judges and arbitrators to settle and adjust differences between those on board. This clearly related to such differences between those belonging to the vessel as are capable of adjustment and settlement by judicial decision or by arbitration, for it simply made the consuls judges or arbitrators in such matters. That would of itself exclude all idea of punishment for crimes against the State which affected the peace and tranquillity of the port; but, to prevent all doubt on this subject, it was expressly provided that it should not apply to differences of that character.

Next came a form of convention which in terms gave the consuls authority to cause proper order to be maintained on

board and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is substantially all there is in the convention with Belgium which we have now to consider. This treaty is the law which now governs the conduct of the United States and Belgium towards each other in this particular. Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board a merchant vessel, but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.

The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done — the disorder that has arisen — on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the "public repose" of the people who look to the state of New Jersey for their protection. If the thing done — "the disorder," as it is called in the treaty — is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they as a rule care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when com-

mitted within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder" the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a "disorder" which will "disturb tranquillity and public order on shore or in the port." The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.

This is fully in accord with the practice in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of *The Sally* and *The Newton*, by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of *Jally*, the mate of an American merchantman, who had killed one of the crew and severely wounded another on board the ship in the port of Havre, the Court of Cassation, the highest judicial

tribunal of France, upon full consideration held, while the Convention of 1853 was in force, that the French courts had rightful jurisdiction, for reasons which sufficiently appear in the following extract from its judgment:

"Considering that it is a principle of the law of nations that every state has sovereign jurisdiction throughout its territory;

"Considering that by the terms of Article 3 of the Code Napoleon the laws of police and safety bind all those who inhabit French territory, and that consequently foreigners, even *transeuntes*, find themselves subject to those laws;

"Considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government;

"Considering that every state is interested in the repression of crimes and offences that may be committed in the ports of its territory, not only by the men of the ship's company of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime by common law," (*droit commun*, the law common to all civilized nations,) "the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory."[1] 1 Ortolan Diplomatie de la Mer (4th ed.), pp. 455, 456; Sirey (N. S.), 1859, p. 189.

The judgment of the Circuit Court is affirmed.

[1] "Attendu que c'est un principe du droit des gens que chaque État a la juridiction souveraine dans l'étendue de tout son territoire;

"Attendu qu'aux termes de l'article 3 du Code Napoléon, les lois de police et de sûreté obligent tous ceux qui habitent le territoire français, et que, par suite, les étrangers, même *transeuntes*, s'y trouvent soumis;

Syllabus.

ALLEN *v.* ST. LOUIS BANK.

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

Argued April 9, 1886. — Decided January 10, 1887.

In an action in which a jury has been waived in writing, and the judgment of the Circuit Court is for more than $5000, the question whether the facts set forth in a special finding of the court are sufficient in law to support the judgment may be reviewed on writ of error, without any bill of exceptions or certificate of division of opinion.

At common law, a factor has no power to pledge, whether he is intrusted with the possession of the goods, or with the bill of lading or other symbol of property.

The statute of Missouri of March 4, 1869, gives no validity to a transfer, without indorsement in writing, of a bill of lading or warehouse receipt.

The statute of Missouri of March 28, 1874, making the pledge of goods by a factor, without the written authority of the owner, a criminal offence, does not render such a pledge valid as between the owner and the pledgee.

A usage of trade for banks to take pledges from factors, as security for the payment of the general balance of account between them, of goods known to be held by them as factors, is unlawful.

An unauthorized pledge by a factor, of goods owned by a partnership of which he is a member, to secure the payment of his own debt to one who knows him as a factor only, is invalid against the partnership.

"Attendu que les bâtiments de commerce entrant dans le port d'une nation autre que celle à laquelle ils appartiennent ne pourraient être soustraits à la juridiction territoriale, toutes les fois que l'intérêt de l'État dont ce port fait partie se trouve engagé, sans danger pour le bon ordre et la dignité du gouvernement;

"Attendu que tout État est intéressé à la répression des crimes et délits qui peuvent être commis dans les ports de son territoire, non-seulement par des hommes de l'équipage d'un bâtiment du commerce étranger envers des personnes ne faisant pas partie de cet équipage, mais même par des hommes de l'équipage entre eux; soit lorsque le fait est de nature à compromettre la tranquillité du port, soit lorsque l'intervention de l'autorité locale est réclamée, soit lorsque le fait constitue un crime de droit commun que sa gravité ne permet à aucune nation de laisser impuni, sans porter atteinte à ses droits de souveraineté juridictionelle et territoriale, parce que ce crime est par lui-même la violation la plus manifeste comme la plus flagrante des lois que chaque nation est chargée de faire respecter dans toutes les parties de son territoire."

Statement of Facts.

If a factor, to whom the owner of goods has made a negotiable promissory note and consigned the goods under an agreement between them that the proceeds of the goods when sold shall be applied to the payment of the note, indorses the note and pledges the goods to secure the payment of advances made to him by one who knows him to be a factor and to hold the goods as such, the pledgee is bound to apply the proceeds of the goods to the payment of the note, and the maker may set up this obligation in defence of an action by the pledgee on the note.

This court, on reversing a judgment of the Circuit Court for the plaintiff on a special finding which ascertains all the facts of the case, will order judgment for the defendant without further trial.

THE original action was brought by the St. Louis National Bank against Augusta B. Allen and her daughter on a promissory note for $3750, with interest at the rate of ten per cent. yearly, made by the defendants May 10, 1878, and payable December 20, 1878, to the order of J. H. Dowell & Co., and by them indorsed to the plaintiff.

The answer alleged that the plaintiff was bound to apply in payment of the note the proceeds of certain cotton pledged to the plaintiff by the payees; and set out the facts attending the making and indorsement of the note and the pledge of the cotton, substantially as afterwards found by the court and stated below, except in the following respects: The answer alleged that the plaintiff took the note and the cotton with full notice of the agreement and understanding between the makers and the payees, and was not a holder of the note in good faith and for value, but took it as collateral security for preëxisting debts of the payees to the plaintiff. The answer contained no statement of the general course of dealing between the payees and the plaintiff, and no mention of any usage of trade. As a further defence, the answer alleged that the note had been paid and satisfied.

The plaintiff filed a replication, denying all the allegations of the answer. A jury was duly waived in writing, and the case was tried by the court, which made this special finding of facts:

"1st. The promissory note set forth in the petition was made by the defendants, and delivered by them to J. H. Dowell for J. H. Dowell & Co., the said J. H. Dowell being

the active partner of J. H. Dowell & Co., and as such having the control and management of their business as cotton factors; and such note was so made under the circumstances and for the purposes hereinafter stated. Said J. H. Dowell procured said note before its maturity to be discounted by the plaintiff, who paid to him the amount of said note less the usual discount, and thereupon the said J. H. Dowell, in the name of J. H. Dowell & Co., indorsed and delivered said note to said plaintiff, by whom it is still held. Said note has not been paid, unless the facts hereinafter found amount to or operate as a payment thereof. The amount due on said note with interest to this time, if the plaintiff is entitled to recover thereon, is the sum of $5377.08. The plaintiff is the *bona fide* holder of the note sued on, for value, before maturity, without notice of any of the defences herein claimed, unless notice is to be implied from the facts hereinafter set forth.

"2d. At the date of said note and for several years before, and until March, 1879, J. H. Dowell was a cotton factor at St. Louis, Mo., doing business as the active member of J. H. Dowell & Co., and as such having the control and management of their business as cotton factors, receiving consignments of cotton for sale on commission from planters and others, and making advances during the pending season to their consignors of supplies and cash, to be reimbursed out of the proceeds of the cotton crops of said consignors when received and sold. Said J. H. Dowell and the defendants were also partners in the working of a cotton plantation in Clover Bend, Arkansas, under the firm name and style of Allen & Dowell; and said J. H. Dowell & Co. of St. Louis acted as the factors of said Allen & Dowell, receiving the cotton raised by them each year and disposing of it at St. Louis, and furnishing each season the supplies needed by Allen & Dowell for carrying on the plantation, and charging such advances to Allen & Dowell in account, and crediting them on said account with the proceeds of the cotton when received and sold or disposed of, the accounts being kept with Allen & Dowell in the same manner as with other consignors of cotton.

"3d. The note sued on was made and delivered to J. H.

Dowell, the active member of the firm aforesaid, under the name of J. H. Dowell & Co., by the defendants, at or about its date, at the request of said J. H. Dowell, for the purpose of being used by him and for his accommodation, to enable him to raise funds to furnish the necessary supplies to Allen & Dowell for operating said plantation during the season of 1878, and with the understanding between J. H. Dowell and the defendants (but not with any understanding or knowledge of the plaintiff) that it should be taken up and paid by J. H. Dowell at maturity out of the proceeds of the cotton crop of Allen & Dowell for that year, when received and sold by J. H. Dowell & Co. There was no other or further consideration as between J. H. Dowell and the defendants for the making of said note. The amount of said note was credited by J. H. Dowell for J. H. Dowell & Co. to Allen & Dowell at its date on account, and at its maturity was charged to Allen & Dowell on said account as though taken up and paid by J. H. Dowell & Co. But it was not in fact paid or taken up. The proceeds of the cotton crop of Allen & Dowell for 1878, consigned to J. H. Dowell & Co., were more than sufficient to pay and satisfy the said note, together with all other advances and charges by J. H. Dowell & Co. to Allen & Dowell, if such proceeds had been applied to the payment of said note. The balance in favor of Allen & Dowell on said account was never paid or settled by J. H. Dowell, and the partnership accounts between the partners composing the firm of Allen & Dowell have never been adjusted and settled.

"4th. During the year 1878, and until March, 1879, J. H. Dowell & Co. kept their bank deposit account with the plaintiff and were very large borrowers of money from said bank. During the said period the following transactions were had between J. H. Dowell & Co. and the said bank, concerning all the cotton consigned to J. H. Dowell & Co., including the cotton of Allen & Dowell consigned to J. H. Dowell & Co. The mode of such transactions was as follows: The cotton being shipped to J. H. Dowell and Co. by railroad, the bills of lading therefor as soon as received by J. H. Dowell & Co. were delivered to the bank, which thereupon gave J. H. Dowell &

Co. credit in their deposit account for an amount equal in the aggregate to $40 for each bale, represented by such bill of lading, taking J. H. Dowell & Co.'s note for said amount, payable on demand with interest. The amount so credited to J. H. Dowell & Co. in their account would be subject to their check when and so far as the balance of account was after such credit in their favor; but their account was sometimes largely overdrawn, as was the case with many of the customers or dealers in St. Louis with the bank. When the cotton represented by such bills of lading arrived in St. Louis, it was delivered by the railroad company transporting it to a cotton warehousing company, which, on receipt thereof, issued therefor its warehouse receipts, acknowledging the receipt of the cotton described by number of bales and marks thereof, and undertaking to deliver said cotton to the bearer of the receipts on demand. Said receipts were then delivered to the bank in exchange for the bills of lading, which were surrendered and cancelled.

"It is not shown whether or not the bills of lading or the warehouse receipts or any of them were indorsed in writing by J. H. Dowell & Co. or by any one, when transferred to the bank, there being no evidence on this specific matter.

"The bank knew that the business of J. H. Dowell & Co. was that of factors, and understood that the cotton represented by the bills of lading and warehouse receipts, as aforesaid, was held by J. H. Dowell & Co. as factors, and also knew that J. H. Dowell and the defendants were jointly interested in owning and operating the plantation in the State of Arkansas. The bank did not know and made no inquiry as to the ownership of any of the cotton, nor as to the particular dealings of J. H. Dowell & Co. with such owners, nor as to the state of accounts between them.

"It does not appear that cotton received by J. H. Dowell & Co. from different consignors was kept distinct or separate in the transactions above referred to as made with the bank, nor does it appear what particular transaction included the cotton of Allen & Dowell or any part of it. During the period said J. H. Dowell & Co. by J. H. Dowell turned over to the

bank, in the manner and for the purposes above specified, all the cotton consigned to said firm, including that of Allen & Dowell.

"5th. The cotton represented by the bills of lading and warehouse receipts, in the transactions with the bank aforesaid, was sold in the manner following: Sales were negotiated by J. H. Dowell & Co. by means of samples, and they agreed with the purchasers as to all the terms of sale, including prices. When the agreement of sale was thus made, the purchaser uniformly paid the entire purchase money to the bank, and on such payment the bank delivered to the purchaser the warehouse receipt held by it, on the presentation of which to the cotton warehouse the cotton would be delivered. The entire amount received by the bank for the cotton was credited to J. H. Dowell & Co. in their deposit account, and at the same time, and as part of the same transaction, J. H. Dowell & Co. were required to and did draw and deliver to the bank their check on the same account for the amouut of their demand notes to the bank, and thereby take up such notes.

"In March, 1879, J. H. Dowell suddenly died, and his estate proved insolvent. J. H. Dowell & Co.'s account with the bank was then overdrawn, and they were indebted to the bank.

"The bank at the time of said Dowell's death held about 1000 bales of cotton through its transactions, as aforesaid, with J. H. Dowell & Co., some of which were replevied, and some by the bank sold and the proceeds applied to the payment *pro tanto* of the said indebtedness of J. H. Dowell & Co. But it does not appear, from any testimony in the case, that any part of the cotton on hand at the time of the death of Dowell was the Allen & Dowell cotton. All the cotton shipped by Allen & Dowell to J. H. Dowell & Co. was sold and disposed of as hereinbefore stated and before the death of J. H. Dowell. The particular sales, including said cotton of Allen & Dowell, do not appear. The defendants had no notice of the nonpayment of the note sued on until after Dowell's death.

"6th. The borrowing of money from the bank by J. H. Dowell & Co., the making of notes therefor, and the transactions, as aforesaid, between J. H. Dowell & Co. and the bank

concerning the bills of lading and the warehouse receipts and the final distribution of the cotton and its proceeds, as aforesaid, were all according to the general usage of trade between banks and cotton factors at St. Louis, Missouri, where the transactions took place.

"7th. At the time that the note in controversy was made, another of the same kind was made by and to the same parties and as a part of the same transactions, which note was at the same time discounted by the bank in the same way, and was at its maturity paid to the bank by J. H. Dowell & Co., and charged to Allen & Dowell in account with J. H. Dowell & Co. against the proceeds of the cotton crop of Allen & Dowell in 1878."

It was also stated, in the finding of facts, that at the time of these transactions certain statutes of Missouri were in force, which are copied in the margin.[1]

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[1] The statute of March 4, 1869, contains the following provisions:

"SECTION 1. All receipts issued or given by any warehouseman or other person or firm, and all bills of lading, transportation receipts and contracts of affreightment, issued or given by any person, boat, railroad or transportation or transfer company, for goods, wares, merchandise, grain, flour or other produce, shall be and are hereby made negotiable by written indorsement thereon and delivery in the same manner as bills of exchange and promissory notes; and no printed or written conditions, clauses or provisions, inserted in or attached to any such receipts, bills of lading or contracts, shall in any manner limit the negotiability or affect any negotiations thereof, nor in any manner impair the rights and duties of the parties thereto, or persons interested therein; and every such conditions, clauses or provisions, purporting to limit or affect the rights, duties or liabilities created or declared in this act, shall be void and of no force or effect.

"SEC. 2. Warehouse receipts given by any warehouseman, wharfinger, or other person or firm, for any goods, wares, merchandise, grain, flour, or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind, given by any carrier, boat, vessel, railroad, transportation or transfer company, may be transferred by indorsement in writing thereon and the delivery thereof so indorsed; and any and all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, grain, flour, or other produce or commodity, so far as to give validity to any pledge, lien or transfer, given, made or created thereby, as on the faith thereof; and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered, except on surrender and cancellation of such

Statement of Facts.

The Circuit Judge and the District Judge certified that they were opposed in opinion upon the following questions:

"1st. Whether the transactions between the plaintiff and J. H. Dowell & Co. concerning the bills of lading, warehouse receipts, and the sales of cotton, and application of the proceeds, were valid and effectual in favor of the plaintiff and as against the defendants, at common law.

"2d. Whether said transactions were or not valid in favor of the plaintiff as against the defendants, by virtue of the statutes of Missouri in respect to bills of lading and warehouse receipts and the transfer or negotiability of such instruments, heretofore set forth.

"3d. Whether such transactions were valid as to the plaintiff against the defendants, by reason of being in conformity to the usage and custom of bankers and factors at St. Louis.

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receipts and bills of lading; provided, however, that all such receipts and bills of lading, which shall have the words 'not negotiable' plainly written or stamped on the face thereof, shall be exempt from the provisions of this act." Missouri Laws, 1869, p. 91.

The statute of March 28, 1874, amends § 12 of the statute of March 10, 1868, so as to read as follows:

"SECTION 12. If any commission merchant, agent or other person storing or shipping any grain, flour, or other produce or commodity, or any person to whom any such property is consigned, and who shall come in possession of a bill of lading or warehouse receipt for such property, for or on account of another person or other persons, shall hypothecate, negotiate or pledge such bill of lading or warehouse receipt, without the written authority therefor of the owner or consignor of such property; or if, having so disposed of such bill of lading or warehouse receipt, shall fail to account for and pay over the proceeds thereof forthwith to his principal or the owner of such property; in either or any of such cases, he shall be adjudged guilty of fraud, and shall, on conviction, be punished by fine not exceeding five thousand dollars, or by imprisonment in the penitentiary for a term not exceeding five years, or by both such fine and imprisonment: Provided, that nothing herein shall be construed to prevent such consignee or other person, lawfully possessed of such bill of lading or warehouse receipt, from pledging the same, to the extent of raising sufficient means thereby to pay charges for storage and shipment, or advances drawn for on such property by the owner or consignor thereof; and a draft or order by such owner or consignor for advances shall be held and taken to be 'written authority,' within the meaning of this section, for the hypothecation of such bill of lading or warehouse receipt, to the extent, and only to the extent, of raising the means to meet such draft and to pay such freights and storage." Missouri Laws, 1874, p. 51.

"4th. Whether such transactions were valid in favor of the plaintiff as against the defendants, by reason of the fact that J. H. Dowell was a partner in the firm of Allen & Dowell.

"5th. Whether upon the sale of cotton having been finally made by J. H. Dowell & Co., as stated in the findings, J. H. Dowell & Co. became debtors only of the consignors of the cotton, and had the right as to the plaintiff for this borrowed money out of the proceeds of the sale of such cotton.

"6th. Whether upon the findings the judgment should be for the plaintiff or for the defendants."

Upon the special finding of facts, and in accordance with the opinion of the Circuit Judge, judgment was entered for the plaintiff in the sum of $5377.08, with interest and costs, and the defendants sued out this writ of error.

Mr. John N. Rogers, for plaintiffs in error, cited: *Gibson* v. *Stevens*, 8 How. 384; *St. Louis National Bank* v. *Ross*, 9 Missouri App. 399, 411; *Fourth National Bank* v. *St. Louis Cotton Compress Co.*, 11 Missouri App. 333; *Rice* v. *Cutler*, 17 Wis. 351; *Warner* v. *Martin*, 11 How. 209, 224; *McCombie* v. *Davies*, 7 East, 5; *Martini* v. *Coles*, 1 M. & S. 140; *Solly* v. *Rathbone*, 2 M. & S. 298; *Cockran* v. *Irlam*, 2 M. & S. 301; *Urquhart* v. *McIver*, 4 Johns. 103, 116; *Gray* v. *Agnew*, 95 Ill. 315; *Newbold* v. *Wright*, 4 Rawle, 195; *Rodriguez* v. *Heffernan*, 5 Johns. Ch. 417, 429; *Merchants' National Bank* v. *Trenholm*, 12 Heiskell, 520; *Kauffman* v. *Beasley*, 54 Texas, 563; *Benny* v. *Rhodes*, 18 Missouri, 147; *S. C.* 59 Am. Dec. 293; *Benny* v. *Pegram*, 18 Missouri, 191; *S. C.* 59 Am. Dec. 298; *Wheeler & Wilson Co.* v. *Givan*, 65 Missouri, 89; *Queiroz* v. *Trueman*, 3 B. & C. 342; *Graham* v. *Dyster*, 2 Starkie, 21; *D'Aubigny* v. *Duval*, 5 T. R. 604; *Barnard* v. *Kellogg*, 10 Wall. 383, 390; *Oelrichs* v. *Ford*, 23 How. 49, 63; *Savings Bank* v. *Ward*, 100 U. S. 195, 206; *Thompson* v. *Riggs*, 5 Wall. 663, 679; *National Bank* v. *Burkhardt*, 100 U. S. 686, 692; *Lehman* v. *Marshall*, 47 Ala. 362; *Rogers* v. *Batchelor*, 12 Pet. 221; *Dob* v. *Halsey*, 16 Johns. 34; *S. C.* 8 Am. Dec. 293; *Snaith* v. *Burridge*, 4 Taunt. 684; *Brewster* v. *Mott*, 4 Scammon, 378; *Kelley* v. *Greenleaf*, 3

Story, 93; *Steiger* v. *Third National Bank*, 2 McCrary, 494; *S. C.* 6 Fed. Rep. 569; *Shaw* v. *Railroad Co.*, 101 U. S. 557; *Smith* v. *Sac County*, 11 Wall. 139; *Greenbaum* v. *Megibben*, 10 Bush, 419; *First National Bank* v. *Boyce*, 78 Kentucky, 42; *Erie & Pacific Dispatch* v. *St. Louis Cotton Compress Co.*, 6 Missouri App. 172; *Whitlock* v. *Hay*, 58 N. Y. 484; *Insurance Co.* v. *Kiger*, 103 U. S. 352; *Price* v. *Ins. Co.*, 43 Wis. 267; *Stevens* v. *Wilson*, 6 Hill, 512; *S. C. in error*, 3 Denio, 472; *Covell* v. *Hill*, 6 N. Y. 374, 380; *Cartwright* v. *Wilmerding*, 24 N. Y. 521, 534; *Howland* v. *Woodruff*, 60 N. Y. 73, 79–80.

Mr. James Hagerman for defendant in error, (*Mr. Frank Hagerman* was with him on the brief,) cited: *Kingston Bank* v. *Gay*, 19 Barb. 459; *Roach* v. *Turk*, 9 Heiskell, 708; *McCombie* v. *Davies*, 6 East, 538; *Laussatt* v. *Lippincott*, 6 S. & R. 386; *S. C.* 9 Am. Dec. 440; *Borie* v. *Napier*, 1 McCord, 1; *Foley* v. *Hill*, 2 H. L. Cas. 28; *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 N. Y. 82; *Boyden* v. *Bank of Cape Fear*, 65 No. Car. 13; *Allen* v. *Fourth Nat. Bank*, 37 N. Y. Superior (5 Jones & Spencer), 137; *Buchanan Farm Oil Co.* v. *Woodman*, 1 Hun, 639; *In re Franklin Bank*, 1 Paige, 249; *S. C.* 19 Am. Dec. 413; *Phœnix Bank* v. *Risley*, 111 U. S. 125; *Thompson* v. *Riggs*, 5 Wall. 663, 678; *Marine Bank* v. *Fulton Bank*, 2 Wall. 252; *Bank of Republic* v. *Millard*, 10 Wall. 152; *Clark* v. *Moody*, 17 Mass. 145, 147; *Martini* v. *Coles*, 1 M. & S. 140; *Shipley* v. *Kymer*, 1 M. & S. 484; *Evans* v. *Pollen*, 2 Gallison, 13; *Kingston* v. *Wilson*, 1 Wash. C. C. 310; *Stewart* v. *Aberdein*, 4 M. & W. 211; *Catterall* v. *Hindle*, L. R. 2 C. P. 368; *Sweeting* v. *Pearce*, 9 C. B. N. S. 534; *McNeil* v. *Tenth National Bank*, 46 N. Y. 325; *Moore* v. *Metropolitan Bank*, 55 N. Y. 41; *Weirick* v. *Mahoning Bank*, 16 Ohio St. 296; *Combes* v. *Chandler*, 33 Ohio St. 178; *Winter* v. *Belmont Mining Co.*, 53 Cal. 428; *Price* v. *Wisconsin Marine & Fire Ins. Co.*, 43 Wis. 267–269; *Henry* v. *Philadelphia Warehouse Co.*, 81 Penn. St. 76; *Pegram* v. *Carson*, 10 Bosworth, 505; *Howland* v. *Woodruff*, 60 N. Y. 73; *Locke* v. *Lewis*, 124 Mass. 1; *International Bank* v. *German Bank*, 71

Missouri, 183; *Talty* v. *Freedman's Savings Co.*, 93 U. S. 321; *Goodenow* v. *Tyler*, 7 Mass. 36; *S. C.* 5 Am. Dec. 22.

Mr. Justice Gray delivered the opinion of the court.

When a jury is waived in writing, and the case tried by the court, the court's finding of facts, whether general or special, has the same effect as the verdict of a jury; and although a bill of exceptions is the only way of presenting rulings made in the progress of the trial, the question whether the facts set forth in a special finding of the court, which is equivalent to a special verdict, are sufficient in law to support the judgment, may be reviewed on writ of error without any bill of exceptions. Act of March 3, 1865, c. 86, § 4, 13 Stat. 501; Rev. Stat. §§ 649, 700; *French* v. *Edwards*, 21 Wall. 147; *Ex parte French*, 91 U. S. 423. The question whether the facts found by the court in the case at bar are sufficient to support the judgment below includes the several questions of law affecting the merits of the case. That judgment is for more than $5000, which is sufficient to give this court jurisdiction in error. Act of February 16, 1875, c. 77, § 3, 18 Stat. 316. It is therefore unnecessary to consider whether those questions are duly stated in the certificate of division of opinion, within the rule affirmed in *Williamsport Bank* v. *Knapp*, 119 U. S. 357.

The leading facts of the case, as found by the Circuit Court, are as follows:

The original action was on a promissory note made by the defendants, payable to the order of J. H. Dowell & Co., and by them indorsed to the plaintiff bank. J. H. Dowell & Co. were a partnership of cotton factors at St. Louis, in which Dowell was the active and managing partner. Dowell was also a partner with the defendants, under the name of Allen & Dowell, in the working of a cotton plantation in Arkansas.

The note in suit was made and delivered by the defendants to the payees, their factors, to enable them to raise funds to furnish supplies for working that plantation, and under an agreement between the parties that the note should be taken

up and paid by the factors out of the proceeds of the cotton crop of the plantation for the coming season, when received and sold by them. That crop was consigned to the factors under that agreement, and its proceeds were more than sufficient to pay this note and all other charges of the factors. It is not doubted that upon these facts the makers would have a complete defence to the note in the hands of the payees.

But before the maturity of the note, the payees had it discounted by, and indorsed and delivered it to, the plaintiff bank, with which they kept their deposit account, and of which they from time to time borrowed large sums of money. As soon as they received the bills of lading of cotton consigned to them as factors by the defendants or by other persons, they delivered those bills to the bank, which thereupon gave them a credit, in their deposit account, of $40 for each bale, and took their note for the amount, payable on demand, with interest. On the arrival of the cotton, it was delivered to warehousemen, who gave receipts undertaking to deliver it to bearer, and these receipts were delivered to the bank in exchange for the bills of lading, which were surrendered and cancelled. There was no evidence that either the bills of lading or the warehouse receipts were indorsed in writing. The bank knew that the payees of the note in suit were factors, and that they held the cotton as such. It did not know and made no inquiry as to the ownership of any of the cotton, or the dealings of the factors with the owners, or the state of accounts between them.

The cotton was sold in the following manner: The factors negotiated sales by means of samples, and fixed the price and other terms of sale. The bank received the whole price from the purchasers, and delivered to them the warehouse receipts, and credited the factors with the amount received, but at the same time, and as part of the same transaction, required them to draw, and they did draw and deliver to the bank, their checks for the amount of their demand notes held by the bank. After all the cotton had been sold, there was a large balance of account due from the factors to the bank.

The substance of the transaction between the factors and

the bank in regard to the cotton was, that the factors delivered the bills of lading and warehouse receipts to the bank to secure the repayment of money lent them by the bank, and thereby made a pledge of the cotton to secure their own debt; *Insurance Co.* v. *Kiger*, 103 U. S. 352, 356; and that the bank sold, on terms negotiated by the factors, the cotton so pledged to it, and received the price from the purchasers. The notes and checks which passed between the factors and the bank were but forms to carry out the main purpose of the transaction between them, and did not change its nature or effect.

By the common law, a factor or agent for sale has no power to pledge, whether the owner has intrusted him with the possession of the goods themselves, or with the symbol of them, as by consigning them to him by a bill of lading in which he is consignee or indorsee. 2 Kent Com. 625; *Kinder* v. *Shaw*, 2 Mass. 398; *Warner* v. *Martin*, 11 How. 209, 224; *Phillips* v. *Huth*, 6 M. & W. 572, 596; *Cole* v. *Northwestern Bank*, L. R. 10 C. P. 354, 363. And such was the law of Missouri before the passage of any statute upon the subject. *Benny* v. *Rhodes*, 18 Missouri, 147 [*S. C.* 59 Am. Dec. 293]; *Benny* v. *Pegram*, 18 Missouri, 191 [*S. C.* 59 Am. Dec. 298].

The essential difference between a power to sell and a power to pledge is well brought out in a recent case in the House of Lords by Lord Chancellor Selborne, who said: "It is manifest that when a man is dealing with other people's goods, the difference between an authority to sell, and an authority to mortgage or pledge, is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money; but when those goods are deposited by way of security for money borrowed, it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if, on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely, that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title, unaccompanied by any

indebtedness, to their full equivalent in money." *City Bank* v. *Barrow*, 5 App. Cas. 664, 670.

The weight and bearing of the cases, cited at the bar, upon the construction of the statutes of Missouri annexed to the finding of facts, cannot be properly appreciated without keeping in mind the provisions of the various statutes under which those cases arose.

The English Factors' Act of 6 Geo. 4, c. 94, passed in 1825, enacted in § 2 that any person intrusted with and in possession of any bill of lading, warehouse receipt or other like document, should be deemed and taken to be the true owner of the goods described therein, so far as to give validity to any contract made by him with other persons for the sale or disposition of the goods, or for the deposit or pledge thereof as a security for advances made by them "upon the faith of such several documents or either of them;" provided such persons had no notice, by such documents or otherwise, that the person intrusted as aforesaid was not the actual and *bona fide* owner of the goods.

The New York Factors' Act of 1830, c. 179, based upon the act of 6 Geo. 4, provided in § 3 that every factor or other agent, intrusted with the possession of any bill of lading, custom-house permit or warehouse-keeper's receipt for the delivery of merchandise, and every such factor or agent, not having the documentary evidence of title, but intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, should be deemed to be the true owner thereof, so far as to give validity to any contract made by him with any other person for the sale or disposition of the merchandise, for any advances made by such other person "upon the faith thereof." It will be observed that this section did not in terms repeat the proviso of the corresponding section of the English act.

But before the enactment in Missouri of any of the statutes cited in argument, the construction of this section of the New York statute had been settled, by decisions of the highest courts of that state and of this court, to be that the words "on the faith thereof" were not to be referred to "merchandise," or to its symbols, but to the words "shall be deemed to

be the true owner thereof." In the leading case, Mr. Justice Bronson, speaking for Chief Justice Nelson, Mr. Justice Beardsley and himself, said: "The obvious meaning is, that the factor or other agent who has been intrusted with certain documentary evidence of title, or with the possession and ostensible ownership of the property, shall be deemed the true owner, so far as may be necessary to protect those who have dealt with him 'upon the faith thereof;' that is, upon the faith, induced by the usual indicia of title, that he was the true owner of the property. The second section of the British statute, which answers very nearly to the third section of our own, contains a proviso which expressly saves the rights of the true owner where the pledgee had notice that he was dealing with an agent; and our statute, though framed in a different manner, was evidently designed to produce the same result. It is impossible to suppose that the legislature intended to enable the factor to commit a fraud upon his principal, by pledging or obtaining advances upon the goods for his own purposes, when the pledgee or person making the advances knew that he was not dealing with the true owner." *Stevens* v. *Wilson* (1844), 6 Hill, 512, 514; *S. C.*, in Court of Errors (1846), 3 Denio, 472; *Warner* v. *Martin* (1850), 11 How. 209, 228; *Covell* v. *Hill* (1852), 6 N. Y. 374, 380; *Cartwright* v. *Wilmerding* (1862), 24 N. Y. 521, 534; *Dows* v. *Greene* (1862), 24 N. Y. 638, 642. See also *Howland* v. *Woodruff* (1875), 60 N. Y. 73, 79, 80; *First National Bank* v. *Shaw* (1874), 61 N. Y. 283, 301.

If the legislature of Missouri had adopted the words of that provision of the New York Factors' Act, the meaning of which had been thus settled on full consideration by the highest courts of that state and by this court, there would be the strongest ground for holding, in accordance with a familiar canon of construction, that it had enacted those words with that meaning. *Cathcart* v. *Robinson*, 5 Pet. 264, 280; *McDonald* v. *Hovey*, 110 U. S. 619, 628; *Commonwealth* v. *Hartnett*, 3 Gray, 450; *Scruggs* v. *Blair*, 44 Mississippi, 406; *Wiesner* v. *Zann*, 39 Wisconsin, 188, 205.

But the statute of Missouri of March 4, 1869, differs widely,

in language and in purpose, from the New York Factors' Act of 1830, and was apparently derived, through §§ 6 and 9 of the Missouri statute of March 10, 1868, from the statute of New York of 1858, c. 326, entitled "An act to prevent the issue of false receipts, and to prevent fraudulent transfers of property, by warehousemen, wharfingers and others," as amended by the statute of that state of 1859, c. 353, extending its provisions to bills of lading. None of these provisions of the Missouri statutes are limited or even addressed to factors or other agents authorized to sell the goods of their principals, and intrusted for that purpose with the possession either of the goods, or of warehouse receipts, bills of lading or other similar documents in which such agents are named as consignees. But their leading object is to regulate the manner and effect of transferring warehouse receipts and bills of lading by indorsement.

By § 6 of the statute of Missouri of 1868, (following almost word for word the statutes of New York of 1858, c. 326, § 6, and 1859, c. 353,) it was enacted that warehouse receipts or bills of lading "may be transferred by indorsement thereon, and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares, merchandise, grain, flour, or other produce or commodity, therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person or persons," that is, by the indorsee before mentioned; and by § 9, warehouse receipts and bills of lading were made "negotiable by indorsement in blank, or by special indorsement, in the same manner and to the same extent as bills of exchange and promissory notes." Missouri Laws, 1868, pp. 12, 13.

By § 3 of the statute of 1869, those sections of the statute of 1868 are repealed. But § 1 of the later statute substantially reënacts § 9 of the earlier one, substituting for the words "by indorsement in blank or by special indorsement," the words "by written indorsement thereon and delivery," and omitting the words "and to the same extent;" and § 2 reënacts § 6, with the substitution, for the words "by indorsement thereon," of the words "by indorsement in writ-

ing thereon and the delivery thereof so indorsed," and, for the words "by such person or persons," of the words "thereby, as on the faith thereof." Missouri Laws, 1869, p. 91.

The principal provisions of the statute of 1869, then, as to all warehouse receipts and bills of lading, (except those which have the words "not negotiable" plainly written or stamped upon their face,) are, first, that they are "made negotiable by written indorsement thereon and delivery in the same manner as bills of exchange and promissory notes;" and, second, that any person "to whom the same may be transferred shall be deemed and held to be the owner of the goods," "so far as to give validity to any pledge, lien or transfer, given, made or created thereby, as on the faith thereof."

The first provision, while it doubtless gives the indorsee the right to sue thereon in his own name, does not, for the reasons fully stated by Mr. Justice Strong in delivering the judgment of this court in *Shaw* v. *Railroad Co.*, 101 U. S. 557, attach to such an indorsement of the symbol of property the same effect which the common law gives to the indorsement of a bill of exchange or promissory note for the payment of a sum of money; nor confer upon persons making, upon a bill of lading indorsed in blank by the owner, an advance of money to a subsequent indorser whom they have reason to believe not to be the owner, the right to hold the goods against the true owner.

The second provision does not appear to have been brought to the notice of this court in that case, and presents more difficulty. It differs from the provision of the Factors' Act of New York, construed by the courts of that state and by this court in the cases before cited, in several important particulars: 1st. Any person "to whom the same may be transferred" (instead of any person by whom it is transferred) "shall be deemed and held to be the owner." 2d. The ensuing qualification is, "so far as to give validity to any pledge, lien or transfer, given, made or created thereby," which last word cannot possibly be referred to anything but the transfer aforesaid. 3d. The words "as on the faith thereof" follow directly afterwards, without any intermediate mention of ad-

vances made by the transferee. In short, the New York Factors' Act declares that any agent intrusted with the possession of goods, or of the symbol thereof, shall be deemed to be the true owner, so far as to give validity to a pledge made by him to another person for advances made by the latter "on the faith thereof;" but the Missouri statute only declares that an indorsee of the symbol of property shall be deemed to be the owner, so far as to give validity to any pledge made to him by such indorsement "as on the faith thereof." The difficulty arises from the introduction of the words "on the faith thereof," borrowed from the factors' acts, into a statute relating to the negotiability of warehouse receipts and bills of lading, without sufficient regard to the difference in the terms and the objects of the two classes of statutes.

It may well be that, upon a view of the whole provision, it protects only *bona fide* indorsees. *Whitlock* v. *Hay*, 58 N. Y. 484, 487; *Steiger* v. *Third National Bank*, 2 McCrary, 494, 498. But it is by no means clear that the mere fact that the indorsee of the bill of lading or warehouse receipt knows that the indorser is a factor and holds the goods as such is sufficient proof of bad faith. Under the English Factors' Act of 5 & 6 Vict. c. 39, extending the provisions of the act of 6 Geo. 4, and protecting those advances only, which are "made *bona fide* and without notice that the agent making" the pledge "has not authority to make the same, or is acting *mala fide* in respect thereof against the owner" of the goods, it has been held by the highest authorities that knowledge that the agent making the pledge is a factor, without further notice that he is acting *mala fide* and beyond his authority, does not deprive the pledgee of the protection of the statute. *Navulshaw* v. *Brownrigg*, 1 Sim. N. S. 573, and 2 D., M. & G. 441; *Vickers* v. *Hertz*, L. R. 2 H. L. Sc. 113; *Kaltenbach* v. *Lewis*, 10 App. Cas. 617. Yet it may be doubted, whether receiving, from persons known to be factors and to hold property as such, a pledge of the symbols of the property, to secure the payment of the general balance of their bank account with the pledgee, is consistent with good faith.

We have considered the question of the effect of the words

"on the faith thereof," as used in Missouri and elsewhere, at some length, because of the large space devoted to it in the arguments of counsel, and in order to put the whole matter in a clearer light. But it is not necessary to express a decisive opinion upon the meaning of those words, as they stand in the Missouri statute of 1869, because upon a narrower ground it is quite clear that that statute affords no protection to the plaintiff.

That statute applies only to transfers of warehouse receipts and bills of lading by "indorsement in writing thereon and the delivery thereof so indorsed." The finding of facts contains this statement: "It is not shown whether or not the bills of lading or the warehouse receipts or any of them were indorsed in writing by J. H. Dowell & Co. or by any one, when transferred to the bank, there being no evidence on this specific matter." The want of any evidence upon this point is perhaps to be explained by the facts, also found and stated, that upon the delivery of the warehouse receipts to the bank the bills of lading were surrendered and cancelled, and that the warehouse receipts ran to bearer, and were therefore probably not indorsed. But whatever be the explanation, the fact remains, that it was not proved, and cannot be presumed, that either the bills of lading or the warehouse receipts were indorsed in writing, as required by the statute; and no better title passes by a transfer of the symbols without such indorsement than by a delivery of the goods which they represent. *Rice* v. *Cutler*, 17 Wisconsin, 351, 358, 359; *Hirschorn* v. *Canney*, 98 Mass. 149; *Erie & Pacific Dispatch Co.* v. *St. Louis Co.*, 6 Missouri App. 172; *Fourth National Bank* v. *St. Louis Co.*, 11 Missouri App. 333.

The decision in *Price* v. *Wisconsin Ins. Co.*, 43 Wisconsin, 267, on which the plaintiff much relied, was based both upon a warehouse receipt act differing from that of Missouri in allowing the documents to be transferred "by delivery, with or without indorsement," and in not containing the words "as on the faith thereof;" and also upon other grounds inconsistent with the judgments of this court in *Warner* v. *Martin*, and *Shaw* v. *Railroad Co.*, before cited.

Opinion of the Court.

The statute of Missouri of March 28, 1874, affixing a heavy penalty to the negotiation or pledge of bills of lading or warehouse receipts by an agent, or consignee, without the written authority of the owner or consignor, does not change the law as to the validity of the transfer as between individuals. A transfer by an agent, that before was valid as between his principal and his transferee, is not invalidated by the statute. *Gardner* v. *Gager*, 1 Allen, 502. And with even stronger reason a transfer that was wholly invalid before is not rendered valid by being made a criminal offence. The proviso that any consignee or agent, lawfully possessed of a bill of lading or warehouse receipt, may pledge it to the extent of raising sufficient means to pay charges for storage or shipment, or for advances drawn for by the owner or consignor, has no application to this case; because this pledge was not made for either of those purposes, but to secure the factors' own debt to the pledgee.

Factors having no power, by the law of Missouri, to make a pledge of the goods of their principals by a transfer, without indorsement in writing, of the bills of lading or warehouse receipts, the finding of the Circuit Court, that the transactions between the factors and the plaintiff "were all according to the general usage of trade between banks and cotton factors at St. Louis," cannot aid the plaintiff; because the usage attempted to be set up was not shown to have been known to the defendants or to other owners of cotton; and because it was contrary to law, in that it undertook to alter the nature of the contract between the factors and their principals, which authorizes them to sell, but not to pledge, and in that it would sustain a pledge by a factor of the goods of several principals to secure the payment of his own general balance of account to a third person. *Barnard* v. *Kellogg*, 10 Wall. 383; *Irwin* v. *Williar*, 110 U. S. 499; *Newbold* v. *Wright*, 4 Rawle, 195; *Lehman* v. *Marshall*, 47 Alabama, 362; *Leuckart* v. *Cooper*, 3 Bing. N. C. 99; *S. C.* 3 Scott, 521, and 2 Hodges, 150; *Robinson* v. *Mollett*, L. R. 7 H. L. 802.

Nor is the further fact found, that Dowell, the active member of the firm of J. H. Dowell & Co., the factors, was also a partner with the defendants in the working of the plantation,

at all material; because he had not been held out by the defendants as the owner of the property, or as authorized by them to dispose of it otherwise than as a factor, and was not understood by the plaintiff to be acting in any other capacity. *Rogers* v. *Batchelor*, 12 Pet. 221; *Locke* v. *Lewis*, 124 Mass. 1.

Although the general relation of a bank to its depositor is that of debtor and creditor, yet when, as in this case, a factor, holding property in trust for his principal, transfers it to a bank which has notice of the capacity in which he holds it, the principal may assert his right in the property against the bank, either by independent suit, or by way of defence to an action by the bank against him. The defendants in this case were therefore entitled to have the proceeds of their property, so received by the plaintiff, applied to the payment of the note in suit. *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Baker* v. *New York Bank*, 100 N. Y. 31; *St. Louis Bank* v. *Ross*, 9 Missouri App. 399. As those proceeds are found to have been more than sufficient to pay and satisfy this note and all other charges of the factors against the defendants, the plaintiff cannot maintain this action.

All the facts of the case being ascertained by the special finding of the court below, as they would be by the special verdict of a jury, there is no reason for awarding a new trial, but there must be a general judgment for the defendants. *Fort Scott* v. *Hickman*, 112 U. S. 150.

Judgment reversed, and case remanded to the Circuit Court, with directions to enter judgment for the original defendants.

NEMAHA COUNTY *v.* FRANK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Submitted December 20, 1886. — Decided January 17, 1887.

When the defendant in an action at law denies each and every allegation in the declaration, and puts the plaintiff on his proof, it is not error to order stricken from the answer special defences which may be set up under this general denial.

It has been settled by this court in *Davenport* v. *Dodge County*, 105 U. S. 237, and *Blair* v. *Cuming County*, 111 U. S. 363, that coupons like those sued on in this case are obligations of the county, and that an action may be maintained against the county upon them.

THIS was an action at law against a county to enforce the payment of coupons on bonds issued by the county. The case is stated in the opinion of the court.

Mr. John M. Thurston, *Mr. J. S. Stull*, and *Mr. Walter J. Lamb*, for plaintiff in error.

Mr. J. M. Woolworth for defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is an action at law brought by Augustus Frank, a citizen of the state of New York, for the purpose of enforcing the payment of the interest coupons on certain municipal bonds alleged to have been issued by the county of Nemaha, on behalf of Brownville precinct in said county, to aid in the construction of the Brownville, Fort Kearney and Pacific Railroad, in pursuance of an act of the legislature of the state of Nebraska. The petition alleges, that, by virtue of an act entitled "An act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such pur-

poses," passed on the 15th day of February, 1869, the board of commissioners of the county of Nemaha issued the special bonds or written obligations of said Brownville precinct, on the 20th day of August, 1870, to aid in the construction of the Brownville, Fort Kearney and Pacific Railroad, and delivered the same to the company authorized to construct said road; that prior to the issue of said bonds the proposition to issue the same was duly submitted to the voters of said Brownville precinct, in strict accordance with the provisions of the said act of the legislature, and that a large majority voted for said proposition; that, during the years 1871 and 1872, the said Brownville precinct and the board of county commissioners duly paid the coupons then falling due by means of a tax levied for that purpose, but for the years 1878 and 1879 they have failed and refused to pay the same or to levy a tax therefor. The petition also alleges, that, on or about the 20th of February, 1871, for a valuable consideration, the bonds and coupons were transferred in good faith to John Fitzgerald, and by him to the plaintiff.

An answer was filed by Nemaha County, as defendant, containing the following matter:

"The total amount of the bonds so issued and sold, being one series, under one proposition, amounted to one hundred thousand dollars. The said bonds and coupons were voted upon the following contract and conditions and none other: At the time of the vote for said bonds certain persons were attempting to organize a railroad corporation under the name of the Brownville, Fort Kearney and Pacific Railroad Company, the identical same organization named in said bonds, with a capital stock of two million dollars, but were unable to organize it because unable to obtain a payment on said amount of stock of ten per cent. thereof, as required by law, precedent to the right to do business; they considered and treated said series of one hundred thousand in bonds as one one-hundred-thousand-dollar cash subscription all paid up in cash in advance, and, also, they treated and considered bonds of the city of Brownville, situated within the said precinct of Brownville mentioned in the petition, of the nominal sum of sixty thou-

sand dollars, as sixty thousand dollars cash subscription paid up in cash in advance, all as capital stock of said railroad company, aggregating one hundred and sixty thousand dollars, so considered and treated as cash capital stock paid in; but, by considering the said bonds of the nominal sum of $160,000 as one hundred and sixty thousand dollars in money paid in on the capital stock, there was still an insufficient amount paid in to enable the company to do business, there being no cash paid in except on a few private subscriptions, and not exceeding ten thousand dollars, so that even by treating said bonds as money there was still a deficiency of thirty thousand dollars of the amount prescribed by law as a condition precedent to the organization of the company for the purpose of transacting any of the business for which it was sought to be organized. Defendant, therefore, denies that said railroad company was ever a corporation with power to transact business or to receive municipal bonds for its aid.

"Defendant, therefore, avers that neither said precinct nor said county had any power or authority to aid in the organization of said railroad company by subscribing to its stock or in any other manner. Defendant further avers, that said pretended railroad company never either filed or recorded its articles of incorporation, if any it ever had, in any county in the state of Nebraska, as by law it was compelled to do prior to its existence as a corporation.

"In the transactions of issuing said bonds by defendant and of receiving the same by said pretended railroad company, neither the defendant nor the said company had any power to act, and all the acts therein on both sides are and ever have been *ultra vires* and null and void.

"The proposition submitted to the voters of said precinct as a basis of the right to issue said bonds was a proposition to subscribe by said precinct one hundred thousand dollars in stock and shares in the capital stock of said pretended railroad company, and pay the same in bonds aforesaid.

"The total assessed valuation of all the property in the said precinct, as shown by the last assessment preceding the issuing of said bonds, was $920,000, and the issue of $100,000 in bonds was in excess of the amount allowed by law."

The plaintiff having filed a reply, afterwards moved the court to strike out from the answer of the defendant all the foregoing matter as immaterial and irrelevant. This motion was sustained by the court, to which ruling the defendant excepted. Upon the pleadings as thus amended the cause was tried by a jury, who returned a verdict in favor of the plaintiff, on which judgment was rendered, to reverse which this writ of error has been sued out and prosecuted.

This ruling of the court in striking out this portion of the answer is alleged as error. For the purposes of the argument we shall assume what is claimed by the plaintiff in error, that the matter stricken out was material and relevant. The defences intended to be raised by it were, that in two particulars the bonds in question were void as not having been issued in conformity with law. The sections of the statute of 1869, in pursuance of which it is alleged they were issued, are as follows:

"SECTION 1. That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or any other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city, *Provided* the county commissioners or city council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the state of Nebraska, for submitting to the people of a county the question of borrowing money."

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

precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds."

The averments in that portion of the answer stricken out are in substance, 1st, that the bonds were illegal and void because not issued to a company authorized by the statute to receive them; and, 2d, that they were illegal and void because issued in excess of the amount of ten per centum of the assessed valuation of the taxable property in said precinct. The answer of the defendant, in addition to the matter stricken out, contains the following: "Defendant has no knowledge as to whether the plaintiff is a *bona fide* holder of said bonds, or any part thereof, or whether he purchased them before due or paid any value therefor, or purchased them at all, and, therefore, for the purpose of raising the issue and procuring the proof thereon by compulsory process, defendant denies the allegations of the petition on that subject, and also denies each and every allegation contained in said petition, except such as it has herein expressly admitted in this answer."

This clause in the answer remained and formed the issue which was tried. It is a general denial of each and every allegation of the petition, as no allegation of the petition was otherwise admitted in the answer. It therefore put the plaintiff upon proof of every fact necessary to constitute the cause of action set out in his petition, and embraced a denial of the legality and validity of the bonds, and the lawfulness of their issue and delivery. It required the plaintiff to show by competent proof that he was the owner of the coupons sued on, taken from bonds in fact executed by the defendant, issued in accordance with law, and delivered to a party competent to receive the title. It permitted proof on the part of the defendant of every fact which tended to establish that the bonds were illegal and void. It follows, therefore, that every defence which was open to the defendant under that portion of the answer stricken out was equally open to it under the answer as it stood at the trial. The plaintiff obtained no advantage, and the defendant suffered no detriment, by the ruling of the court requiring that portion of the answer to be stricken out. The action of the court in granting the motion

did not, therefore, prejudice the defendant. It does not appear from this record what took place at the trial. There is no bill of exceptions which shows what evidence, if any, the defendant offered, or whether any that he did offer was rejected. For aught that appears, the very matters which he might have offered in evidence, under that portion of the answer stricken out, were in fact offered and received under the pleadings as they stood at the time of the trial.

It seems also to be objected to the judgment rendered against the county of Nemaha that the coupons sued on are not the obligations of the county. It is said that the bonds are precinct bonds, issued by the county commissioners of the county, the duty to pay which rests upon the precinct alone; the mode of payment being by means of a tax to be levied by the county commissioners upon the property within the bounds of the precinct. It is, therefore, argued that no action will lie against the county in respect to these bonds and coupons, except in case of the refusal of the county commissioners to levy the tax when it ought to be levied, when a mandamus is the sole remedy, being the one prescribed by the statute. This question has been set at rest by the previous decisions of this court. *Davenport* v. *Dodge County*, 105 U. S. 237, and *Blair* v. *Cuming County*, 111 U. S. 363, are decisions upon the very point arising under the same statute.

There is, therefore, no error in the record, and

The judgment is affirmed.

UNITED STATES *v.* SYMONDS.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 6, 1886. — Decided January 10, 1887.

The sea-pay given to officers of the navy by Rev. Stat. § 1556 may be earned by services performed under orders of the Navy Department in a vessel employed, by authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regula-

tions and requirements that are incident or peculiar to service on the high seas.

The authority of the head of an Executive Department to issue orders and regulations under directions of the President to have the force of law is subject to the condition that they conflict with no act of Congress: and an order by the Secretary of the Navy that a service shall not be a sea service which Congress has directed shall be a sea service is invalid.

THIS was an appeal from a judgment of the Court of Claims. The case is stated in the opinion of the court.

Mr. Attorney General and *Mr. F. P. Dewees* for appellant.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

The question in this case is, whether certain services of the appellee, a lieutenant in the navy of more than five years' standing, were performed "at sea," within the meaning of § 1556 of the Revised Statutes. That section provides as follows:

"The commissioned officers and warrant officers on the active list of the navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the navy shall be entitled to receive annual pay at the rates herein stated after their respective designations: . . . Lieutenants, during the first five years after date of commission, when at sea, $2400; on shore duty, $2000; on leave or waiting orders, $1600; after five years from such date, when at sea, $2600; on shore duty, $2200; on leave or waiting orders, $1800."

By an order of the Secretary of the Navy, June 30, 1881, the officer commanding the United States training-ship New Hampshire, then at Norfolk, Virginia, was authorized to enlist officers' stewards, cooks, and servants, such as were allowed for a vessel with her complement of officers, the order declaring that her officers "will be considered as attached to a vessel commissioned for sea service the same as other apprentice training vessels." On the first day of April, 1882, Symonds,

in obedience to orders, assumed the post of executive officer of the New Hampshire, and thereafter discharged the duties of that position, which were similar to those performed by executive officers of cruising ships. He also discharged other duties of a character more exacting and arduous than those on board of any other class of naval vessels. There was no change in the nature of his services after he reported for duty as executive officer of the New Hampshire. He was required to have his quarters on board, to wear his uniform, to mess on the vessel, and was not permitted by the rules of the service to live with his family. When he reported on board that ship she was stationed at Narragansett Bay, and, during most of his service thereon, was the flag-ship of the training squadron.

On the seventh day of July, 1882, the then Secretary of the Navy issued an order to the effect that "on and after the first day of August next, the New Hampshire, the Minnesota, the Intrepid, and the Alarm will not be considered in commission for sea service." There was, however, no change in the status of the ship on or after August, 1882, her equipment and complement of officers being those of a cruising ship.

From April 1, 1882, to July 31, 1882, appellee was allowed sea-pay, and commutation of rations at thirty cents per day; but from the latter date he was allowed only shore-pay of an officer of his grade, without rations or commutation therefor.

This suit was brought by appellee to recover the difference between pay for sea and shore duty as regulated by § 1556 of the Revised Statutes.

Section 1571 of the Revised Statutes — which is a reproduction of the third section of an act of June 1, 1860, increasing and regulating the pay of the navy, 12 Stat. 27, — provides that "no service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department and in vessels employed by authority of law." It is not disputed that the services of Symonds were performed under the orders of the Secretary of the Navy, and in a vessel employed with authority of law. If they were performed "at sea," his compensation therefor is absolutely fixed by § 1556. Does the statute confer upon the Secretary of the Navy, acting

alone or by direction of the President, the power to declare a particular service to be shore service if, in fact, it was performed by the officer "when at sea," under the orders of the Department and on a vessel employed with authority of law? By the navy regulations of 1876, it was declared that "duty on board a sea-going vessel of the Navy in commission, on board a practice ship at sea, or on board a coast-survey vessel actually employed at sea, will be regarded by the Department as sea service." p. 85. Assuming that the first clause of that regulation contemplates services at sea under the orders of the Department, in a vessel employed with authority of law, it is clear that all the different kinds of services described therein are services performed at sea in the meaning of § 1556. But they are to be deemed such, not because the Secretary of the Navy has announced that the Department will so regard them, but because they are, in fact, services performed at sea, and not on shore. If the regulations of 1876 had not recognized services "on board a practice ship at sea" as sea services, the argument in behalf of the government would imply that they could not be regarded by the courts, or by the proper accounting officers, as sea services; in other words, that the Secretary of the Navy could fix, by order, and conclusively, what was and what was not sea service. But Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was, in fact, sea service, or to increase his compensation by declaring that to be sea service which was, in fact, shore service. The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent with

Gratiot v. *United States*, 4 How. 80, and *Ex parte Reed*, 100 U. S. 13, upon which the government relies. Referring in the first case to certain army regulations, and in the other to certain navy regulations, which had been approved by Congress, the court observed that they had the force of law. See also *Smith* v. *Whitney*, 116 U. S. 181. In neither case, however, was it held that such regulations, when in conflict with the acts of Congress, could be upheld. If the services of Symonds were, in the meaning of the statute, performed "at sea," his right to the compensation established by law for sea service is as absolute as is the right of any other officer to his salary as established by law. The same observations may be made in reference to the order of the Secretary of the Navy of July 7, 1882, which — without modifying the previous order that Symonds should perform the duties of executive officer of the New Hampshire — declared that that ship would not be considered as in commission for sea service after August 1, 1882. It does not appear that the Secretary had any purpose, by his order, to affect the pay of the officers of the ship as fixed by the statute. Other reasons doubtless suggested the propriety or necessity of its being issued. But his order is relied upon here as depriving Symonds of the right to sea-pay after the date last named. For the reasons stated, that order could not convert the services of Symonds from sea services into shore services, if they were, in fact, performed when "at sea."

We concur in the conclusion reached by the Court of Claims, namely, that the sea-pay given in § 1556 may be earned by services performed under the orders of the Navy Department in a vessel employed, with authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high sea. It is of no consequence, in this case, that the New Hampshire was not, during the period in question, in such condition that she could be safely taken out to sea beyond the main land. She was a training-ship, anchored in Narragansett Bay during the whole time covered by the claim of appellee, and was subject to such

regulations as would have been enforced had she been put in order and used for purposes of cruising, or as a practice ship at sea. Within the meaning of the law, Symonds, when performing his duties as executive officer of the New Hampshire, was "at sea."

Judgment affirmed.

UNITED STATES *v.* BISHOP.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 6, 1886. — Decided January 10, 1887.

This case is affirmed on the authority of *United States* v. *Symonds*, just decided (*ante*, 46).

THE case is stated in the opinion of the court.

Mr. Attorney General and *Mr. F. P. Dewees* for appellant.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case does not differ in principle from that of *United States* v. *Symonds*, just decided.

Bishop is now, and has been for more than four years, a lieutenant-commander in the navy. By direction of the Secretary of the Navy, he assumed the duties of executive officer of the training-ship Minnesota, on the 18th of April, 1884. During the period of such service that vessel was stationed in New York harbor, cruising and moving about under her own power. Her machinery and equipment were kept in order, and she was perfectly seaworthy, capable, upon short notice, of being used in a protracted cruise.

The duties of Bishop, while such executive officer, were more arduous and confining than those of officers of similar grade upon vessels in foreign waters.

Syllabus.

For the reasons given in *United States* v. *Symonds*, we are of opinion that the services of appellee were, within the meaning of § 1556 of the Revised Statutes, performed "at sea," and, consequently, it was rightly adjudged in the court below that he was entitled to sea-pay, as established for officers of his grade, during the period of his service on the Minnesota.

Judgment affirmed.

UNITED STATES *v.* PHILBRICK.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 6, 1886. — Decided January 10, 1887.

Prior to the enactment in the act of February 25, 1871, 16 Stat. 431, now Rev. Stat. § 12, that "whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived unless it shall be expressly so provided," it was the general rule of law that the repeal of a repealing act restored the law as it was before the passage of the latter act without formal words for that purpose, unless otherwise provided either in the repealing act or by some general statute.

Before the passage of the act of March 3, 1835, forbidding it, 4 Stat. 757, it was lawful for the Secretary of the Navy to make allowances out of appropriations in gross to officers of the Navy beyond their regular pay, for quarters, furniture, lights, fuel, &c., and the repeal of that act by the act of April 17, 1866, 14 Stat. 33, restored the right to make such allowances; and such as were made by him and were settled at the Treasury Department, between the date when the latter act went into effect and the passage of the act of February 25, 1871, 16 Stat. 431, were made in accordance with the executive construction of the statutes respecting the navy and the Navy Department prior to 1835, and this court will not at this late day question their validity.

The contemporaneous construction of a statute by the Executive Department charged with its execution is entitled to great weight, and ought not to be overturned unless clearly erroneous.

It is not decided (1) whether after settlement of an account at the Treasury it can be reopened by the accounting officers on the ground of error arising only from mistake of law; nor (2) whether errors in accounts with the United States, stated closed and settled by payment, can be corrected otherwise than by regular judicial proceedings instituted by the United States.

Opinion of the Court.

THE case is stated in the opinion of the court.

Mr. Attorney General and *Mr. F. P. Dewees* for appellant.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellee, Philbrick, having served as a carpenter in the navy from July 8, 1861, to March 14, 1866, and again continuously after November 12, 1869, filed with the Fourth Auditor of the Treasury his claim for the benefits of the act of Congress of March 3, 1883, providing, among other things, that "all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous, and in the regular navy, in the lowest grade having graduated pay held by such officer since last entering the service." 22 Stat. 473. The claim having been passed by the Fourth Auditor, was forwarded to the Second Comptroller of the Treasury, who is the reviewing officer charged with the examination of all accounts of this class. The latter officer, while recognizing that the appellee had a valid claim under the act of 1883, deducted from the amount which the Fourth Auditor had ascertained to be due the sum of $214.88. That amount was made up of two items, $169.50 and $45.38.

In respect to the item of $169.50 — which is the only one disputed on this appeal — the Second Comptroller held that that sum had, by mistake of law, been improperly allowed and paid to appellee for commutation of quarters, furniture, lights, and fuel from November 12, 1869, to July 1, 1870, although such payment was in conformity with a general order, issued by the Secretary of the Navy on the 12th of May, 1866, in reference to allowances to officers in that branch of the public service.

It is, however, insisted, on behalf of the United States, that

that order was unauthorized by law and void; and, consequently, that the amount allowed under it to appellee was properly chargeable against his claim for pay under the act of 1883.

So far as we are aware, the first act of Congress providing for special allowances or compensation to officers, seamen, and marines beyond their regular pay, was that of April 18, 1814. The second section of that act authorized the President "to make an addition, not exceeding twenty-five per cent., to the pay of the officers, midshipmen, seamen, and marines, engaged in any service, the hardships or disadvantages of which shall, in his judgment, render such addition necessary." 3 Stat. 136, c. 83. That section was, however, repealed by the act of February 22, 1817. 3 Stat. 345, c. 13. The reasons which led to the withdrawal of this power from the President are not disclosed in any public document to which our attention has been called. The practice which prevailed in the Navy Department for many years after the passage of the act of 1817, in reference to special allowances to or for the benefit of naval officers beyond their regular pay — of which practice Congress was fully informed — tends to show that the repeal of the act of 1814 was not intended as a prohibition of allowances of every kind. In the Rules, Regulations, and Instructions prepared by the Board of Navy Commissioners, with the consent of the Secretary of the Navy, and published in 1818, — a copy of which was transmitted to Congress by President Monroe on the 20th of April of that year, American State Papers, Class VI, Naval Affairs, p. 510, — will be found provisions for certain allowances, graduated according to the character of the vessel or the rank of the officer in charge. In the "Rules of the Navy Department regulating the Civil Administration of the Navy Department," prepared under the supervision of Secretary Woodbury, and by him published in 1832 in what is known as the "Red Book," are provisions in reference to allowances for cabin furniture, chamber money, furniture of officers' houses at yards, fuel, lights, servants, &c. Chapter 10. Besides, the naval appropriation acts, for many years before and after 1832, contained items in gross for all the objects

covered by these allowances; but none of them contained directions as to the manner in which the sums appropriated should be apportioned. The absence of such directions was no doubt due to the fact, known to Congress, that the amounts annually appropriated were used or apportioned by the Navy Department as indicated in the rules prescribed by the Secretary.

That these allowances were habitually made, and that Congress was aware of this practice, appears from a report to President Monroe by the Secretary of the Navy, transmitted to Congress on the 4th of March, 1822. That report was accompanied by a statement showing the number and grade of the officers attached to each navy yard or station, with the amount allowed each for pay, subsistence, emoluments, or extra compensation. The Secretary in his report says: "The allowances to officers attached to the navy yards have, I understand, been made to them since the commencement of these establishments, and vary in some instances according to the expense of living, house rent, &c., in the different places at which they are located. The pay and rations, authorized by law to officers, are understood to be for their maintenance on board ship, in which they are accommodated with rooms, fuel, candles, &c.; but when placed on shore at naval stations they have not such accommodations. . . . The allowances now made are regulated by a table, making them all equal, or as nearly so as practicable. . . . The allowances have, in most instances, been made by the Auditor in the settlement of accounts without any reference to this Department, he considering himself authorized so to do by the usage of the service, from the commencement of the naval establishment, with the approbation and sanction of the Secretary of the Navy." American State Papers, Class VI, Naval Affairs, Vol. 1, p. 797. The subject was subsequently brought to the attention of Congress by the report of the Secretary of the Navy to the Senate, January 1, 1825, American State Papers, Naval Affairs, Vol. 2, p. 40; by the letter of the Secretary to the chairman of the House Committee on Naval Affairs, February 2, 1826, Ib., p. 626; by the communication of the Fourth

Auditor of the Treasury, May 28, 1830, which was transmitted to Congress, Ib., Vol. 3, p. 685, the latter being accompanied by a table showing every kind of allowance made under the regulations and orders of the Navy Department. The same facts are disclosed by the report of Amos Kendall, the Fourth Auditor of the Treasury, February 5, 1835, to the Secretary of the Navy, and transmitted by the latter to the House of Representatives in conformity with a resolution of that body. The latter report embodies a statement, in detail, showing the regular pay, rations, and allowances of all commissioned officers of the navy according to the laws and regulations then in force. Ex. Doc. 192, H. R. Navy Department 23d Congress, 2d Session.

Thus matters stood until the passage of the act of March 3, 1835, 4 Stat. 753, regulating (and increasing) the pay of the navy, by which allowances of every description were prohibited. The second section of that act provided that "no allowance shall hereafter be made to any officer in the naval service of the United States for drawing bills, for recovering or disbursing money, or transacting any business for the government of the United States, nor shall he be allowed servants, or pay for servants, or clothing or rations for them, or pay for the same; nor shall any allowance be made to him for rent of quarters, or to pay rent for furniture, or for lights, or fuels, or transporting baggage. It is hereby expressly declared that the yearly allowance provided in this act is all the pay, compensation, and allowance that shall be received under any circumstances whatever by any such officer or person, except for travelling expenses when under orders, for which ten cents per mile shall be allowed." 4 Stat. 757.

This prohibition of allowances continued in force until the act of April 17, 1866, making appropriations for the naval service. The second section of that act provided "that so much of the second section of an act entitled 'An act to regulate the pay of the navy of the United States,' approved March three, 1835, as prohibits any allowance to any officer in the naval service for rent of quarters, or for furniture, or for lights, or fuel, or transporting baggage, and all acts or parts

of acts authorizing the appointment of navy agents, be, and the same are hereby, repealed." 14 Stat. 33, 38, c. 45.

After the passage of that act Secretary Welles issued the order which the government now assails as unauthorized by law. It is as follows:

"[General Order No. 75.]

"NAVY DEPARTMENT, May 23, 1866.

"Congress having, in view of the call for increased compensation for officers of the navy, repealed the law which prohibited any allowance to them 'for rent of quarters or to pay rent for furniture, or for lights and fuel, &c.,' the Department, in order to prevent a recurrence of the irregularities, abuses, and arbitrary allowances which occasioned the prohibition, deems it proper to establish a fixed rate of compensation in lieu of the extra allowances which were prohibited by the law now repealed. Accordingly, from and after the first day of June proximo, officers who are not provided with quarters on shore stations, will be allowed a sum equal to thirty-three and one-third per centum of their pay in lieu of all allowances, except for mileage or travelling expenses under orders; and those provided with such quarters, twenty per centum of their pay in lieu of said allowances.

"The act of March 3, 1865, having increased the pay of midshipmen and mates, the allowances hereby authorized will not be extended to them.

"GIDEON WELLES,

"*Secretary of the Navy.*"

This order was, no doubt, issued in the belief that the legal effect of the repeal of that part of the act forbidding allowances "for rent of quarters, or for furniture, or for lights, or fuel, or transporting baggage," was to reinvest the Department with the authority it had prior to the act of 1835. That act, upon its face, recognized the fact that such allowances had theretofore been made, and its object was to forbid them in the future. When the act of 1866 simply removed the prohibition contained in the act of 1835, the effect was, without formal

words for that purpose, to restore the law as it was before the passage of the latter act. Such is the rule where the effect of the repealing statute is not by its own terms, or by some general statute, limited to the abrogation of the act repealed. 1 Blackstone, 90; 1 Kent, 460; Bouvier's Bacon's Abridgment, Title Statute, D; *Commonwealth* v. *Churchill*, 2 Met. 118; *Van Denburgh* v. *Village of Greenbush*, 66 N. Y. 1. The general rule was never modified by Congress until the passage of the act of February 25, 1871, now § 12 of the Revised Statutes, which declared that "whenever an act is repealed which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided." 16 Stat. 431, c. 71. It is scarcely necessary to say that the act of 1871 cannot control the present case, for the order of Secretary Welles, and the settlement under it with Philbrick, both occurred before its passage. And for the same reason, this case is unaffected by the 4th section of the act of July 15, 1870, (now § 1558 Rev. Stat.,) which provides that the pay prescribed therein for officers of the navy, shall be their full and entire compensation, and that (with certain exceptions not material to be here noticed) "no additional allowance shall be made in favor of any of said officers on any account whatever, and all laws or parts of laws authorizing any such allowances shall, on 1st of July, 1870, be repealed." 16 Stat. 332, c. 295.

Notwithstanding the order of Secretary Welles was in harmony with the long-established practice of the Navy Department for many years prior to the passage of the act of 1835, it is contended that such a practice never has had support in an act of Congress; and that, without legislative sanction, the Secretary of the Navy was without authority to establish an arbitrary rule for the distribution of moneys appropriated in gross for specified objects connected with the naval service, and could, in no event, make allowances beyond the actual cost incurred by the officer in whose behalf they were made. It is a sufficient answer to these propositions to say that the power of the Secretary to establish rules and regulations for the apportionment of the sums set apart by Congress, in gross,

for such objects as those involved in the allowances here in dispute, having been frequently exercised prior to 1835, without objection by the legislative branch of the government; and since that act, as well as the one of 1866, is an implied recognition of the practice established in the Navy Department prior to 1835, we are not disposed, at this late day, to question the validity of the order of May 23, 1866. That order was in accordance with the construction which the Executive Department, for many years prior to 1835, placed upon the various statutes relating to the naval establishment and defining the powers of the Secretary of the Navy. A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned. See *Hahn* v. *United States*, 107 U. S. 405, and *Brown* v. *United States*, 113 U. S. 571, and authorities cited in each case.

As these views lead to an affirmance of the judgment, it is unnecessary to consider whether, after the account of the appellee for commutation of quarters, furniture, lights, and fuel, between November 12, 1869, and June 30, 1870, had been finally stated and closed, and after he had been paid the amount allowed him, the Second Comptroller had authority to open it upon the ground of error therein arising from mere mistake of law. Nor need we determine whether errors in accounts so stated, closed and settled by payment, could be corrected otherwise than by regular judicial proceedings instituted for that purpose by the United States against the appellee.

Judgment affirmed.

UNITED STATES *v.* ROCKWELL.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 6, 1886. — Decided January 10, 1887.

Under that clause in the act of March 3, 1883, 22 Stat. 473, which provides for crediting an officer of the navy with his time of service in the regular or volunteer army or navy, or both, in the same manner as if all the service "had been continuous, and in the regular Navy in the lowest grade, having graduated pay held by" him "since last entering the service," officers are entitled to be credited as of the lowest grade with graduated pay held by them after reëntering the service, and not as of a still lower grade in which they may actually have served, but to which no graduated pay was attached when the act of July 15, 1870, took effect.

THE case is stated in the opinion of the court.

Mr. Attorney General and *Mr. F. P. Dewees* for appellant.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellee Rockwell served in the volunteer Navy as acting master from July 15, 1862, to December 16, 1862; as lieutenant from December 16, 1862, to April 29, 1865; as lieutenant-commander from April 29, 1865, to December 8, 1865, when he was honorably discharged; and as acting master from November 19, 1866, to March 12, 1868; in the regular Navy, as master from March 12, 1868, to December 18, 1868; as lieutenant from December 18, 1868, to February 26, 1878; and as lieutenant-commander from February 26, 1878, to March 3, 1883. He was paid for his services in those several positions in accordance with the laws in force at the time they were performed. But he claims, in this action, additional pay under the act of March 3, 1883, making appropriations for the naval service for the year ending June 30, 1884. 22 Stat. 472, 473, c. 97. He obtained judgment, and upon this appeal the government questions the construction placed by the court below upon that act.

Opinion of the Court.

The act of August 5, 1882, making appropriations for the naval service for the year ending June 30, 1883, and for other purposes, provides: "And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous, and in the regular navy: *Provided*, that nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers." 22 Stat. 284, 287, c. 391.

Very soon after the passage of that act it became necessary for the Second Comptroller of the Treasury to determine, for his office, its full scope and effect. One James Nash had been appointed a boatswain in the regular navy on the 7th of May, 1867. Prior to that time, from July 30, 1862, to April 16, 1866, he served as master's mate and acting gunner. He claimed, under the act of August 5, 1882, that, in ascertaining his rate of pay as boatswain, he should be credited with his former services as master's mate and acting gunner. As the pay of boatswain, prior to August 5, 1882, was fixed by the Revised Statutes (§ 1556) at certain rates "during the first three years after date of appointment," and at certain other designated rates during the second, third, and fourth "three years after such date," the Second Comptroller was of opinion that the services performed by Nash, in any other capacity than that of boatswain, could not be counted in determining his rate of pay even had such services been continuous and in the regular navy. And since that act provided that officers should receive the credit and the benefit of services, "in all respects in the same manner as if all said services had been continuous and in the regular navy," that officer held that to credit Nash with the time of his service as master's mate and acting gunner would be inconsistent with those provisions of the statute fixing the salary of officers, and making the rate of pay dependent on the period of service in their particular grades. Senate Ex. Doc. 107, 48th Cong., 1st Session.

After this interpretation of the act of 1882, Congress, in the

Naval Appropriation Act of March 3, 1883, modified, in some degree, the principle upon which officers of the navy should be credited with the time they served in the volunteer army and navy. The latter act provides (the additions to the act of 1882 being shown by italics) that "all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service, in all respects, in the same manner as if all said service had been continuous and in the regular navy *in the lowest grade having graduated pay held by such officer since last entering the service:* Provided, that nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided, further, that nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer army or navy.*" 22 Stat. 473, c. 97.

While Congress did not, by the last act, give an officer in the regular navy additional pay "during the time of his service in the volunteer army or navy," it did give him the benefit of previous service in either, as if all of such service had been continuously rendered in the regular navy "in the lowest grade having graduated pay held by such officer since last entering the service." What, within the meaning of the statute, was the lowest grade having graduated pay held by Rockwell after he last entered the service? He reëntered the service as master in the regular navy on March 12, 1868. He was promoted to the position of lieutenant on December 16, 1868. The positions of master and lieutenant did not, at either of those dates, have "graduated pay" attached to them. Their annual compensation was fixed by statute, and was not, during the period of his service as master, or when he became a lieutenant in the regular navy, subject to be increased by length of previous service in any particular grade. But, by the act of July 15, 1870, 16 Stat. 321, 330, c. 295, now § 1556 Rev. Stat., the pay for lieutenants and masters in the navy was graduated according to length of service in such positions. Under that act, the salary of a lieutenant, during the first five years after

date of commission, when at sea, is $2400; when on shore duty, $2000; and when on leave or waiting orders, $1600. Masters, during the first five years from date of commission, are allowed annually, when at sea, $1800; when on shore duty, $1500; and when on leave or waiting orders, $1200. In the case of each of those officers this annual salary, after the expiration of the first five years, is increased by $200 for the different kinds of service performed.

When the act of July 15, 1870, took effect, Rockwell still held the position of lieutenant. But at the passage of the act of March 3, 1883, he was lieutenant-commander, the pay of which position was likewise graduated, by the act of 1870, according to length of service. It thus appears that when the rule of graduated pay was applied by the act of 1870 to lieutenants, masters, and other officers of the navy, Rockwell held the position of lieutenant. That was not the lowest grade held by him after "last entering the service;" but it was the lowest held by him after the pay of officers of the navy was graduated by the act of 1870 according to length of service. In other words, it was the lowest position held by him after that act took effect. It seems to the court clear that the actual time of appellee's previous service must be credited to the grade of lieutenant — that being the lowest grade held by him after the act of 1870 took effect, having graduated pay attached to it by that act — and not to the grade of master, which, although the lowest held by him after last entering the service, was not graduated, in respect to pay, until after he had ceased to hold it. Such we understand to be the view taken by the court below. That interpretation of the statute meets our approval, and the judgment is

Affirmed.

ST. TAMMANY WATER WORKS *v.* NEW ORLEANS WATER WORKS.

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

Submitted December 3, 1886. — Decided January 10, 1887.

On similar facts, with reference to the same corporate grant, *New Orleans Water Works Co.* v. *Rivers*, 115. U.S. 674, is affirmed to the point that a legislative grant of an exclusive right to supply water to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation, and against provisions in state constitutions, to impair it.

THE case is stated in the opinion of the court.

Mr. G. L. Hall for appellant.

Mr. J. R. Beckwith and *Mr. E. H. Farrar* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The parties to this appeal are corporations of the state of Louisiana. The New Orleans Water Works Company was created by a special act of the General Assembly of Louisiana, passed March 31, 1877, and was given the exclusive right, for fifty years from the date of its charter, "of supplying the city of New Orleans and its inhabitants with water from the Mississippi River, *or any other stream or river*, by means of pipes and conduits, and for erecting and constructing any necessary works or engines or machines for that purpose." It was vested with authority to construct canals and trenches for conducting "the water of the rivers from any place or places it may deem fit, and to raise and construct such dykes, mounds, and reservoirs as may be required for securing and carrying a full supply of pure water to said city and its inhabitants," and "to

lay and place any number of conduits or pipes or aqueducts . . . through or over any of the streets of the city of New Orleans." It was required to proceed, immediately after its organization, in the "erection of new works and pipes sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi River, or elsewhere, as may be judged most expedient."

In *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674, 681, which involved the validity of a municipal ordinance granting to one Rivers the privilege of bringing water from the Mississippi River into his hotel, in the city of New Orleans, by means of mains and pipes laid in its streets — it was adjudged that so much of the company's charter as gave it the exclusive privilege before mentioned was, within the meaning of the Constitution of the United States, a contract protected against impairment, in respect of its obligation, by that provision of the state constitution of 1879 abolishing the monopoly features in the charters of all then existing corporations other than railroad corporations; consequently, that that ordinance was void as interfering with the contract rights of the company.

It was also decided that "the right to dig up and use the streets and alleys of New Orleans for the purpose of placing mains and pipes for supplying the city and its inhabitants with water is a franchise belonging to the state, which she could grant to persons or corporations upon such terms as she deemed best for the public interests;" and since "the object to be attained was a public one, for which the state could make provision by legislative enactment, the granting the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property." But it was also decided that, notwithstanding the exclusive privileges granted to the company, "the power remains with the state or with the municipal government of New Orleans acting under legislative authority to make such regulations as will secure to the public

the uninterrupted use of the streets as well as prevent the distribution of water unfit for use, and provide for such a continuous supply, in quantity, as protection to property, public and private, may require;" and that rights and privileges arising from contracts with the state are "subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense as are all contracts and all property, whether owned by natural persons or corporations."

The St. Tammany Water Works Company was organized in 1882, under the general laws of Louisiana relating to corporations. Its articles of association declare the object of its incorporation to be "to furnish and supply the inhabitants of the city of New Orleans and other localities contiguous to the line of its works with an ample supply of pure, clear, and wholesome water from such rivers, streams, or other fountain sources as may be found most available for such purpose," and to that end to lay pipes and conduits and construct and maintain such system of water works as may be required for the purposes of its organization.

This company being about to take active steps to obtain authority for bringing into New Orleans the waters of the Bogue Falaya River in the parish of St. Tammany, and distributing the same by means of pipes, mains, and conduits placed in the streets of that city parallel with those constructed by the New Orleans Water Works Company, the present suit was brought by the latter corporation for the purpose of obtaining an injunction against all attempts by the appellant, its agents, and employés to infringe upon the exclusive privileges granted to the appellee. The answer admits the material facts alleged in the bill, but insists that the charter of the appellee, so far as it granted the exclusive privileges in question, could be set aside, repealed, or abolished by the state, or by the legislature, or by the municipal government of New Orleans, in the exercise of police functions. The controlling question is as to the effect of the before-mentioned provision of the state constitution upon the exclusive rights granted to the plaintiff by its charter.

As the exclusive right of the appellee to supply the city of New Orleans and its inhabitants with water was not restricted to water drawn from the Mississippi River, but embraced water from any other stream, it is impossible to distinguish this case in principle from that of the *New Orleans Water Works Company* v. *Rivers*. Upon the authority of the latter case, it must be held that the carrying out by appellant of its scheme for a system of water works in New Orleans would be in violation of the rights of the appellee, and that the state constitution of 1879, so far as it assumes to withdraw the exclusive privileges granted to the appellee, is inconsistent with the clause of the national Constitution forbidding a state from passing any law impairing the obligation of contracts.

It is, however, contended, in behalf of the St. Tammany Water Works Company, that the water from the Bogue Falaya River is shown by the proof to be pure, uncontaminated by saline or organic matters to any appreciable extent, and to be more suitable for drinking, washing, cooking, manufacturing, and other purposes, than the water drawn from the Mississippi River and distributed through the city by the New Orleans Water Works Company. And upon these facts is based the suggestion that the people of New Orleans cannot be prevented, by the contract the appellee has with the state, from obtaining, through any lawful agency, such water as is most beneficial to their health or best adapted for business or public uses. Touching this and similar suggestions by counsel of the appellant, it is sufficient to say that no question arises in the present case as to whether the state or the municipal government of New Orleans may not, if the public health or the public comfort so require, compel the appellee, now having the exclusive right of supplying the city of New Orleans and its inhabitants with water distributed through pipes laid in the streets of that municipality (or if it refuses, employ other agencies) to supply water from some river or stream other than the Mississippi. No such action has been had either by the state or by the city, and, consequently, there was no substantial dispute between the plaintiff and the city. The latter has not given its assent to the use by the St. Tammany Water

Counsel for Defendant in Error.

Works Company of the public streets for the distribution of water by means of pipes laid in them, nor has it, so far as the record shows, determined that the public health would be better protected, or the public comfort subserved, by supplying the people with water from the Bogue Falaya River rather than from the Mississippi River. These are matters which neither the appellant nor individual citizens may determine for the constituted authorities. In what mode such questions may be determined, so as to be binding upon the appellee, need not be considered until they actually arise in proper form.

The legal effect of the decree is only to prevent the St. Tammany Water Works Company, under any power it now has, from laying pipes, mains, and conduits, in and through the streets of New Orleans, for supplying that city and its inhabitants with water. It is, therefore, upon the authority of the former case,

Affirmed.

HAYES *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF MISSOURI.

Submitted January 3, 1887. — Decided January 17, 1887.

A statute of a state which provides that in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the state it is allowed in such cases only eight peremptory challenges, does not deny to a person accused and tried for murder in a city containing over 100,000 inhabitants, the equal protection of the laws enjoined by the Fourteenth Amendment to the Constitution; and there was no error in refusing to limit the state's peremptory challenges to eight.

THE case is stated in the opinion of the court.

Mr. Jeff. Chandler for plaintiff in error.

Mr. B. G. Boone, Attorney General of Missouri, for defendant in error.

Opinion of the Court.

MR. JUSTICE FIELD delivered the opinion of the court.

The Revised Statutes of Missouri provide, that, in all capital cases, except in cities having a population of over 100,000 inhabitants, the state shall be allowed eight peremptory challenges to jurors, and, in such cities, shall be allowed fifteen. Rev. Stat. Missouri, 1879, §§ 1900, 1902.

The plaintiff in error, John Hayes, was indicted in the criminal court of St. Louis, a city of over 100,000 inhabitants, by its grand jury, for the crime of murder in shooting and killing one Mueller, in that city, on the 26th of August, 1881; and was tried in April, 1882, and convicted of murder in the first degree. A new trial having been obtained from the Supreme Court of the state, he was again tried in January, 1885, and convicted, as on the first trial, of murder in the first degree. Judgment of death followed. On appeal to the Supreme Court of the state, the judgment was affirmed, and the case is brought before us on error, upon the single ground that — by the law of Missouri providing that, in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges to jurors, whilst elsewhere in Missouri the state is allowed in such cases only eight peremptory challenges — the accused is denied the equal protection of the laws enjoined by the Fourteenth Amendment of the Constitution of the United States. When the jurors were summoned for the trial, and before any peremptory challenges were made by the state, the accused moved the court to limit the state's peremptory challenges to eight, objecting to its being allowed more than that number. But the motion was overruled, and the accused excepted. And, on the trial, against his protest and objection, the state challenged, peremptorily, fifteen of the forty-seven qualified jurors.

The constitution of Missouri, and, indeed, every state of the Union, guarantees to all persons accused of a capital offence, or of a felony of lower grade, the right to a trial by an impartial jury, selected from the county or city where the offence is alleged to have been committed; and this implies

that the jurors shall be free from all bias for or against the accused. In providing such a body of jurors the state affords the surest means of protecting the accused against an unjust conviction, and at the same time of enforcing the laws against offenders meriting punishment. To secure such a body numerous legislative directions are necessary, prescribing the class from which the jurors are to be taken, whether from voters, tax-payers, and free-holders, or from the mass of the population indiscriminately; the number to be summoned from whom the trial jurors are to be selected; the manner in which their selection is to be made; the objections that may be offered to those returned, and how such objections shall be presented, considered, and disposed of; the oath to be administered to those selected; the custody in which they shall be kept during the progress of the trial; the form and presentation of their verdict; and many other particulars. All these, it may be said in general, are matters of legislative discretion. But to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the legislature, but is among its highest duties. It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.

Experience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted.

The number of such challenges must necessarily depend upon the discretion of the legislature, and may vary according to the condition of different communities, and the difficulties in them of securing intelligent and impartial jurors. The whole matter is under its control. *Stokes* v. *People*, 53 N. Y. 164; *Walter* v. *People*, 32 N. Y. 147, 159; *Commonwealth* v. *Dorsey*, 103 Mass. 412, 418.

Originally, by the common law, the Crown could challenge peremptorily without limitation as to number. By act of Parliament passed in the time of Edward the First, the right to challenge was restricted to challenges for cause. But, by a rule of court, the Crown was not obliged to show cause until the whole panel was called. Those not accepted on the call were directed to stand aside. If, when the panel was gone through, a full jury was obtained, it was taken for the trial. If, however, a full jury was not obtained, the Crown was required to show cause against the jurors who had been directed to stand aside; and, if no sufficient cause was shown, the jury was completed from them.

In this country the power of the legislature of a state to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury. In our large cities there is such a mixed population, there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors. And to that end it may be a wise proceeding on the part of the legislature to enlarge the number of peremptory challenges in criminal cases tried in those cities. The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642. The right to challenge is the right to reject, not to select a juror. If from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained. In this case it is not even suggested that the jury by which the accused was tried was not a competent and impartial one. He was allowed twenty peremptory challenges, and it does not appear that he exhausted them.

The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges con-

ferred and in the liabilities imposed. As we said in *Barbier* v. *Connolly*, speaking of the Fourteenth Amendment: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." 113 U. S. 27, 32.

In *Missouri* v. *Lewis*, 101 U. S. 22, it was held, that the last clause of the amendment as to the equal protection of the laws, was not violated by any diversity in the jurisdiction of the several courts which the state might establish, as to subject-matter, amount, or finality of their decisions, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases, and under like circumstances, to resort to them for redress; that the state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government; and that, as respects the administration of justice, it may establish one system of courts for cities and another for rural districts. And we may add, that the systems of procedure in them may be different without violating any provision of the Fourteenth Amendment.

Allowing the state fifteen peremptory challenges in capital cases, tried in cities containing a population of over 100,000 inhabitants, is simply providing against the difficulty of securing, in such cases, an impartial jury in cities of that size, which does not exist in other portions of the state. So far from defeating, it may furnish the necessary means of giving that equal protection of its laws to all persons, which that amendment declares shall not be denied to any one within its jurisdiction.

We see nothing in the legislation of Missouri which is repugnant to that amendment.

The judgment of the Supreme Court of that state, therefore, is affirmed.

FORSYTH *v.* DOOLITTLE.

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

Argued December 21, 22, 1886. — Decided January 17, 1877.

In Illinois when a declaration in an action at law alleges a joint liability of two defendants, a plea in bar which does not traverse this allegation admits it, and makes the declarations of one defendant not served with process evidence against the other who has appeared and answered.

In an action by an attorney to recover for services rendered in defending a suit for the foreclosure of a mortgage upon a tract of land near a large town, and in preventing the foreclosure, and in bringing about a favorable sale of the property, evidence as to the character of the land and its possible value as a future suburb of the town is admissible.

As the length of hypothetical statements presented to a witness to ascertain his opinion upon any matter, growing out of the facts supposed, necessarily depends upon the simple or complicated character of the transactions recited, and upon the number of particulars which must be considered for the formation of the opinion desired, it must in a great degree be left to the discretion of the court; and in this case that discretion was properly exercised.

THE case is stated in the opinion of the court.

Mr. Joseph E. McDonald and *Mr. John M. Butler* for plaintiff in error.

Mr. J. R. Doolittle, *Mr. J. R. Doolittle, Jr.*, and *Mr. Melville W. Fuller* for defendants in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action to recover compensation for services rendered by the plaintiffs below to the defendants, in effecting a sale of certain lands in Indiana, and in various legal proceedings concerning the title, or claims against them. The declaration alleges a joint contract and liability by the defendants below, Caroline Forsyth and Jacob Forsyth, her husband; but the summons was served on her only. She appeared and pleaded the general issue. A statute of Illinois provides that

in actions on contracts, express or implied, against two or more defendants as partners, joint obligors, or payors, proof of their joint liability or partnership shall not be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by a plea in abatement, or a plea in bar, denying the partnership or joint liability, verified by affidavit. The joint contract and liability of the defendants, therefore, stood admitted by the pleadings, and this is a sufficient answer to several objections taken to the admissibility of statements and the proof of acts of the defendant, Jacob Forsyth. Being jointly liable with Caroline on the contract in suit, his declarations respecting the services rendered under it were as admissible as if made by her.

The services for which compensation is sought were not only those required of attorneys and counsellors at law, but were also those of negotiators seeking to accomplish the result desired, by consultation with proposed purchasers, and presentation to them of the advantages to be derived from the property, present and prospective. Varied as were the legal services of the plaintiffs, it is plain from the testimony that those rendered by negotiation and consultation, and presentation of the uses to which the property could be applied, were far more effective and important. This fact necessarily had a controlling weight in estimating the value of the services. It is difficult to apply to such services any fixed standard by which they can be measured, and their value determined, as can be done with reference to services purely professional. There is a tact and skill and a happy manner with some persons, which render them successful as negotiators, while others of equal learning, attainments, and intellectual ability, fail for the want of those qualities. The compensation to be made in such cases is, by the ordinary judgment of business men, measured by the results obtained. It is not limited by the time occupied or the labor bestowed. It is from overlooking the difference in the rule by which compensation is measured in such cases, and that in cases where the services are strictly of a professional nature, that several objections are urged for reversal of the judgment recovered, which, if this difference were regarded, would not be seriously pressed.

The services rendered related to so many different subjects, that it would require a long narrative to describe them with much detail. It is sufficient for the consideration of the questions not disposed of by what has already been said, to state generally the main facts of the case. Caroline Forsyth, for several years before the employment of the plaintiffs, had been the owner of a tract of land consisting of 8000 acres in Indiana, about sixteen miles from Chicago. Only about 1000 acres of it were fit for cultivation. The principal value of the tract was owing to its proximity to Chicago, and to the belief that it could be made use of for manufacturing and commercial purposes as a suburb of that city. It yielded no revenue; there were taxes due upon it, and portions of it had been sold for taxes. It was subject to a mortgage for $163,000, executed in 1875, upon a loan of $100,000, which, with the stipulated interest to maturity, amounted to that sum; and a suit had been commenced by its holders in the Circuit Court of the United States in Indiana for its foreclosure, and the sale of the premises.

The defendants were without means to meet the mortgage debt or pay the taxes due, or even the expenses of agents dealing with the property, and relied entirely upon effecting a sale to obtain what was needed for these several demands. The defendants had previously made an effort to sell the property to a stock company in London, and had signed certain documents for that purpose. The company claimed a right to a conveyance pursuant to a contract made upon the supposed authority of those documents. Another party, by the name of Horne, claimed that he had negotiated a sale, and was demanding $50,000 for his services.

It was when the property was in this condition, and when its entire loss seemed highly probable, from the inability of the defendants to meet the demands pressing for payment, that the plaintiffs were retained to help them out of their complicated embarrassments and effect a sale of the property, the defendants promising them, in case of success, compensation which should be "large, liberal, and generous." The plaintiffs entered upon their employment, and during the fol-

lowing nine months, by arduous labor, constant negotiation, and great tact, they accomplished what was desired. The suit to foreclose the mortgage was resisted, and its dismissal obtained. The property was sold for one million of dollars, one-third of which was paid in cash, and the balance secured by mortgage on the property. The existing mortgage was then redeemed, a large reduction from the amount claimed having been first obtained. The taxes and other debts were paid, and the claim of Horne was compromised and settled. A suit commenced pending these proceedings by the trustee of the London stock company to compel a conveyance of the property, was defended and ultimately defeated. It would serve no useful purpose to detail the number of particulars in which the skill and tact of the plaintiffs were exhibited. The claim made by them for compensation was resisted, and this action was thereupon brought. The jury found that it should have been $40,000, and gave their verdict for that amount. Of the justice of this amount we are not to determine. We are called upon only to see whether any error was committed in the manner in which the case was submitted to the jury.

We see nothing in the objection that evidence was admitted as to the character of the land sold, or its possible value as a future suburb of Chicago. Its character in this respect might increase or diminish the chances of its sale. The only points which we find in the record calling for examination arose from the hypothetical statements submitted to witnesses, with inquiry as to the value of the services thus supposed to have been rendered. There were such hypothetical statements upon five subjects, which embraced matters that were to be disposed of before the consummation of the contract of sale. They embody with some fulness the matters supposed by the plaintiffs to have been established, and it was only upon that assumption that the opinions of the witnesses as to the value of the services rendered were given. If the assumption was erroneous, if the matters supposed to be established were not in the judgment of the jury in truth established, the opinions went for nothing; and so the court instructed the jury. Its language was as follows:

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"As to the questions, you must understand that they are not evidence; they are mere statements to these witnesses, called by the respective parties, of what the party putting these questions claims the proof shows was the nature and amount of plaintiff's services rendered; and, upon the hypothesis or assumption of these questions the witnesses are asked to give their estimate of the value of these services. You must readily see that the value of the answers to these questions depends largely, if not wholly, upon the fact whether the statements made in these questions are sustained by the proof. If the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight, because based upon false assumptions or statements of facts."

And as to the estimate of the value placed by the witnesses upon the services, the language of the court to the jury was as follows:

"You are not bound by the estimate which these witnesses have put upon these services. They are proper to be considered by you, as part of the proof bearing upon the question of value, as the testimony of men experienced in such matters, and whose judgment may aid yours. But it is your duty, after all, to settle and determine this question of value from all the testimony in the case, and to award to the plaintiffs such amount, by your verdict, as the proof satisfies you is a reasonable compensation for the services which, from the proof, you find plaintiff rendered, after deducting the amount the plaintiffs have already received for such services."

The length of the hypothetical statements is urged as an objection to them. They were lengthy even without the exhibits, which constituted the larger portion; but the court took especial care to impress upon the jury that they were not to consider the statements as facts in the case, but merely as assumptions of the party propounding the questions. *Cowley* v. *The People*, 83 N. Y. 464, 470. The witnesses do not appear to have been confused by their length; they expressed no inability to fully comprehend them. Nor did the court, though complaining of their length, indicate that they were

unintelligible to the jury, or tended in any way to turn their minds from the points in issue.

The length of hypothetical statements presented to a witness to ascertain his opinion upon any matter growing out of the facts supposed, will necessarily depend upon the simple or complicated character of the transactions recited, and the number of particulars which must be considered for the formation of the opinion desired. And this subject, like the extent to which the examination of a witness may be allowed, must, in a great degree, be left to the discretion of the court.

We do not see that the rights of the defendants were at all prejudiced by them. The judgment, therefore, must be affirmed; and it is so ordered.

Affirmed.

HUNTINGTON *v.* SAUNDERS.

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

Argued December 22, 1886. — Decided January 17, 1887.

While a creditor who finds specific property of his debtor in the hands of the debtor's wife to whom it had been assigned by the debtor before bankruptcy may follow it and have it appropriated to the payment of his debt, a judgment *in personam* for its value cannot be taken against her in case the property itself cannot be found. *Phipps* v. *Sedgwick*, 95 U. S. 3, and *Trust Co.* v. *Sedgwick*, 97 U. S, 304, affirmed.

A bill in equity against husband and wife by the assignees in bankruptcy of the husband, which alleges that the husband before the bankruptcy transferred a large amount of personal property in the form of bonds, stocks, &c., to the wife for the purpose of concealing the same from his creditors, and delaying, hindering, and defrauding them, and in contemplation of bankruptcy, and which does not describe the property, but avers inability to do so, and which waives answer under oath and asks as relief for a transfer to the assignees of the property in whatever form it may exist, as assets of the bankrupt, sets forth no case for relief in equity, and should be dismissed on demurrer.

THIS was a bill in equity, which was dismissed on demurrer. The case is stated in the opinion of the court.

Mr. George W. Parke for appellants.

Mr. Henry C. Hutchins and *Mr. James H. Young* filed a brief for appellees; but the court declined to hear argument.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the District of Massachusetts.

It was decided in that court upon a demurrer to the bill of complaint, the demurrer being sustained and the bill dismissed. The bill was brought by the present appellants, as assignees in bankruptcy of William A. Saunders, against said William A. Saunders and Mary P. Saunders, his wife, and, after alleging that, by due course of proceeding, William A. Saunders had been adjudged a bankrupt and the plaintiffs appointed assignees of his estate, it proceeds to say that they have discovered, within one year, "and been first informed of facts and circumstances upon which they believe, and therefore aver, that the said bankrupt, without consideration, transferred to and placed in the hands of his wife, the said Mary P. Saunders, a large amount of personal property in the form of money, bonds, stocks, and other securities, none of which can your orators more particularly describe, because all particular information is refused by the bankrupt and his wife and the persons managing the property for them, and because the same has been invested for income, and often changed in form by reinvestment and in pursuance of devices for more effectual concealment." Then it is further averred, that "said property is of the value of about forty thousand dollars, and was so transferred by said bankrupt to his said wife for the purpose of concealing the same from his creditors and from these assignees, and to delay, hinder, and defraud his creditors, he being then deeply indebted, and to an amount wholly beyond his means and ability to liquidate and pay, so that he was hopelessly insolvent and in contemplation of bankruptcy." The prayer of the bill is "that said Mary P. Saunders, the respondent, may fully, truly, and particularly answer this bill, but not under oath, which is hereby waived," and for a decree that

said property may be held to belong to the assets of said William A. Saunders in bankruptcy, and the respondent compelled to transfer and deliver the property, or the proceeds thereof, in whatever form existing, to the plaintiffs, as assets of the bankrupt, and for further and other relief.

The imperfections of this bill are very obvious. Counsel for appellants, conceding the doctrine of *Phipps* v. *Sedgwick*, 95 U. S. 3, and *Trust Co.* v. *Sedgwick*, 97 U. S. 304, that a wife cannot be held liable to a personal judgment for money received of her husband during the marital relation, argues that this bill is an attempt to proceed against a fund in her hands; but as no particular fund is named, as no particular set of securities or description of them is given in the bill, as no place is named where they are deposited, nor any person, even the wife, as holding them, as no real estate is mentioned as belonging to this fund, as the nature and character of the conversion made of the fund after it came to the hands of the wife is not set forth, it seems impossible to maintain such a bill as seeking to lay hold of and appropriate a particular fund coming from the bankrupt himself, or even the proceeds of such a fund. As was very pertinently asked by the circuit judge in his opinion sustaining the demurrer, what relief could be given by the court, or what decree could be granted on this bill, if it were taken *pro confesso*, no opposition being made to it? 14 Fed. Rep. 907. It is not possible to see what decree could be made or what relief could be given. It is not a bill of discovery, because the answer under oath of the defendant is expressly waived. No interrogatories are propounded to either of the defendants; no effort made to obtain from them, or either of them, by way of sworn answer, anything which could be used as evidence in the case. An issue of a general denial of the truth of the bill would leave nothing on which evidence could be introduced. It is in fact what is familiarly known as a fishing bill. The plaintiffs allege no distinct fact which the defendants or either of them can be called upon to deny. The plaintiffs do not say positively that any of the allegations of the bill are true, but the substance of what they say is, that they have received certain information which

excites their suspicion; and this information is so vague, so uncertain and indefinite as it regards any fund or any particular sum of money or bonds, or any time or occasion when they were placed in the control of the female defendant, that, unless we are prepared to establish the proposition, that whenever a married woman is suspected of having received money from her husband to the prejudice of his creditors, she must be brought up to answer, and not under oath, as to what she has done with it, this bill must be held to be insufficient.

In the case of *Phipps* v. *Sedgwick*, 95 U. S. 3, which is a case somewhat analogous to this, this court said: "While the statutes of New York have recognized certain rights of the wife to deal with and contract in reference to her separate property, they fall far short of establishing the principle that out of that separate property she can be made liable for money or property received at her husband's hands, which in equity ought to have gone to pay his debts. Equity has been ready, where such property remains in her hands, to restore it to its proper use, but not to hold her separate estate liable for what she has received, and probably spent at his dictation. Such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of the husband. In receiving favors at his hands, which she supposed to be the offerings of affection, or a proper provision for her comfort, she would be subjecting that which was her own, or which might afterwards come to her from other sources, to unknown and unsuspected charges, of the amount and nature of which she would be wholly ignorant. It answers the demands of justice in such cases if the creditor, finding the property itself in her hands or in the hands of one holding it with notice, appropriates it to pay his debt. But, if it is beyond his reach, the wife should no more be held liable for it than if the husband himself had spent it in support of his family, or even of his own extravagance."

To this principle we adhere; and, as there is no statement or description or reference in this bill to any fund now existing arising out of the bankrupt's gift to his wife, and no call for discovery in regard to any such fund, but an express waiver

Names of Counsel.

of an answer under oath, we think the bill was properly dismissed.

Affirmed.

HEINEMANN *v.* ARTHUR'S EXECUTORS.

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

Submitted January 3, 1887. — Decided January 24, 1887.

Wool of the third class was dutiable under § 1 of the act of March 2, 1867, c. 197, 14 Stat. 560, at three cents per pound, if its value at the last port or place whence exported into the United States, excluding charges in such port, was twelve cents or less per pound; and at six cents per pound, if such value exceeded twelve cents per pound. On January 5, 1874, such wool, bought in Russia, in October, 1873, the actual cost of which, exclusive of charges was below twelve cents per pound, at the time and place of exportation, was entered at the custom house at the port of New York, at an invoice value stated in Russian silver roubles. The collector computed the rouble at 77.17 cents, under the authority of a proclamation to that effect made by the Secretary of the Treasury in December, 1873, in pursuance of an estimation of the value of the rouble for the year 1874, made by the director of the mint, as required by the act of March 3, 1873, c. 268, 17 Stat. 602. Prior to that act the value of the rouble had been fixed by statute at seventy-five cents. If the rouble had been computed at seventy-five cents, the invoice value of the wool would have been less than twelve cents per pound. Computing it at 77.17 cents raised such invoice value above twelve cents per pound. The collector exacted a duty of six cents per pound. In an action to recover back the excess of duty over three cents per pound; *Held:*

(1) The effect of the act of 1873 was to repeal the prior statute;

(2) the requirement of § 7 of the act of March 3, 1865, c. 80, 13 Stat. 493, forbade the assessment of duty on an amount less than the invoice or entered value;

(3) the collector was, therefore, required to compute the rouble at 77.17 cents, although the cost of the goods, computing the rouble at seventy-five cents, was twelve cents or less per pound.

Mr. Sidney De Kay and *Mr. Patrick A. Collins* for plaintiff in error.

Mr. Solicitor General for defendants in error.

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

In October, 1873, the firm of Heinemann, Payson & Morgan bought, paid for, and exported from Taganrog, in Russia, some colored carpet wools, the actual cost of which, exclusive of charges, was below twelve cents per pound, at the time and place of exportation. They were imported into the port of New York, and entered at the custom-house there January 5, 1874, at the invoice value of 41,975.01 silver roubles. The collector reduced the amount into United States money at 77.17 cents to the rouble. This made the value of the wool greater than twelve cents per pound, and the collector exacted a duty on it of six cents per pound. The importers protested that the rouble should be computed at seventy-five cents, which would have made the value twelve cents or less per pound, and the duty would have been three cents per pound. The tariff act in force at the time of the entry was § 1 of the act of March 2, 1867, c. 197, 14 Stat. 560, which, as applicable to the merchandise, which was wool of the third class, provided as follows: "Upon wools of the third class, the value whereof at the last port or place whence exported into the United States, excluding charges in such port, shall be twelve cents or less per pound, the duty shall be three cents per pound; upon wools of the same class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall exceed twelve cents per pound, the duty shall be six cents per pound." The Secretary of the Treasury, on appeal, confirmed the action of the collector, and the importers, after paying the duty exacted, to obtain their goods, brought this suit against the collector to recover the alleged excess.

Section 1 of the act of March 3, 1843, c. 92, 5 Stat. 625, provided, "that in all computations of the value of foreign moneys of account at the custom-houses of the United States, . . . the rouble of Russia shall be deemed and taken to be of the value of seventy-five cents."

On the 3d of March, 1873, the following act was approved, 17 Stat. 602, c. 268:

"SEC. 1. That the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and proclaimed on the first day of January by the Secretary of the Treasury.

"SEC. 2. That in all payments by or to the treasury, whether made here or in foreign countries, when it becomes necessary to compute the value of the sovereign or pound sterling, it shall be deemed equal to four dollars eighty-six cents and six and one half mills, and the same rule shall be applied in appraising merchandise imported, when the value is, by the invoice, in sovereigns or pounds sterling, and in the construction of contracts payable in sovereigns or pounds sterling; and this valuation shall be the par of exchange between Great Britain and the United States; and all contracts made after the first day of January, eighteen hundred and seventy-four, based on assumed par of exchange with Great Britain, of fifty-four pence to the dollar, or four dollars forty-four and four ninths cents to the sovereign or pound sterling, shall be null and void.

"SEC. 3. That all acts and parts of acts inconsistent with these provisions be, and the same are hereby, repealed."

In pursuance of this statute the director of the mint estimated the value of the Russian rouble for the year 1874 at 77.17 cents in United States money of account, and the Secretary of the Treasury thereafter, on the 20th of December, 1873, proclaimed by a circular addressed to the collectors of customs, that, "from and after January 1st, 1874, the following table of standard values of foreign moneys, reduced to the moneys of account of the United States, will, until otherwise provided for by law or regulation, be taken at custom-houses in computing the invoice value of all imported merchandise expressed in such currency, to wit, Russian roubles of 100 copecks, silver, 77.17."

The foregoing facts appearing at the trial of the case before the court and a jury, the plaintiffs contended that the wool was purchased before the act of March 3, 1873, took

effect, and that the value in United States money should have been computed as of the time of exportation. These positions were overruled by the court, and it directed the jury to find a verdict for the defendant, which was done under the objection and exception of the plaintiffs. To review a judgment for the defendant the plaintiffs have brought this writ of error.

The decision of this court in *The Collector* v. *Richards*, 23 Wall. 246, establishes that the effect of the act of 1873 was to fix the value of the Russian silver rouble, in the money of account of the United States, for the purpose of computing, at the custom-house, the amount of an invoice of imported goods, and, consequently, to repeal the act of 1843. See, also, *Cramer* v. *Arthur*, 102 U. S. 612; *Hadden* v. *Merritt*, 115 U. S. 25.

Evidence that the merchandise cost, exclusive of charges, less than twelve cents per pound, at the time and place of exportation, could not affect the question, because, although the duty was imposed according to the value of the goods "at the last port or place whence exported to the United States," yet, when that value was stated, in the invoice, in the foreign silver currency, its equivalent in the money of account of the United States could not be computed, for the purpose of the entry of the goods at the custom-house, for duty, at any sum less than the invoice or entered value. Section 7 of the act of March 3, 1865, c. 80, 13 Stat. 493, in force at the time of this importation, provided that, in all cases where the duty imposed by law should be based upon the value of any specified quantity of merchandise, the value upon which the duty should be assessed should be its actual market value or wholesale price at the period of exportation, in the principal markets of the country of exportation, but that the duty should not be assessed "upon an amount less than the invoice or entered value, any act of Congress to the contrary notwithstanding." This made it imperative on the collector to compute the value of the silver rouble, at the time of the entry, according to that value as determined in accordance with the act of 1873, which was 77.17 cents. The duty was imposed by the statute ac-

cording to the "value" of the goods at the time and place of exportation. The importer stated that "value," in the foreign coin, in his invoice and entry. The statute as to computation applied as of the date of entry, to such entered value. Hence it could not affect the question to show that the "cost" of the goods abroad, computing the rouble at a lower rate, as of the date of exportation, was twelve cents or less per pound.

Judgment affirmed.

ROBERTS *v.* PHŒNIX LIFE INSURANCE COMPANY.

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

Argued January 12, 13, 1887. — Decided January 24, 1887.

In a suit in equity by a wife against a life insurance company and her husband, in the Circuit Court of the United States in Kentucky, to recover, as assignee of her husband by a written assignment, the amount insured by a policy issued by the company in favor of the husband and his assigns, on the life of a debtor of his, for $20,000, the husband having, after the date of such assignment and before the death of the debtor, delivered the policy to the company, with a written assignment by him to it, indorsed on the policy of "all right and title to the within policy," and expressing a consideration of $4000, and received the $4000, the Circuit Court having dismissed the bill, this court, on appeal, affirmed the decree, on the ground that the assignment to the wife was not satisfactorily proved to have been made or delivered before the transaction between the husband and the company.

Mr. Marc. Mundy and *Mr. Samuel Shellabarger* for appellant.

Mr. Augustus E. Willson for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

On the 27th of August, 1872, the Phœnix Mutual Life Insurance Company, of Hartford, Connecticut, a Connecticut

corporation, issued a policy, No. 66,488, whereby, in consideration of the representations made to them in the application for the policy, and the sum of $1024 to it duly paid "by A. B. Cook, creditor," and of the annual payment of a like amount on or before the 27th day of August in every year during the continuance of the policy, it assured the life of William G. Harvison, of Louisville, Kentucky, in the amount of $20,000, for the term of his natural life, the amount of the insurance to be paid, after the death of Harvison, "to the said A. B. Cook, creditor, and his executors, administrators, or assigns," "any indebtedness to the company on account of this policy being first deducted therefrom." The policy was in force at the death of Harvison, which occurred August 25, 1880. Fannie M. Cook, the wife of said A. B. Cook, both of whom resided at Louisville, Kentucky, commenced a suit in March, 1881, in a state court of Kentucky, against the company, to recover on the policy $17,340, with interest, being the amount of the policy, less certain premium notes. She based her claim to recover on a written assignment, which she alleged had been executed by her husband, A. B. Cook, and delivered to her, on the 19th of September, 1872, twenty-three days after the date of the policy, and which was in these words:

"This instrument of writing certifies that the policy No. 66,488 I have taken out on the life of Wm. G. Harvison, for twenty thousand ($20,000) dollars in the Phœnix Mutual Life Insurance Company, of Hartford, Connecticut, was taken out by me for the sole benefit of my wife, Fannie M. Cook; and I hereby declare that the above-mentioned life policy of $20,000, and the money secured thereby, is given and assigned to my said wife as separate estate, and shall continue to be the separate estate of my said wife; and whether the said Harvison dies before or after me, my said wife shall have and receive and hold said money as her separate estate and for her separate and sole benefit, to dispose of as she may think proper.

"Witness my hand this 19th day of September, 1872, at Louisville, Ky. A. B. Cook."

The suit was removed into the Circuit Court of the United States for the District of Kentucky, where the plaintiff filed a bill in equity making the company and A. B. Cook defendants, and praying judgment against the company for the $17,340 and interest. The company answered, setting up various defences, on which issue was joined. A. B. Cook also answered. On a hearing on proofs, the court dismissed the bill, without delivering any opinion, oral or written. The plaintiff appealed to this court. She has since died, and her executrix has been substituted as plaintiff.

It appears, by the proofs, that A. B. Cook, on the 14th of June, 1880, and before Harvison's death, received from the company $4000, and delivered to it the policy and the following instrument, signed by him, indorsed on the policy:

"Louisville, Ky., June 14, 1880.

"I hereby sell, transfer, and assign to the Phœnix Mut. Life Ins. Co. of Hartford, Conn., all right and title to the within policy on the life of W. G. Harvison, in consideration of the sum of four thousand dollars in hand paid, by draft on the said Co., and a return of the premium notes.

A. B. Cook."

Among the defences set up and urged by the defendant were: (1) that A. B. Cook, who was a witness for his wife, was not a competent witness for her under the statutes of Kentucky; (2) that no assignment of the policy by A. B. Cook to his wife was ever in fact executed and delivered; (3) that Fannie A. Cook had no insurable interest in the life of Harvison, and, therefore, could not become assignee of the policy; (4) that the statement in the application for the policy, that Harvison was not addicted to the habitual use of spirituous liquors was untrue; (5) that after the policy was issued the habits of Harvison became, as to the use of spirituous liquors, so far different from his habits as to such use represented in the application, as to make the risk more than ordinarily hazardous.

Without considering any of the other questions raised, we

are of opinion that, as a matter of fact, and even conceding that A. B. Cook was a competent witness, the assignment by him to his wife is not satisfactorily proved to have been made or delivered prior to the transaction of June 14, 1880. The evidence on that point is conflicting, and it would not be profitable to discuss it in detail. As the suit cannot be maintained without proof of the assignment,

The decree is affirmed.

UNITED STATES *v.* PARKER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

Argued January 3, 1887. — Decided January 24, 1887.

A judgment entered upon motion of defendant's attorney of record that "it appearing that the subject-matter in this suit has been adjusted and settled by the parties, it is therefore ordered that this cause be, and the same is, hereby dismissed," is a judgment on the merits, final in form and nature, and is a bar to a subsequent suit against the defendant for the same cause of action. This rule also prevails in Nevada by statute. Gen. Stat. Nevada, 1885, § 3173.

The difference between a *retraxit* and a non-suit pointed out.

As pleadings in Nevada are required to be construed in a sense to support the cause of action or defence, and as facts in the record not fully set forth in defendant's plea clearly show that the cause of action sued on in this case is the cause of action in the judgment pleaded in bar; *Held:* that the defendant's plea sufficiently avers all the facts necessary to constitute the former judgment a bar to this action.

Mr. Solicitor General for plaintiff in error.

Mr. C. J. Hillyer for defendants in error. *Mr. William M. Stewart* was with him on the brief.

Mr. Justice Matthews delivered the opinion of the court.

This is an action at law commenced by the United States, on the 18th of November, 1885, against Hubbard G. Parker, as principal, and William M. Stewart, as surety, upon an offi-

cial bond executed on the 12th day of March, 1867, in the penal sum of $20,000, the condition of which was that, whereas the said Hubbard G. Parker had been appointed superintendent of Indian affairs for Nevada, and had accepted such appointment, if the said Hubbard G. Parker should at all times carefully discharge the duties thereof, and faithfully expend all public moneys and honestly account for the same, and for all public property which should or might come into his hands, without fraud or delay, the obligation should be void.

It is alleged in the complaint, that, after the execution of the bond, and while the defendant Parker still held and remained in said office, and prior to November 18, 1869, the plaintiff placed in his hands various and sundry large sums of money to be expended by him for the benefit of the Indians of Nevada, and to be properly accounted for by him. That on said November 18, 1869, "there, then, and ever since has remained and now remains of said moneys in said defendant Parker's hands, unexpended and unaccounted for, the sum of $6184.14;" and he having failed to account for or to return the same to the plaintiff, judgment is prayed for against the defendants for that amount, with interest thereon at the rate of six per cent. per annum from November 18, 1869.

The defendants filed the following answer:

"That heretofore, to wit, on the 27th day of November, A.D. 1871, the above-named plaintiff commenced an action in the Circuit Court of the United States, Ninth Circuit and District of Nevada, against said above-named defendants, upon the official bond of the defendant Hubbard G. Parker, as superintendent of Indian affairs for Nevada, (the same identical bond as set out in the complaint herein,) to recover the sum of fifteen thousand one hundred and eight and $\frac{62}{100}$ ($15,108.62) dollars, together with interest and costs. That said action was commenced by the filing of a complaint and the issuance of summons thereon in due form of law. That the said defendants appeared in said action by their attorneys, Ellis & King, and on, to wit, December 15, A.D. 1871, filed their answer to the complaint, and, among other things, denied that there was any balance due the United States from the said defend-

ant, Hubbard G. Parker, as superintendent of Indian affairs for Nevada, or otherwise. That said United States Circuit Court had jurisdiction of the parties and the subject-matter of said action.

"That afterwards, and on, to wit, the 1st day of December, A.D. 1873, said cause came on for trial in the said Circuit Court of the United States and District of Nevada, before Hon. Lorenzo Sawyer, Circuit Judge, and Hon. E. W. Hillyer, United States District Judge for Nevada, the plaintiff being represented by its duly authorized and appointed attorney for the District of Nevada, Jonas Seely, and the defendants being represented by their attorneys, Messrs. Ellis & King.

"That thereupon the defendants, by their attorneys, presented to the court a statement of accounts duly certified by the Second Auditor and Second Comptroller of the Treasury Department of plaintiff, showing that said defendant Hubbard G. Parker's accounts with the United States as superintendent of Indian affairs for Nevada had been settled and adjusted, and that the said defendant Parker was discharged from all claims of the United States as superintendent of Indian affairs for Nevada, or otherwise, and that said Parker was not indebted to the United States in any sum whatever as superintendent of Indian affairs for Nevada, or otherwise.

"Whereupon in open court, on motion of defendants' attorneys, the district attorney representing the United States consenting thereto, the following judgment was duly made and entered, to wit:

"'Upon motion of Ellis & King, attorneys for defendants, and it appearing to the court that the subject-matter in this suit has been adjusted and settled by the proper parties in Washington, it is therefore ordered that this cause be, and the same is, hereby dismissed.'

"Defendants further aver that said judgment so as aforesaid made and entered is a bar to any and all claims of the plaintiff in this action against each and all of the said defendants, and that the said plaintiff is estopped thereby, and ought not to have or maintain this action.

"And for further and separate answer defendants aver that

on the 21st day of June, A.D. 1872, the said defendant Hubbard G. Parker, as superintendent of Indian affairs for Nevada, made a full settlement with proper officers of the United States of all his accounts as superintendent of Indian affairs for Nevada, and his accounts were finally adjusted and settled by the Second Auditor and Second Comptroller of the Treasury Department of plaintiff, whereby he was fully discharged from all obligations and demands of the United States as superintendent of Indian affairs for Nevada, or otherwise.

"Defendants further aver that the pretended claim against these defendants for six thousand one hundred and eighty-four and $\frac{14}{100}$ ($6184.14) dollars is founded upon a pretended readjustment of the accounts of the said defendant Parker by the Second Auditor and Second Comptroller of the Treasury Department of plaintiff, made on the 25th day of June, A.D. 1884, and that such pretended readjustment was made without authority of law. That the said settlement and adjustment made on the 21st day of June, A.D. 1872, aforesaid, was final and conclusive, and a bar to the pretended claim for $6184.14 herein, or any claim of the United States against these defendants, or either of them."

To this answer the plaintiff demurred, on the ground that it did not state facts sufficient to constitute a bar to the cause of action set out in the complaint. This demurrer was overruled; and, the attorney for the plaintiff resting his case upon the demurrer, judgment was entered in favor of the defendants, to reverse which the United States have sued out and now prosecute this writ of error.

In the view which we take of the case, it is not necessary to consider the validity of the second defence set up in the answer. The points relied upon by the plaintiff in error, so far as the first defence is concerned, are, 1st, that the former judgment relied on as an estoppel does not appear to be for the same cause of action as that on which recovery is now sought; and, 2d, that the judgment is not a final judgment on the merits. The two actions are upon the same bond, but it is alleged that it does not sufficiently appear that the recovery sought in the two actions is upon the same breach. In the

first action the amount alleged to be due was $15,108.62, the action having been brought November 27, 1871. On the trial on December 1, 1873, the averment is that the defendants presented to the court a statement of accounts, duly certified by the Second Auditor and Second Comptroller of the Treasury Department, showing that the defendant Parker's accounts with the United States as superintendent of Indian affairs for Nevada had been settled and adjusted, and that Parker was thereby discharged from all claims of the United States against him as superintendent of Indian affairs for Nevada, or otherwise, and that said Parker was not indebted to the United States in any sum whatever as superintendent of Indian affairs for Nevada, or otherwise.

It is stated, by way of recital in the judgment itself, that it thus appeared to the court, "that the subject-matter in this suit has been adjusted and settled by the proper parties in Washington." This recital, together with the judgment founded on it, was entered by the consent of the attorney representing the United States, who thus in open court officially admitted the effect of the evidence to be as claimed. The present action was begun on the 18th of November, 1885, but the breach alleged occurred on November 18, 1869, the judgment demanded being for the amount stated then to have become due, with interest thereon from that date. The cause of action, therefore, arose and existed at that time, and if in existence now it must have been so at the date of the trial of the first action, to wit, December, 1, 1873. It is, therefore, a fair and reasonable, if not a necessary, inference that the amount alleged to be due in the present action was part of the larger amount sought to be recovered in the former action. It is not material that the two sums are not identical; it is sufficient that the smaller was part of the larger amount. In the first cause there might have been a recovery, if the proof had justified, for a sum less than that demanded. It was found and adjudged by the court in that cause, not only that the whole sum demanded was not due, but that there was nothing due from the defendant to the United States; and if nothing was then due, the amount now sought to be recovered

must have been adjudged not to have been due; for if due now, according to the averments of the complaint, it was due from a time prior to the date of that trial and judgment. The averment is that it was due on and from November 18, 1869. It may be, according to the rule of pleading at common law, where a former judgment is set up by way of a bar to the action as an estoppel, the plea in this case would not be regarded as sufficiently certain, for want of an express averment that the amount sought to be recovered in this action was part of the same amount sought to be recovered in the prior action. But the rules of the common law as to pleading are not in force in Nevada, where the procedure is regulated by a statutory code, which governs the practice of the courts of the United States sitting therein in common law cases by virtue of § 914 of the Revised Statutes. This code, like other similar codes regulating the practice of the state courts, has relaxed the strictness of the common law rules of pleading, so that now, instead of construing pleadings strictly against the party, they are to be construed liberally in his favor, for the furtherance of justice.

Section 70 of the Civil Procedure Act of the State of Nevada, approved March 8, 1869 (Laws of 1869, p. 206), being § 3092 of the General Statutes of Nevada of 1885, is as follows: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

In commenting on this section, the Supreme Court of Nevada, in *Ferguson* v. *Virginia & Truckee Railroad*, 13 Nevada, 184, 191, uses the following language: "But the rule of construing pleadings most strongly against a pleader has been replaced in this state by the more liberal rule prescribed in § 70 of the Practice Act. This section is the same as § 159 of the New York Code. The result of the decisions in that state seems to be, that, on a general demurrer, the allegations of a complaint will be construed as liberally in favor of the pleader as, before the code, they would have been construed after the verdict for the plaintiff. That is, they will be construed in such a sense as to support the cause of action or the defence.

Moak's Van Santvoord's Pl., 3d ed., side page 771 *et seq.*, and cases cited. In this state a similar doctrine has been declared in *State* v. *Central Pacific Co.*, 7 Nevada, 99, 103."

Applying this rule, it becomes quite clear that the pleading in question sufficiently avers all the facts necessary to constitute the former judgment, a bar to the present action.

The second question is, whether the judgment rendered in the first action was final. It is claimed to be equivalent only to a non-suit, and therefore not *res judicata*. A judgment of *non-suit*, whether rendered because of the failure of the plaintiff to appear and prosecute his action, or because upon the trial he fails to prove the particulars necessary to make good his action, or when rendered by consent upon an agreed statement of facts, is not conclusive as an estoppel, because it does not determine the rights of the parties. *Homer* v. *Brown*, 16 How. 354; *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121; *Haldeman* v. *United States*, 91 U. S. 584. But a non-suit is to be distinguished from a *retraxit*. *Minor* v. *Mechanics' Bank*, 1 Pet. 46. Blackstone defines the difference as follows: "A *retraxit* differs from a non-suit in this: one is negative and the other positive. The non-suit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open, voluntary renunciation of his claim in court, and by this he forever loses his action." 3 Blackstone Com. 296. And it has been held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves through the judgment of the court, as will constitute a defence to another action afterwards brought upon the same cause of action. *Bank of Commonwealth* v. *Hopkins*, 2 Dana, 395; *Merritt* v. *Campbell*, 47 Cal. 542. It is clearly so, when, as here, the judgment recites that the subject-matter of the suit had been adjusted and settled by the parties. This is equivalent to a judgment that the plaintiff had no cause of action, because the defence of the defendant was found to be

sufficient in law and true in fact. Upon general principles of the common law, regulating the practice and procedure of courts of justice, it must be held that the judgment here in question was rendered upon the merits of the case, is final in its form and nature, and must have the effect of a bar to the present action upon the same cause.

If its effect is to be determined by the statutes of Nevada, the same conclusion will be reached. The Civil Practice Act of that state, passed March 8, 1869, Gen. Stat. Nevada, 1885, § 3173, is as follows:

"An action may be dismissed or a judgment of non-suit entered in the following cases: First. By the plaintiff himself at any time before trial, upon the payment of costs, if a counter-claim has not been made. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon. Second. By either party upon the written consent of the other. Third. By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal. Fourth. By the court, when upon trial and before the final submission of the case the plaintiff abandons it. Fifth. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly. In every other case the judgment shall be rendered on the merits."

It thus appears that there are five instances in which the dismissal of an action has the force only of a judgment of non-suit; "in every other case," the statute provides, "the judgment shall be rendered on the merits." If the case at bar is not included among the enumerated cases in which a dismissal is equivalent to a non-suit, it must, therefore, be a judgment on the merits. In the present case the suit was not dismissed by the plaintiff himself before trial, nor by one party upon the written consent of the other, nor by the court for the plaintiff's failure to appear on the trial, nor by the court at the trial for an abandonment by the plaintiff of his cause; neither was

it a dismissal by the court upon motion of the defendant, on the ground that the plaintiff had failed to prove a sufficient case for the jury at the trial. The judgment was rendered upon the evidence offered by the defendants, which could only have been after the plaintiff had made out a *prima facie* case. That evidence was passed upon judicially by the court, who determined its effect to be a bar to the cause of action. This was confirmed by the consent of the attorney representing the United States. The judgment of dismissal was based on the ground of the finding of the court, as matter of fact and matter of law, that the subject-matter of the suit had been so adjusted and settled by the parties that there was no cause of action then existing. This was an ascertainment judicially that the defence relied upon was valid and sufficient, and consequently was a judgment upon the merits, finding the issue for the defendants. Being, as already found, for the same cause of action as now sued upon, it operates as a bar to the present suit by way of estoppel.

The judgment is affirmed.

HUNTINGTON *v.* WORTHEN.

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

LITTLE ROCK & FORT SMITH RAILWAY *v.* WORTHEN.

ERROR TO THE SUPREME COURT OF ARKANSAS.

Submitted January 6, 1887. — Decided January 24, 1887.

The statute of Arkansas of March 31, 1883, § 46, which directs the board of railroad commissioners not to include the embankments, tunnels, cuts, ties, trestles, or bridges of railroads in the schedule of the property of railroad companies, prepared by them for the purpose of assessment of taxes, is in conflict with the provisions in the Constitution of the State of 1874, relating to the assessment and taxation of property within the state; but, the unconstitutional part of the act being separable from the remainder, the latter continues valid.

Statement of Facts.

THE following is the case stated by the court.

In the first of the above-entitled cases the plaintiff, the Little Rock and Fort Smith Railway, is a corporation created under the laws of Arkansas, and operates a railroad from Little Rock to Fort Smith in that state, running through several counties in its route. The defendants are the sheriffs of those counties, and *ex officio* collectors of taxes therein. The suit was brought to enjoin them from collecting certain taxes assessed and levied for the year 1885 on what is termed in the revenue act of the state as the "railroad track" of the corporation, upon the alleged ground that the Board of Railroad Commissioners of the state exceeded its powers by including unauthorized elements in the estimate of its value. That term "railroad track" embraces all fixed railroad property of the corporation, and is assessed for purposes of taxation as real estate.

In the second of the above-entitled cases the plaintiffs, who are citizens of Massachusetts, and trustees under a mortgage executed by the railway company upon its railroad and land grant, filed their bill of complaint against the same collectors to restrain the collection of the same taxes. Subsequently the bill was amended by joining the county clerks of the several counties on the line of the railway as defendants, with prayers for injunctions restraining them from doing the several acts which the revenue act requires them to perform in connection with and subsequently to the sale of the railroad track.

By a statute of Arkansas, passed in 1883, the Governor, Secretary of State, and Auditor of Public Accounts were constituted a Board of Railroad Commissioners for the state, and required on the first Monday of April of each year to ascertain the value of all property, real and personal, of every railroad company existing under the laws of the state, including therein the railroad track, rolling-stock, water and wood stations, passenger and freight depots, offices, and furniture. And it was made the duty of the company in March, 1883, and every second year thereafter when required, to prepare and file with the Secretary of State a statement or schedule

showing the length of its main and side-tracks, switches and turn-outs in each county, in which the road is located, and in each city and town through or into which its road may run; also the value of all improvements, stations and structures, including the railroad track located on the right of way; but the statute declares that "*such schedule shall not include, nor value, embankments, tunnels, cuts, ties, trestles, or bridges.*"

The statute also required the Board of Railroad Commissioners to meet on the first Monday of April in each year, at the office of the Secretary of State, and examine the lists or schedules of the description and value of the railroad track of the railroad companies filed with the Secretary of State; and if the schedules are made out in accordance with the provisions of the act, and, in the opinion of the Board, the valuation of the railroad track is fair and reasonable, it shall appraise the same, and the Secretary of State shall certify to the assessor of each county, in which the railroad is located, so much of the list as values the railroad track located in the county and in any city or town thereof; and the assessors shall list and assess the same as real estate.

The Little Rock and Fort Smith Railway, under this statute, made a return of the length of its main and side-tracks; and of the value thereof; and of the improvements and structures, including the railroad track on its right of way, but omitted in its estimate the value of the embankments, tunnels, cuts, ties, trestles, and bridges, following in this respect the directions of the statute.

At a subsequent meeting, the Board passed a resolution declaring that all property of railroad companies in the state should be assessed at its true value, without regard to the restrictions and limitations mentioned, by which the value of the embankments, tunnels, cuts, ties, trestles, and bridges is excluded from the schedule of their property; that, after full examination and consultation, it had determined that such limitations and restrictions were unconstitutional, and that it was not bound thereby. The several railroad companies were, therefore, requested to render full statements of their property of whatever kind or description, and the true value thereof,

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without regard to the restrictions and limitations mentioned. A hearing was accorded to the companies by the Board; but its conclusion was not changed, and it proceeded to include in the assessment on the railroad track the value of the embankments, tunnels, cuts, ties, trestles, and bridges. The assessment was thereby largely increased. The plaintiff thereupon commenced the present suit to restrain the collection of the taxes, setting forth the matters above mentioned, and alleging that it was unable to state to what extent the assessment of its property was increased by this action of the Board, as the increase was incapable of separation from the whole. It charged, therefore, that the whole assessment was vitiated and rendered void by this unlawful action of the Board, and prayed an injunction to restrain the collection of the taxes based upon it.

The defendants appeared in the suit and demurred to the complaint. The court in which the suit was commenced sustained the demurrer and dismissed the suit. The Supreme Court of the state, on appeal, affirmed the decree of the court below, and the case is now brought here for review.

In the second suit — the one from the Federal court — the defendants appeared and pleaded in bar the decree in the above case in the state court, and also, by leave of the court, demurred to the complaint. The court sustained the demurrer and dismissed the bill. From its decree the case is brought here on appeal.

Mr. C. W. Huntington for appellants and plaintiff in error.

Mr. Daniel W. Jones, Attorney General of Arkansas, for appellees and defendants in error.

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

The constitution of Arkansas of 1874 provides that "all property subject to taxation shall be taxed according to its value, to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform through-

out the state," and that "no one species of property, from which a tax may be collected, shall be taxed higher than another species of property of equal value."

The following property is declared to be exempt from taxation: "Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity." And the constitution declares that "all laws exempting property from taxation other than is provided" therein "shall be void."

As thus seen, no part of the property of railroad companies in the state is exempt from taxation, and any law which exempts it is in express terms declared to be void. But laws which indirectly produce such exemption must be equally inoperative. That cannot be accomplished indirectly which the organic law declares shall not be done directly. The assessment of property, that is, the appraisement and estimate of its value, is the basis upon which the amount of the tax is fixed. A law, therefore, omitting from assessment portions of any particular property, thus lessening the estimate of its value, has the effect of exempting it to that extent from taxation. That result cannot be accomplished, as well observed by the Supreme Court of the state, under the guise of regulating the duties of assessors.

When, therefore, under the advice of the Attorney General, the Board of Railroad Commissioners treated as invalid the direction of the statute, that the value of embankments, tunnels, cuts, ties, trestles, and bridges should not be included in the estimate of the railroad track, it obeyed the constitution, rather than the legislature. It may not be a wise thing, as a rule, for subordinate executive or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and productive of great inconvenience to the public; but still the determination of the judicial tribunals can alone settle the legality of their action. An unconstitutional act is not a law;

it binds no one, and protects no one. Here the conflict between the constitution and the statute was obvious, and the Board had the advice of the highest legal officer of the state; and his conclusion was sustained by the judgment of the Supreme Court of the state. The unconstitutional part of the statute was separable from the remainder. The statute declared that, in making its statement of the value of its property, the railroad company should omit certain items; that clause being held invalid, the rest remained unaffected, and could be fully carried out. An exemption, which was invalid, was alone taken from it. It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other — as when the two things provided are necessary parts of one system — that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected.

As to the objection which the counsel of the plaintiffs in error in the State case, and of the appellants in the Federal case, raise, that the action of the Board of Railroad Commissioners was in conflict with that clause of the Fourteenth Amendment of the Constitution of the United States, which declares that no state shall deprive any one of property without due process of law, we can only say, we do not perceive its application. The complaint of the plaintiffs in error and appellants is, that the Board of Railroad Commissioners did not follow the act of the legislature. If that act was valid, no ground lay for complaint that the state had done anything to deprive the company of its property without due process of law. If the act was, in the particulars mentioned, unconstitutional, as the Supreme Court of the state afterwards held, there was no just ground of complaint that the Railroad Commissioners had refused to follow its directions.

In the State case the writ is dismissed, there being no Federal question involved. In the Federal case, the decree of the court below is affirmed.

KANSAS ENDOWMENT ASSOCIATION *v.* KANSAS.

ERROR TO THE SUPREME COURT OF KANSAS.

Submitted January 6, 1887. — Decided January 24, 1887.

An averment in a motion for a new trial (contained in a record, brought up in error from a state court) that a statute of the state upon which the suit was based is "unconstitutional and void," may apply to the constitution of the state, and, taken by itself, raises no question for decision below, which this court can review in error.

THE case is stated in the opinion of the court.

Mr. George W. De Camp and *Mr. J. Jay Buck* for plaintiff in error.

Mr. S. B. Bradford, Attorney General of Kansas, *Mr. Edwin A. Austin*, and *Mr. Charles B. Smith*, for defendant in error.

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

This was a suit begun by the state of Kansas in the District Court of Lyon County against the Endowment and Benevolent Association of Kansas, for a forfeiture of its charter because it had neglected to comply with the requirements of chapter 131 of the laws of Kansas of the year 1885, approved March 7, 1885, "providing for the organization and control of mutual life insurance companies in this state." The case was submitted without pleadings on an agreed statement of facts, from which it appears that the corporation was organized under the general laws of Kansas, January 7, 1885, with the following objects:

"1st. To guard its members, to a great extent, against the ills of pecuniary want during life, and especially during the period of infirm old age, and at their death to make a provision for their families and friends, which latter is supposed to be the only physical anxiety of dying man.

"2d. To create a fund to be paid to the members of the society, in accordance with rules and regulations thereof, whereby the members may the better be enabled to perpetuate and sustain their membership, which in so doing will secure to them and their dependents the continued support and protection of the association.

"3d. To encourage and promote benevolence, industry, and charity among its members."

The district court gave judgment against the corporation, but on what ground does not appear, except as it may be inferred from the following reasons assigned in support of a motion for a new trial:

"1. That said chap. 131 is unconstitutional and void.

"2. For error of law occurring at the trial and excepted to by the defendant.

"3. That the facts of this case do not warrant either the conclusion of law made by the court or the judgment herein rendered."

When the case went to the Supreme Court of the state on a petition in error, the following was the assignment of errors:

"1. The said court erred in rendering judgment for said plaintiff below.

"2. The conclusions of law and the judgment are not authorized or warranted by the facts of the case.

"3. Said court erred in overruling the motion of the defendant below for a new trial."

From this statement it is clear that we have no jurisdiction, as no Federal question appears affirmatively on the face of the record. It is true that in the motion for a new trial the question of the constitutionality of chapter 131 of the acts of 1885 was presented; but that is not enough, since it is nowhere shown that any provision of the Constitution of the United States was relied on. The suggestion in the motion applies as well to the constitution of the state as to that of the United States, and it has long been settled that we have no jurisdiction unless it distinctly appears that a question under the Constitution or a law of the United States not only might have been but actually was raised and decided. *Crowell* v. *Randell*, 10 Pet. 368,

398; *Brown* v. *Colorado*, 106 U. S. 95, 97; *Chouteau* v. *Gibson*, 111 U. S. 200; *Detroit Railway Company* v. *Guthard*, 114 U. S. 133. Here there is nothing of the kind, and in the assignment of errors on the petition in error to the Supreme Court of the state no reference was made to any constitutional question whatever, except inferentially under that which relates to overruling the motion for a new trial. Certainly it does not appear unmistakably on the face of the record that the Supreme Court of the state either knew or ought to have known that the validity of the statute in question was challenged on account of its repugnancy to the Constitution or laws of the United States. *Brown* v. *Colorado*, supra, p. 97. Indeed, we know of no provision of the Constitution which renders such a statute invalid as a whole, and there is nowhere in the record any claim that in the charter of the corporation there was a contract by the state the obligation of which had been impaired by the legislation. If there had been, the validity of the statute could not have been challenged except in its application to this charter, and that was not the objection made either in the motion for a new trial or anywhere else that we can discover.

The writ of error is dismissed for want of jurisdiction.

GIBBS *v.* CRANDALL.

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

Submitted January 7, 1887. — Decided January 24, 1887.

The parties in this case on both sides being all citizens of Louisiana, it is held that the facts as stated in the opinion of the court show no real and substantial dispute or controversy arising under the Constitution or laws of the United States, so as to authorize the removal of the case from the state court of Louisiana, to the Circuit Court of the United States.

This was an appeal from a judgment of the Circuit Court of the United States for the Western District of Louisiana re-

manding to a court of the state a cause which had been removed from it. The case is stated in the opinion of the court.

Mr. S. Prentiss Nutt and *Mr. Wade R. Young* for appellants.

Mr. Thomas C. Catchings and *Mr. James T. Coleman* 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, c. 137, 18 Stat. 470, from an order of the Circuit Court remanding a case which had been removed from a state court, on the ground that the suit was one "arising under the Constitution and laws of the United States." All the parties, both plaintiffs and defendants, are citizens of Louisiana, and the right of removal depends entirely on the question whether it appears on the face of the record that there is in the case a real and substantial dispute or controversy arising under the Constitution or laws of the United States; that is to say, whether "some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction." *Starin* v. *New York*, 115 U. S. 248, 257; *Southern Pacific Railroad* v. *California*, 118 U. S. 109.

The facts are these: At some time prior to September, 1878, Thomas J. Martin brought suit in the Eighth District Court of the parish of Madison, Louisiana, against Thomas W. Watts, as principal, and Phillip Hoggatt, then in life, as surety, "on a contract of rent." Pending this suit Hoggatt died, and Mrs. Martha A. Gibbs was appointed and qualified as administratrix of his succession. The suit was then revived and afterwards conducted contradictorily with the administratrix. At November term, 1880, a judgment was rendered in favor of the administratrix, rejecting the demand against the succes-

sion of Hoggatt. By agreement of Martin and Watts a new trial was awarded, but it is claimed that the administratrix of Hoggatt was not a party to this agreement, and that no new trial was ever ordered as to her. At November term, 1881, a second trial was had and judgment rendered. On appeal to the Supreme Court of the state this judgment was reversed and a new judgment given against Watts and the succession of Hoggatt *in solido*. At May term, 1882, of the District Court a rule was taken on the administratrix of Hoggatt to show cause why the property of the succession should not be sold to pay this judgment. To this rule the administratrix made answer, setting up the original judgment in her favor rejecting the claim, and averring that the subsequent proceedings were null and void as to the succession for lack of jurisdiction. The defence was sustained in the District Court, but on appeal to the Supreme Court this was reversed, and the District Court afterwards, in obedience to the mandate of the Supreme Court, made the rule absolute and directed the administratrix to cause the property to be sold to pay the judgment.

In this condition of things the heirs of Hoggatt, on the 1st of August, 1885, filed their petition in the District Court against the administrator of the estate of Martin, who had died pending the original proceedings, and the administratrix of Hoggatt, to restrain the sale which had been ordered and to annul the judgment of the Supreme Court against the estate, on the ground that after the original judgment in her favor the administratrix was no longer a party to the suit, and that the estate was not bound by the subsequent proceedings therein. In the petition it is averred, in various forms, that the judgment against the administratrix, when she was not a party to the suit, was "absolutely null and void, as being repugnant to and in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States, and an attempt to deprive these petitioners of their property without due process of law." On the 3d of August a writ of injunction, as prayed for, was issued on the allowance of the judge of the District Court, and the next day this writ and a citation in the suit

were served on the administrator of Martin. On the 23d of October, 1885, the heirs of Hoggatt filed in the state court their petition for the removal of the suit to the Circuit Court of the United States, as "a suit of a civil nature, in equity . . . arising under the Constitution and laws of the United States, the said suit being a bill in equity to avoid the mandate, judgments and decrees of the honorable the Supreme Court of Louisiana and of your honorable court, for the reason that said mandate, judgments and decrees are repugnant to and in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States." After the case was entered in the Circuit Court, Crandall moved that it be remanded, and this motion was granted July 20, 1886, the court "being of opinion that the record does not disclose a case within the jurisdiction of the court."

This order was clearly right. The case as made by the plaintiffs presents no disputed question of Federal law. If the administratrix of the estate of Hoggatt was not a party to the proceedings after the first judgment in her favor, no one can claim that the succession she represented was bound by what was afterwards done in the suit. All depends on whether she continued to be in law and in fact a party; and this is to be determined by the effect of the original judgment in her favor, and the form of the proceedings thereafter. This may involve a consideration of the law and practice in Louisiana; but it is not, so far as anything now appears on the record, at all dependent for its solution on any construction of the Constitution or laws of the United States. As was said in *Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 203: "Before [therefore] a Circuit Court can be required to retain a cause under this jurisdiction it must in some form appear upon the record, by a statement of facts 'in legal and logical form,' such as is required in good pleading, (1 Chit. Pl. 213,) that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States." It is not enough for the party who seeks a removal of his cause to say that the suit is one arising under the Constitution

He must state the facts so as to enable the court to see whether the right he claims does really and substantially depend on a construction of that instrument. That has not been done in this case, and the order remanding the suit is consequently

Affirmed.

UNITED STATES *v.* SCHLESINGER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Argued January 13, 1887. — Decided January 24, 1887.

Construing together §§ 2931 and 3011 of the Revised Statutes, the decision of the Secretary of the Treasury, on an appeal from a collector of customs, as to the rate and amount of duties, is not final and conclusive, except in a case where, after a protest and appeal, a payment of duties is made in order to obtain possession of goods, and then a suit is not brought to recover back the duties within the times and under the limitations prescribed by § 2931.

Such decision is not final, in a suit brought by the United States against an importer, where, on entering goods, he paid the estimated duties, and the goods were delivered to him, and on a reliquidation of the entry further duties were assessed, and he duly protested, and appealed to the Secretary, who sustained the action of the collector, the suit being brought to recover such further duties.

In such suit the defendant may show, as a defence, that the further duties were illegally assessed.

This was an action at law to recover a sum alleged to be due the United States on imported merchandise. Judgment for defendant. Plaintiff below sued out this writ of error. The case is stated in the opinion of the the court.

Mr. Solicitor General for plaintiff in error.

Mr. L. S. Dabney and *Mr. William S. Hall* for defendants in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law brought by the United States against the members of the firm of Naylor & Co., in the Circuit Court

of the United States for the District of Massachusetts, to recover a sum of money claimed to be due as duties on merchandise, imported into the port of Boston from England, in January, 1880. The importers paid the estimated amount of duties, and obtained possession of the goods, and this suit was brought to recover the difference between the duties so paid and a larger amount at which the collector subsequently liquidated the duties. The case was tried by the court without a jury, evidence being introduced by both parties. The court found the following facts: "The defendants imported into Boston from Liverpool the merchandise named in plaintiffs' declaration, which they (the defendants) invoiced and entered as 'scrap steel,' dutiable at thirty per cent. *ad valorem.* At the time of the entry they paid the estimated duties thereon, calculated at thirty per cent. *ad valorem*, and all the merchandise was thereupon then delivered to them. No question was made but that a portion of the merchandise was dutiable at thirty per cent. *ad valorem*, as entered. The other and disputed portion of the merchandise consisted of pieces of steel railway bars, sawed at both ends, from two feet to six feet in length. After entry the whole merchandise was weighed by customs officers, proper examination was made thereof by the appraiser, who duly made report thereon to the collector, who, in due course and form of law, liquidated the entries, classifying the undisputed portion of the merchandise as it was entered, and assessing the duty thereon at thirty per cent. *ad valorem*, but classifying the disputed portion as 'steel in bars, dutiable at $2\frac{1}{4}$ cents a pound, under Department decision of October 31st, 1879, No. 4273.' Against this classification of the disputed portion of the merchandise and the ascertainment and liquidation of the duty thereon the defendants duly protested, and appealed to the Secretary of the Treasury, who sustained the action of the collector, and, the defendants not paying the duty thus ascertained and assessed, this action was brought. The plaintiffs claimed that the decision of the Secretary of the Treasury, under the provisions of section 2931 of the Revised Statutes of the United States, was final and conclusive, the defendants not having paid the duties and brought suit to

recover the amount so paid, and that the plaintiffs were entitled to recover the whole amount found due upon liquidation by the collector, with interest, which amount so found due was $2125.80. It also appeared, that, owing to error in the supposed weight and amount of the merchandise when the estimated duties were paid, the proper duty due upon all the importations, calling the merchandise 'scrap steel,' as entered, and dutiable at thirty per cent. *ad valorem*, was $116.50 more than had been paid as the estimated duty thereon; which sum of $116.50 is included in the above amount of $2125.80. The defendants introduced testimony tending to show, and the court found, as a fact, that the steel railway bars above described were commercially known as 'scrap steel,' and that they were fit only to be remanufactured."

Upon the foregoing facts the court ruled, as matter of law, that the assessment of duty by the collector upon the disputed portion of the merchandise was illegal, and that the plaintiffs were not, under the provisions of § 2931, entitled to recover the full amount they claimed, and ordered judgment for the plaintiffs for $116.50 only. To this ruling and order the plaintiffs excepted; and judgment being entered for them for $116.50, they have brought this writ of error.

The Circuit Court, in its decision, made in December, 1882, 14 Fed. Rep. 682, construed §§ 2931 and 3011 of the Revised Statutes. Section 3011, as it stood at the time of these importations and stands now, reads as follows: "Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest [and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one.]" The portion contained in brackets was inserted by the act of February 27, 1877, c. 69, 19 Stat. 247, in place of the words

"in writing and signed by the claimant or his agent, was made and delivered at or before the payment, setting forth distinctly and specifically the grounds of objection to the amount claimed." Section 3011, as it originally stood in the Revised Statutes, was a reënactment of the act of February 26, 1845, c. 22, 5 Stat. 727.

Section 2931 is a reënactment of § 14 of the act of June 30, 1864, c. 171, 13 Stat. 214, and is in these words: "On the entry of any vessel or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall

be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains." The view of the Circuit Court was, that, under § 3011, there could be no suit against a collector to recover back an excess of duties paid on merchandise imported, unless the payment, in addition to being made under protest, was made "in order to obtain possession" of the merchandise; that § 2931 did not destroy the limitation imposed by § 3011 on the right to sue to recover back duties, or create any right to sue independently of such limitation; and that, consequently, as it was plain, as a fact, that the $2009.30 of duties liquidated and sought to be recovered were illegally imposed, the importers could not, after paying them, recover them back, but could obtain the benefit of the exemption from the duty demanded by a defence in this suit, and by that means alone.

We concur in this view, and are of opinion that the proper construction of § 2931, in view of the fact that § 3011 is in force concurrently with it, is, that the decision of the Secretary of the Treasury is not final and conclusive, except in a case where, after a protest and an appeal, a payment of duties is made in order to obtain possession of the goods, and then a suit is not brought to recover back the duties within the times and under the limitations prescribed by § 2931. That being so, it is not final in the present case, there having been a payment of estimated duties, a delivery of the goods, a reliquidation assessing further duties, a protest, an appeal, and a suit against the importers by the United States to recover the further duties.

The United States cite the decision of the District Court of the United States for the Southern District of New York in *United States* v. *Cousinery*, 7 Ben. 252, and the cases of *Watt* v. *United States*, 15 Blatchford, 29, and *United States* v. *Phelps*, 17 Blatchford, 312, as sustaining the view maintained by them. The first case cited was decided in April, 1874, before the enactment of the Revised Statutes, in June, 1874; the second case in July, 1878; and the third in November, 1879. But this court, in November, 1883, in *Arnson* v. *Mur-*

phy, 109 U. S. 238, a suit brought against a collector in 1879 to recover back duties exacted in 1871, held that the only existing authority for such a suit was to be found in the provisions of §§ 3011 and 2931 taken together. In the opinion of this court at October term, 1875, in *Barney* v. *Watson*, 92 U. S. 449, a suit brought to recover back duties paid in March, 1864, on an importation made in December, 1863, it was suggested that the act of February 26, 1845, now § 3011, was supplied by § 14 of the act of June 30, 1864, now § 2931, and was thus repealed by implication. That case, however, arose before the act of June 30, 1864, was passed, and not under it, though adjudged here after it was enacted. But the decision in *Arnson* v. *Murphy* was based on the view that §§ 3011 and 2931 coexist, and must be construed together. So, what was held in *United States* v. *Cousinery*, under the idea that § 14 of the act of June 30, 1864, was the only statute to be considered, (and the act of February 26, 1845, is not alluded to in the decision,) is of no force when §§ 3011 and 2931 are both of them to be taken into consideration, as coexisting. The same remarks apply to what was ruled, on the same basis, in *United States* v. *Phelps*.

In *Watt* v. *United States*, the suit was by the United States to recover duties liquidated in 1876 on an importation made in 1872, and there was no appeal after liquidation; and it was held that for that reason the defendant could not attack the liquidation.

Nor does anything in the decision in *Westray* v. *United States*, 18 Wall. 322, control the present case. That case had reference, it is true, to § 14 of the act of June 30, 1864, and the suit was one by the United States, on a bond given on the entry of goods for warehousing, conditioned to pay the amount of duties to be ascertained to be due and owing on the goods. The duties were afterwards liquidated. The defendants, at the trial, offered to show that the duties should have been less. The evidence was excluded, on the ground that there had been no appeal from the decision of the collector, and this court sustained the ruling.

Judgment affirmed.

UNITED STATES *v.* OTIS.

OTIS *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Submitted December 20, 1886. — Decided January 24, 1887.

Contracts between the United States and a mail contractor, one for mail station service, and the other for mail messenger service, construed, in reference to payment for extra service.

THE case is stated in the opinion of the court.

Mr. Assistant Attorney General Howard for the United States.

Mr. J. Coleman for Otis.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

These are appeals by both parties from a judgment rendered by the Court of Claims in favor of George K. Otis against the United States for $16,445.36. The claims of Otis are founded on two contracts for carrying the mails, on two routes, No. 6636 and No. 6635. The findings of fact by the Court of Claims, contained in the record, are set forth at length in the report of the case in 20 C. Cl. 315. Such of them as are material are as follows:

As to No. 6636. Finding No. 1. The United States advertised, March 1, 1877, by an advertisement headed "*Mail Station Service, New York City*," for proposals "for carrying the mails of the United States from July 1, 1877, to June 30, 1881, in the city of New York, as herein specified. Route No. 6636." The findings state that the advertisement designated the points to and from which the mails should be carried, but those points are not set forth in the findings. The advertisement then proceeded: "It is to be understood and agreed that any increase in the service which may be

rendered necessary by the removal to other localities of any of the above named stations, or by any other cause, may be ordered by the Postmaster General, and shall be paid for *pro rata;* and, also, that compensation, *pro rata*, shall be deducted in case of decrease in said service, caused by any such removal or by the discontinuance of any of said stations."

Under this advertisement Otis made a written proposal "to carry the mails of the United States from July 1, 1877, to June 30, 1881, on Route No. 6636, between New York City post-office and branch offices, state of New York, under the advertisement of the Postmaster General dated March 1, 1877," for the sum of $14,900 per annum. On the 13th of April, 1877, a written contract was executed by the United States and Otis, which recited that the proposal of Otis, under said advertisement, "for the performance of the mail station service at the city of New York, in the said advertisement described," at the price and for the term above named, had been accepted, and then proceeded: "Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America to carry the mail of the United States, using such proper means therefor, and particularly the wagons hereinafter described, as may be necessary to transport the whole of said mail, whatever may be its size or weight, during the term of this contract. . . . And any new or additional mail station service which may become necessary and be required by the Postmaster General during the term of this contract. . . . It is further understood and agreed, that any increase in the service which may be rendered necessary by the removal to other localities of any of the above named stations, or by any other cause, may be ordered by the Postmaster General, and shall be paid for *pro rata;* and, also, that compensation, *pro rata*, shall be deducted in case of decrease in said service, caused by any such removal, or by the discontinuance of any of said stations."

Otis, while engaged in carrying the mails under this contract, and also under the contract for mail messenger service, set forth hereinafter in Finding No. 2, was directed by the postmaster in New York City to perform the following trips:

Eighteen round trips per week from Station E, No. 465 Eighth Avenue, to the Hudson River Railroad depot, Thirtieth Street and Tenth Avenue; six trips per week from post-office to Harlem Railroad depot, Forty-second Street and Fourth Avenue, 6.30 A.M. train. These trips were duly performed. The service between Station E and the Hudson River Railroad depot amounted to 2784 miles. The allowance therefor under said station service contract would be $657.58. The service between the post-office and the Harlem Railroad depot amounted to 2607.82 miles. The allowance therefor under said station service contract would be $615.97.

As to No. 6635. Finding No. 2. The United States advertised March 1, 1877, by an advertisement headed, "*Mail Messenger Service, New York City,*" for proposals, "for carrying the mails of the United States between the post-office in the city of New York and the railroad stations and steamboat landings, and between the several stations where transfer service is required, from July 1, 1877, to June 30, 1881," on Route No. 6635. The advertisement then proceeded: "The following schedule shows the mail messenger and transfer service now required at New York; but the accepted bidder under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may become necessary during the term of the contract, whether to and between depots and landings now established or those which may be hereafter established. Bids must be made with this distinct understanding, and must name the amount per annum for the whole service, and not by the trip. There will be no diminution of compensation on account of the discontinuance of such portions of the service as may become unnecessary during the contract term; but deductions will be made for neglect of duty. . . .

"*Schedule of service now required.*

Railroad.	Location of depot.	Distance from post-office to depot.	Number of trips per week from office to depot.	Number of trips per week from depot to office.
		Miles.		
Pennsylvania	Jersey City	1.45	54	27
Pennsylvania	Foot of Cortlandt Street.	.45	50	50
Erie Railway	Jersey City	1.63	43	57
Northern Railroad of New Jersey	Jersey City	1.63	12	12
New Jersey and New York	Jersey City	1.63	18	24
Montclair and Greenwood Lake	Jersey City	1.63	6	6
New Jersey Midland	Jersey City	1.45	6	6
Central Railroad of New Jersey	Jersey City	1.63	49	37
Delaware, Lackawanna, and Western	Hoboken	2.20	36	42
New York and New Haven	Grand Central depot	3.23	50	44
New York and Harlem	Grand Central depot	3.23	18	18
New York Central and Hudson River	Grand Central depot	3.23	45	71
New Jersey Southern	Pier 8, North River	.65	12	12
Staten Island	Foot of Whitehall Street.	.90	18	18
Fall River Boat landing	Pier 28, North River	.58	6	7
Long Island	Long Island City	3.85	36	36

"*Transfers.* Grand Central depot to Erie Railway, 3.35 miles, six times a week; Grand Central depot to Pennsylvania Railroad, 3.55 miles, twenty-four times a week; Grand Central depot (Boston line) to Grand Central depot (New York Central and Hudson River line), .35 of a mile, as often as required. The transfer service to include the conveyance of all cases of post-office supplies for transit through the city."

Under this advertisement Otis made a written proposal "to carry the mails of the United States, from July 1, 1877, to June 30, 1881, on mail messenger route, No. 6635, between the post-office at New York City and the railroad stations and steamship landings in said city, including transfers between stations, and under the advertisement of the Postmaster General, dated March 1, 1877," for the sum of $57,900 per annum. On the 13th of April, 1877, a written contract was executed by the United States and Otis, which recited that the proposal of Otis, under said advertisement, "for the performance of the mail messenger service at the city of New York, in the said advertisement described," at the price and for the term above named, had been accepted, and then proceeded: "Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with

the United States of America to carry the mails of the United States, using such proper means therefor, and particularly the wagons hereinafter described, as may be necessary to transport the whole of said mail, whatever may be its size or weight, during the term of this contract, as follows, to wit:

"From the New York City post-office to the Pennsylvania Railroad depot (Jersey City) fifty-four (54) times per week; returning from said depot to post-office twenty-seven (27) times per week.

"From the New York City post-office to the Pennsylvania Railroad depot (foot of Cortlandt Street) and back fifty (50) times per week.

"From the New York City post-office to the Erie Railway depot forty-three (43) times per week; returning from said depot to post-office fifty-seven (57) times per week.

"From the New York City post-office to the depot of the Northern Railroad of New Jersey and back twelve (12) times per week.

"From the New York City post-office to the New Jersey and New York Railroad depot eighteen (18) times per week; returning from said depot to post-office twenty-four (24) times per week.

"From the New York City post-office to the Montclair and Greenwood Lake Railroad depot and back six (6) times per week.

"From the New York City post-office to the New Jersey Midland Railroad depot and back six (6) times per week.

"From the New York City post-office to the depot of the Central Railroad of New Jersey forty-nine (49) times per week; returning from said depot to post-office thirty-seven (37) times per week.

"From the New York City post-office to the Delaware, Lackawanna and Western depot thirty-six (36) times per week; returning from said depot to post-office forty-two (42) times per week.

"From the New York City post-office to the New York and New Haven Railroad depot fifty (50) times per week; returning from said depot to post-office forty-four (44) times per week.

"From the New York City post-office to the New York and Harlem Railroad depot and back eighteen (18) times per week.

"From the New York City post-office to the New York Central and Hudson River Railroad depot forty-five (45) times per week; returning from said depot to post-office seventy-one (71) times per week.

"From the New York City post-office to the New Jersey Southern Railroad depot and back twelve (12) times per week.

"From the New York City post-office to the Staten Island Railroad depot and back eighteen (18) times per week.

"From the New York City post-office to the Fall River Boat landing six (6) times per week; returning from said landing to post-office seven (7) times per week.

"From the New York City post-office to the Long Island Railroad depot and back thirty-six (36) times per week.

"*Transfers.* Grand Central depot to Erie Railway six times a week; Grand Central depot to Pennsylvania Railroad twenty-four times a week; Grand Central depot (Boston line) to Grand Central depot (New York Central and Hudson River line) as often as required.

"The transfer service to include the conveyance of all cases of post-office supplies arriving for transit through the city; each and every transfer to be made as often as may be required by the Postmaster General; and will do and perform all other mail messenger and transfer service now being performed in the said city of New York, and any and all new or additional mail messenger or transfer service in the said city, whether to and between depots and landings now established and those which may hereafter be established, which may become necessary and be required by the Postmaster General during the time of this contract, without additional compensation, said service to be performed at such hours of arrival and departure at and from the above designated points or places, or those which may be hereafter established, as the postmaster at New York City may order and direct.

* * * * * * * * * *

"It is hereby stipulated and agreed that the Postmaster Gen-

eral may, if it be required by the public interest, order new or additional service which may become necessary to be performed, which shall be performed without additional compensation; also, that he may discontinue or curtail the service, in whole or in part, if in his judgment the public interest shall so require, he allowing as full indemnity to the contractor one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued."

While Otis was engaged in the performance of this contract, the United States, on the 12th of November, 1878, directed him to transport mails which theretofore had been transferred, as required by the contract, "from the New York City post-office to the Pennsylvania Railroad depot (foot of Cortlandt Street) and back, fifty times per week," across the Hudson River to the Pennsylvania Railroad depot at Jersey City, in the State of New Jersey. This service Otis performed from November 12, 1878, to July 1, 1881. The *pro rata* compensation for it, as also its reasonable value, is $15,787.78. When the contract was executed, this extra service was being performed by the Pennsylvania Railroad Company, under contract with the United States.

The item for the extra service between Station E and the Hudson River Railroad depot, $657.58, and the item for the extra service between the foot of Cortlandt Street and Jersey City, $15,787.78, were allowed by the Court of Claims. The item for the extra service between the post-office and the Harlem Railroad depot, $615.97, was disallowed.

No error is assigned by Otis as to the disallowance of the $615.97. But the United States question the propriety of the allowance of the other two items. They contend that the "eighteen round trips per week from Station E, No. 465 Eighth Avenue, to the Hudson River Railroad depot, Thirtieth Street and Tenth Avenue," were mail messenger service, under the contract for Route No. 6635, and not, as held by the Court of Claims, mail station service, under the contract for Route No. 6636. The argument is made that mail station service, under the latter contract, comprehended only service

between the city post-office and the stations or branch offices, and did not include service between a station or branch office and a railroad depot; and that the latter was mail messenger service, and was governed by the terms of the contract for Route No. 6635, which forbade extra compensation in regard to it. Although it does not appear by the record what points were designated in the advertisement or in the contract for Route No. 6636, as those between which the mails were to be carried, the fair inference is that there was no specific designation which would include the trips between Station E and the Hudson River Railroad depot. The opinion of the Court of Claims says, on this subject, that this service was not "named in the station contract, but that instrument provided that any increase in mail station service should be paid for *pro rata*." It held that the service was, on its face, station service, the mails being taken from a station. The mail station service for which Otis proposed was designated in his proposal as "between New York City post-office and branch offices," and the "mail station service" named in the contract is referred to as that for which Otis proposed. Any increase in the service which might be ordered was to be paid for *pro rata*. The service in question was an increase in the service, beyond that for which the $14,900 per annum was to be paid. The mail messenger contract for Route No. 6635 did not contemplate mail station service, but only service between the main post-office and railroad stations and steamboat landings. The $657.58 was, accordingly, properly allowed.

As to the extra service to Jersey City, under the contract for Route No. 6635, the contract covered fifty-four trips per week, from the New York City post-office to the Pennsylvania Railroad depot at Jersey City, and twenty-seven trips per week from that depot to that post-office; and also fifty trips per week from that post-office to the Pennsylvania Railroad depot at the foot of Cortlandt Street, and fifty trips per week from the latter depot to that post-office. The finding of the Court of Claims is, that on each occasion of a trip under the item of fifty trips per week from the post-office to the depot at the foot of Cortlandt Street and back, Otis was required, in

addition, to carry the mails across the Hudson River, and did so. These trips were no portion of the trips contracted for from the post-office to the Pennsylvania Railroad depot at Jersey City and back. It is also found by the Court of Claims that, when the contract was executed, this extra service in regard to the fifty trips was being performed by the Pennsylvania Railroad Company, under a contract with the United States. This extra service was not included in the routes designated in the contract.

The contract provides that Otis shall "do and perform all other mail messenger and transfer service now being performed in the said city of New York, and any and all new or additional mail messenger or transfer service in the said city, whether to and between depots and landings now established and those which may hereafter be established, which may become necessary and be required by the Postmaster General during the time of this contract, without additional compensation." There is this further provision: "It is hereby stipulated and agreed that the Postmaster General may, if it be required by the public interest, order new or additional service which may become necessary to be performed, which shall be performed without additional compensation."

It is contended for the United States, that, as Otis specifically agreed, in the contract, to carry the mails to the Pennsylvania Railroad depot at Jersey City, 54 times, and back 27 times, each week, in addition to carrying them to Cortlandt Street and back 50 times each week, the extra service across the river is "new or additional service," and so to be performed without additional compensation. But the fair construction of the two clauses of the contract, taken together, is, that the new or additional service which is to be performed without additional compensation is new or additional service in the city of New York, as expressed in the first clause. Especially is this so, as the contract specifically designates the 54 trips and the 27 trips as being to and from Jersey City, and then provides for 50 other trips to Cortlandt Street and 50 back. Under those circumstances, the limitation of the new or additional service to be performed without additional compensa-

tion, to such service in the city of New York, would be natural, service under the contract, and out of that city, and to Jersey City, being specially provided for in the case of mails deliverable at a depot of the Pennsylvania Railroad, at Jersey City, and service under the contract, and out of the city of New York, being also provided for in six other instances of delivery in Jersey City, and one in Hoboken, and one in Long Island City, at places to be reached only by ferries.

Judgment affirmed.

UNITED STATES *v.* COOPER.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 7, 1887. — Decided January 24, 1887.

Certain real property in Tennessee having been sold for direct taxes, under the act of Congress of August 5, 1861, and the surplus of the monies received, after payment of the taxes and charges, having been deposited in the Treasury; *Held*, that the owner of the property, prior to his application for the surplus had no claim therefor which could be enforced by suit against the United States; and that the statute of limitations began to run against it only from the date of his application.

United States v. *Taylor*, 104 U. S. 216, on this point affirmed.

The case is stated in the opinion of the court.

Mr. Attorney General and *Mr. Heber J. May* for appellant.

Mr. Gilbert Moyers for appellee.

Mr. Justice Field delivered the opinion of the court.

In June, 1864, certain parcels of real estate in the county of Shelby, state of Tennessee, at that time the property of John C. Cooper, were sold by the United States tax commissioners for direct taxes, under the act of Congress of August 5, 1861, and acts amendatory thereof. 12 Stat., pp. 292, 304, c. 45 and c. 98, p. 422. The taxes, including charges and commissions, amounted to $33.35. The property was sold for $425. The surplus, after payment of the taxes, charges, and commissions,

was paid into the Treasury of the United States. For this surplus, amounting to $391.45, Cooper presented a claim to the Secretary of the Treasury in August, 1882, which was disallowed in April, 1884, and he thereupon brought this suit in the Court of Claims, and obtained a judgment for the amount, from which the United States have appealed.

The grounds of the appeal, as set forth by counsel of the government, are not sustained by the record. The Court of Claims found that, in 1865, the claimant sold the property, subject to the tax title; and, in 1882, released to the government, and those claiming under it, all his interest, to secure it against a second payment of the surplus. Upon these findings, counsel assume that the claimant retained possession of the property after the tax sale; and that he sold it to a third person for a valuable consideration, regardless of the sale and conveyance by the tax commissioners. But there was no evidence that the claimant was in possession, either at the time of the sale or afterwards; nor does it appear that the claimant ever asserted ownership over the property after the tax sale, and sold it, regardless of that sale, for a valuable consideration. His sale was made subject to the tax title, and could, therefore, have been of nothing more than his right to redeem the property from the tax sale, and the consideration paid is not stated. Of course it is not necessary to consider the argument founded upon these assumed facts, however ingeniously framed or however replete with learning.

The thirty-sixth section of the act of August 5, 1861, in prescribing the manner in which property subject to a direct tax shall be sold, where it is not divisible, so that by a sale of a part the whole amount of the tax, with costs, charges, and commissions, may be raised, provides that "the surplus of the proceeds of the sale, after satisfying the tax, costs, charges, and commissions, shall be paid to the owner of the property, or his legal representatives; or if he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner or his legal representatives, until he or they shall make application therefor to the Secretary of the Treas-

ury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant." 12 Stat., c. 45, § 36, p. 304.

In *United States* v. *Taylor*, 104 U. S. 216, this section was the subject of consideration by this court; and it was held that it was not repealed by the act of June 7, 1862; that prior to the application of the owner for the surplus, he has no claim therefor which can be enforced by suit against the United States; and that the statute of limitations begins to run against it only from the date of his application. This decision covers the present case. It is of no consequence to the government what the claimant did with his right of redemption; it was never exercised by him or the purchaser from him, assuming that it could have been enforced, and the time for its assertion has long since elapsed. The United States did not guarantee the title it gave upon the tax sale; and it does not appear that the levy or the proceedings for the sale have ever been called in question. If the sale was for any reason invalid, and the United States could be held to indemnify the owner therefor, the release by his quitclaim of all interest in the property would secure the government against any claim on that account.

We see no valid ground for the refusal of the Secretary of the Treasury to comply with the command of the law and pay to the claimant the money which the government has always held as trustee for him, and payable on his application.

Judgment affirmed.

UNITED STATES *v.* SAUNDERS.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 7, 1887. — Decided January 24, 1887.

A clerk in the office of the President of the United States, who is also appointed to be the clerk of a committee of Congress, and who performs the duties of both positions, is entitled to receive the compensation appropriated and allowed by law for each.

Opinion of the Court.

Sections 1763, 1764, and 1765 of the Revised Statutes have no application to the case of two distinct offices, places, or employments, each with its own duties and compensation, but both held by one person at the same time.

THIS was a suit to recover salary withheld. The case is stated in the opinion of the court.

Mr. Attorney General and *Mr. Heber J. May* for appellant.

Mr. Van H. Manning for appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

Saunders, the appellee in this case, recovered against the United States in the Court of Claims a judgment for $1627.00, from which the United States appealed. The recovery was for the salary of the claimant as clerk of the Committee on Commerce of the House of Representatives, from the 14th day of March, 1885, to the 7th day of January, 1886, at the rate of $2000.00 per annum.

Mr. Saunders held this place from the 1st day of July, 1884, when he was appointed, up to the 7th day of January, 1886, when his successor was appointed. He was paid the compensation up to the 14th of March, 1885, and for the time between that and the 7th of January, 1886, the Comptroller refused to pay him. The various appropriation acts, including the one which would cover the period now in question, had all made appropriations for compensation for the clerk of the Committee on Commerce. The ground upon which payment is resisted by the United States is, that the claimant was, on the 14th day of March, 1885, appointed a clerk in the office of the President of the United States, since which time he has continued to perform the duties of that office and receive its salary. The Comptroller, in his decision refusing to allow the claim, places his objection upon § 1765 Rev. Stat., and upon the opinion of Attorney General Black, in regard to extra pay and double compensation, delivered in 1857. 9 Opinions Att'y Gen. 123. Section 1765 is found in immediate connection with

several other sections on the same subject, of which the two immediately preceding may be considered to some extent *in pari materia*. They are as follows:

"SEC. 1763. No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

"SEC. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

"SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

Some stress is laid in the letter of the Comptroller on the proposition that the clerkship to the committee is not an office in contemplation of the Constitution of the United States and the law, and the decision in *United States* v. *Germaine*, 99 U. S. 508, is relied upon in support of that proposition. We do not think it important to decide in this case whether such a clerkship is an office within the meaning of these sections of the law and the Constitution, because §§ 1764 and 1765 both include in their prohibition officers, clerks, and other persons. The proposition of the Comptroller that the clerk is not an officer is made to meet his concession that a person who holds two distinct compatible offices may lawfully receive the salary of each.

The general question here raised has been much discussed in the opinions of the Attorneys General, and in the decisions of

this court. This § 1765, mainly relied upon by the government, is taken from two statutes, the first passed March 3, 1839, 5 Stat. 339, 349, and the second, August 23, 1842, 5 Stat. 508, 510. This opinion of Attorney General Black seems to be in conflict with the principles laid down by his predecessors, and is materially modified, if not overruled, on the point mainly in question here, by his opinion in the case of J. P. Brown, on page 507 of the same volume. In *Hiero's Case*, 5 Opinions Attys. Gen. 765, Attorney General Crittenden held that these two acts of 1839 and 1842 "were intended to fence against arbitrary extra allowances in each particular case, but do not apply to distinct employments, with salaries or compensation affixed to each by law or by regulation."

The case before us comes within the terms of this language, which is further confirmed by the fact that he regarded the act of 1850 as prohibiting a person "from receiving the salary of an office which he does not hold, and not against his receiving the salaries of two offices which he does legitimately hold;" and we do not see that there is any distinction between emoluments received for two distinct employments, whether offices or not, the salaries of which are distinct, and the services rendered distinct, both appointments being held by the same person, as in this case. We are of opinion that, taking these sections all together, the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of Congress or by order of the head of his Department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case, he is in the eye of the law two officers, or holds two places or appointments, the functions of which are sepa-

rate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations. In the former case, he performs the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation. The case of *United States* v. *Brindle*, 110 U. S. 688, in which an Indian agent received large additional compensation for services connected with the sale of lands belonging to the Indians of his agency, which was affirmed in this court, was upon the ground that these additional services were performed for the benefit of the Indians, and the statute implied the payment of a reasonable compensation for such services. See also *Converse* v. *The United States*, 21 How. 463.

These views require the affirmance of the judgment of the Court of Claims; and it is so ordered.

Affirmed.

KIRBY *v.* LAKE SHORE & MICHIGAN SOUTHERN RAILROAD.

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

Argued November 15, 16, 1886.—Decided January 10, 1887.

When relief is asked in equity in courts of the United States on the ground of fraud, time will not run in favor of defendant until discovery of the fraud, or until, with reasonable diligence, it might have been discovered; and this rule is not affected in the State of New York by the provisions of § 382 of the Code of that state as amended in 1877 in so far as they may be construed to modify it.

A statute of a state which provides that "the time which shall have elapsed between the death of any person and the granting of letters testamentary or of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters shall not be deemed any part of the time limited by any law for the commencement of actions by executors or administrators," does not give the party claiming the benefit of its provisions both periods of six months therein mentioned, but only such time, not exceeding six months, as elapsed after

Statement of Facts.

the death of the testator or intestate, before the granting of letters, and the additional time of six months after the granting of letters.

In a state where the statutes authorize ancillary letters to be issued on a will proved in another state, on depositing in the office of the probating court a certified copy of the will and its probate, the executor cannot prevent the statute of limitations of the State from running against him in a court of the United States, sitting in the State, by an unreasonable delay in taking out ancillary letters.

THIS case was heard in the court below upon demurrers to an amended bill and to an amended bill in the nature of a supplemental bill. The demurrers were sustained and the bill dismissed upon the ground that the suit was barred by the statute of limitations of the State of New York.

The material facts admitted by the demurrer were as follows: The appellant, the plaintiff below, was the executor of John T. Alexander, who died, at his domicil in the State of Illinois, on the 21st of August, 1876. He received his letters testamentary from the proper court in that state on the 6th of September of the same year. On the 7th of April, 1880, ancillary letters were issued to him by the Surrogate of the county of New York, in the State of New York. 2 Rev. Stat. N. Y. (2 ed.), marginal page 67, § 68. (Albany, 1836.)

This suit was brought April 9, 1880. Its object was to obtain a decree setting aside sundry settlements of accounts had by the firm of J. T. & G. D. Alexander & Co. (composed of John T. Alexander, G. D. Alexander, and William Fitch, and to be hereafter called Alexander & Co.) with certain railroad corporations, defendants below, in reference to various business transactions between the parties. Those transactions arose under an agreement, partly written and partly verbal, entered into May 28, 1870, between those corporations and Alexander & Co., relating to the shipment of horned cattle and hogs by the latter over the roads of the former between designated points, and at specified rates of freight. The agreement took effect June 10, 1870, and was to continue in force one year, during which period Alexander & Co. were not to ship horned cattle or hogs over any rival road between the points named. In the event there was a reduction of rates, Alexander & Co. were to have the benefit of the lowest rates between those

points charged by either of the defendant corporations or by any other rival corporation. The agreement contemplated settlements between the parties from time to time and the payment by Alexander & Co., on each shipment, of the rates specified in the agreement. But the amounts so paid, when in excess of the lowest rates charged by the defendant corporations, or either of them, or by other rival corporations, were to be held by the defendants in trust for the shippers and repaid to the latter, by way of "drawbacks," on each occasion when the accounts between the parties were stated and settled.

These settlements were had monthly or oftener. At each of them Vanderbilt, the testator of the individual defendants, in behalf of the railroad corporations, claimed to have peculiar facilities for obtaining information in reference to rates, and promised to keep Alexander & Co. (who had no means of obtaining such information) fully advised in the premises. In reply to specific inquiries addressed to him on the occasion of each of such settlements, he represented that the rates charged by his companies to that firm were not higher than those charged by rival corporations. Relying upon such representations, Alexander & Co. consummated the various settlements upon the basis suggested by Vanderbilt. They, however, subsequently ascertained that the rates charged by the defendant corporations, as well as by rival corporations, to shippers between the points named, and during the same period, were much lower than those charged Alexander & Co., and that the representations to the contrary by the defendant corporations were knowingly false, and made with the intent to cheat and defraud said firm. The bill alleges that the truth, as to what were the current rates for the period covered by the settlements, was fraudulently concealed by the defendant corporations from Alexander & Co., and that said frauds were not, and could not have been, discovered by the latter until on or about April 16, 1873.

The settlements between the parties, it may be stated, covered more than two hundred shipments of cattle and hogs, the freights upon which aggregated nearly $350,000, or about $9000 per week, from June 10, 1870, to March 14, 1871, when

the contract was cancelled by mutual consent. Immediately thereafter the partnership of Alexander & Co. was dissolved and its affairs adjusted.

G. D. Alexander was adjudged to be a lunatic by the proper court in Illinois on the 3d day of April, 1872, and is still of unsound mind. A conservator of his estate was shortly thereafter selected, but in reference to that appointment the bill charged that it was a nullity, and that no valid appointment was made until July 3, 1880. As to Fitch, the remaining partner, he, on April 12, 1879, brought an action in one of the courts of New York for the purpose of enforcing the liability to him, individually, of the defendant corporations and Vanderbilt, on account of the matters in this suit set forth, but, by proceedings had after the commencement of this litigation, his interest in the claim preferred in his own suit was sold, one Taylor becoming the purchaser thereof, and subsequently Fitch's suit was dismissed, by the procurement of the defendants, for want of prosecution. The plaintiff stated that, at the time of Taylor's purchase, Fitch, by his laches, had lost any individual rights he might theretofore have had in said claim; and that Taylor had not succeeded to any substantial interest capable of being enforced herein. He also averred that both Fitch and the present conservator of the estate of G. D. Alexander declined, upon request, to unite as coplaintiffs in this suit.

It was further alleged by the plaintiff, that the receipted freight bills having been surrendered to the defendant corporations at the time of the settlements with them, he had no means of ascertaining the amount justly due to said firm, by way of drawbacks, except from the freight bills, checks, and vouchers in the possession or under the control of said corporations.

The prayer of the bill was, that the before-mentioned settlements be opened and set aside, that a reaccounting be had in respect of all of said transactions, and that, upon final hearing, the plaintiff have a decree for the difference between the amount of "drawbacks" repaid to Alexander & Co. at the time of the settlements and the amounts which that firm were

entitled to receive upon each settlement, with interest thereon from the time they were respectively payable.

Mr. John C. Fay and *Mr. George Norris* for appellant. *Mr. Joseph E. McDonald* was with them on the brief.

Mr. John E. Burrill for appellees.

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

The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. 1 Story Eq. Juris. § 451. Justice could not be done except by employing the methods of investigation peculiar to courts of equity. When to these considerations is added the charge against the defendants of actual concealed fraud, the right of the plaintiff to invoke the jurisdiction of equity cannot well be doubted.

Did the Circuit Court err in adjudging that the suit was barred by the statute of limitations?

By the Code of Civil Procedure of New York in force prior to September 1, 1877, the period of six years was prescribed as the limitation for —

"1. An action upon a contract, obligation, or liability, express or implied," except a judgment or sealed instrument.

* * * * * * * * * * *

"6. An action of relief, on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of

the facts constituting the fraud." Voorhees' Code, § 91; 4th ed. 86; 5th ed. 69–70.

The Code which went into operation September 1, 1877, prescribed the like limitation for actions upon contracts, obligations, or liabilities, express or implied, other than judgments or sealed instruments; but, in place of subdivision 6 of § 91 of the old Code, was substituted the following:

"5. An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery. The cause of action in such a case is not deemed to have accrued until the discovery, by the plaintiff or the person under whom he claims, of the facts constituting the fraud." N. Y. Code, as amended in 1877, § 382.

The Circuit Court, deeming the jurisdiction in equity and at law to be concurrent in cases like this, was of opinion that the question of limitation is controlled by the local statute, and, upon the authority of *Carr* v. *Thompson*, 87 N. Y. 160, adjudged that this action was not, within the meaning of § 382 of the Code, one "to procure a judgment, other than for a sum of money, on the ground of fraud;" and that, consequently, the cause of action accrued upon the commission of the alleged frauds (which was in 1871), and not at the date of their discovery, on the 16th of April, 1873. As this view is controverted by the appellant, and is the main ground upon which appellees rely for an affirmance of the judgment below, it must be examined.

It is not clear that the decision in *Carr* v. *Thompson* goes as far as the circuit judge supposed. That was an action against an agent to recover moneys obtained from his principals and converted to his own use, by means of false and fictitious accounts, rendered from time to time, and which he represented to be correct and just. Fraud, although charged, was not regarded by the state court as the basis of the action. It was not deemed a suit to recover damages for the fraud practised, but one merely to recover damages for the violation of the agent's contract or obligation to account justly and honestly to his principals. The sole question, the state court said,

presented by the complaint and answer, was whether the agent properly performed his duty. It also was careful to say: "It is to be observed that the complaint is not framed for the purpose of opening an account stated; it does not allege the existence of such an account as an obstacle to a recovery, which requires the aid of equity to remove; nor, indeed, does the answer set up any such defence." These remarks, in connection with the further declaration, that the words "an action to procure a judgment, other than for a sum of money, on the ground of fraud," sufficiently describe "a case in which judgment for an accounting is sought in addition to, and as a means of reaching, a judgment for money," lead us to doubt whether that court would hold, in a case like the present, that the time for commencing the action begins to run from the commission, not from the discovery, of the fraud.

Be that as it may, it is an established rule of equity, as administered in the courts of the United States, that, where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered. *Meader* v. *Norton*, 11 Wall. 442, 458; *Prevost* v. *Gratz*, 6 Wheat. 481; *Michoud* v. *Girod*, 4 How. 503, 561; *Veazie* v. *Williams*, 8 How. 134, 149, 158; *Brown* v. *Buena Vista*, 95 U. S. 157; *Rosenthal* v. *Walker*, 111 U. S. 185, 190; 2 Story Eq. § 1521*a*; Angell on Limitations. In *Bailey* v. *Glover*, 21 Wall. 342, 347, it was said, that, "in suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special cir-

cumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." In the same case it was said: "To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law, which was designed to prevent fraud, the means by which it is made successful and secure." See, also, *Traer* v. *Clews*, 115 U. S. 528, 538. These observations were made with reference to an act of Congress prescribing a fixed time within which a suit between an assignee in bankruptcy and persons asserting adverse rights in property conveyed to such assignee should be brought. They are peculiarly applicable to a local statute, which, if followed, would impair the power of the courts of the United States to enforce the settled principles of equity in suits of which they have, by the Constitution and the laws of the United States, full jurisdiction. While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law, the laws of the several states, except where the Constitution, laws, treaties, and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit. In *United States* v. *Howland*, 4 Wheat. 108, 115, Chief Justice Marshall, speaking for the court, said, that, as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in all the states. The same view was expressed by Mr. Justice Curtis in his work on the jurisdiction of the courts in the United States (p. 13), when he observed that "the equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole of the United States without regard to state laws." So, in *Payne* v. *Hook*, 7 Wall. 425, 430, it was said: "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of differ-

ent states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. The equity jurisdiction of the courts of the United States is the same that the High Court of Chancery in England possesses, is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union." See, also, *Robinson* v. *Campbell*, 3 Wheat. 212, 221, 222; *Boyle* v. *Zacharie*, 6 Pet. 632, 648, 658; *Livingston* v. *Story*, 9 Pet. 632, 656; *Stearns* v. *Page*, 7 How. 819; *Russell* v. *Southard*, 12 How. 139, 147; *Neves* v. *Scott*, 13 How. 267, 272; *Barber* v. *Barber*, 21 How. 582, 592; *Green* v. *Creighton*, 23 How. 90, 105. In view of these authorities, it is clear that the statute of New York upon the subject of limitation does not affect the power and duty of the court below — following the settled rules of equity — to adjudge that time did not run in favor of defendants, charged with actual concealed fraud, until after such fraud was or should, with due diligence, have been discovered. Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every state. It is undoubtedly true, as announced in adjudged cases, that courts of equity feel themselves bound, in cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances, and that sometimes they act upon the analogy of the like limitation at law. But these general rules must be taken subject to the qualification that the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit. It is an inflexible rule in those courts, when applying the general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered, and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud.

It results that even if this be not an action "to procure a judgment, other than for a sum of money, on the ground of fraud," within the meaning of the New York Code of Procedure, the limitation of six years, being applied here, does not, as adjudged below, commence from the commission of the alleged frauds.

Can the suit be maintained if the cause of action is to be deemed to have accrued from the discovery of the fraud? In *Burke* v. *Smith*, 16 Wall. 390, 401, where the local statute prescribed six years for the commencement of actions for fraud, the court, after observing that equity acts or refuses to act in analogy to the statute, said: "We think a court of equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud or after he was put upon inquiry with the means of knowledge accessible to him." Without inquiring whether the plaintiff was not guilty of such gross laches, in applying for relief, as deprived him of all right to the aid of equity, and giving him the benefit of the limitation of six years, to be computed from the discovery of the fraud, there seems to be even then no escape from the conclusion that the suit was not brought in time. Seven years, lacking only seven days, elapsed after the discovery of the frauds by the plaintiff's testator before suit was brought.

The plaintiff, however, contends that he had seven years within which to sue. This position is supposed to be justified by the New York statute, which declares that "the time which shall have elapsed between the death of any person and the granting of letters testamentary or of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters, shall not be deemed any part of the time limited by any law for the commencement of actions by executors or administrators." Rev. Stat. N. Y. pt. iii, c. 8, tit. 3, art. 1, § 9, 1st ed. vol. 2, p. 448, 6th ed. 2, p. 733. [Sess. Laws, 1880, vol. 1, p. 367, c. 245.]

If this statute has any application to a case where the cause of action accrued in the lifetime of the testator or intestate, it

cannot avail the plaintiff. It does not give the party claiming the benefit of its provisions both of the two periods of six months therein mentioned, but only such time, not exceeding six months, as elapsed after the death of the testator or intestate before the granting of letters, and the additional time of six months after the granting of letters. Here only sixteen days intervened between the death and the granting of letters testamentary. In computing the time for suing there must be excluded only these sixteen days and the six months immediately succeeding that period. In other words — applying that statute to the case in hand — the plaintiff had only six years six months and sixteen days, after the discovery on April 16, 1873, of the alleged frauds, within which to sue; whereas, this action was not brought until seven years, lacking only seven days, after the alleged frauds were discovered.

We do not conceive that the time of granting the ancillary letters testamentary in New York can affect the question. The will having been proved in Illinois, the place of domicil, there was nothing to prevent the immediate issue of letters upon it in New York. By the laws of that state, no further probate was necessary; a certified copy deposited in the office of the surrogate was all that was required. As this was in the executor's power to have done at any time, he can hardly claim that his own voluntary delay should extend the period which equity considers reasonable for the institution of a suit. 2 N. Y. Rev. Stat. (2d ed.), marg. paging 67, § 82; Civil Code, § 2695.

The decree is affirmed.

CRESCENT CITY LIVE STOCK COMPANY *v.* BUTCHERS' UNION SLAUGHTER-HOUSE COMPANY.

ERROR TO THE SUPREME COURT OF LOUISIANA.

Submitted January 6, 1887. — Decided January 24, 1887.

According to the law and practice of Louisiana, the Supreme Court of that state, in cases brought before it by appeal from inferior courts, determines the matter in controversy, as presented by the record, both as to fact and law, without regard to the particular rulings of the courts below, and its opinion, showing the grounds of its judgment, constitutes part of the record to be reviewed in this court, upon writ of error, when the question for determination is whether the Supreme Court of the state decided a Federal question, necessary to the decision of the case, without respect to the rulings of the inferior state court.

In Louisiana, an action for malicious prosecution is founded on the principles, and is subject to the defences, established by the common law; and in order to sustain it, it is necessary to show: (1) that the suit had terminated unfavorably to the prosecutor; (2) that in bringing it the prosecutor had acted without probable cause; (3) that he was actuated by legal malice, that is, by improper or sinister motives; and that these three elements concur.

The question of probable cause is a question of law, where the facts are undisputed; and the judgment of the court, in favor of the plaintiff, is conclusive proof of probable cause for the prosecution of the suit alleged to be malicious, notwithstanding its subsequent reversal by an appellate court, unless it is shown to have been obtained by means of fraud. This rule seems to reconcile the apparent contradiction in the authorities, is well grounded in reason, fair and just to the parties, and consistent with the principle on which the action for malicious prosecution is founded.

The judgments and decrees of the circuit courts of the United States, sitting in a particular state, are to be accorded in the courts of that state, whether as the foundation of an action, or of a defence, either by plea or in proof, such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority; and whether such due effect has been given by a state court to a judgment or decree of a court of the United States is a Federal question within the jurisdiction of this court, on a writ of error to the Supreme Court of the state.

The decree of the Circuit Court of the United States, relied on by the plaintiff in error in this case, as a defence, was sufficient evidence of probable cause for the prosecution of the suit, notwithstanding its rever-

sal, on appeal, by this court. It does not detract from its effect that in another previous suit, between the plaintiff in error and another defendant, the Supreme Court of Louisiana had decided the questions of law on which alone his right depended adversely to him.

THIS was an action to recover on a bond. The case which makes the Federal question is stated in the opinion of the court.

Mr. Assistant Attorney General Maury and *Mr. Robert Mott* for plaintiffs in error.

Mr. E. Howard McCaleb and *Mr. B. R. Forman* for defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is a writ of error bringing into review a judgment of the Supreme Court of the State of Louisiana, reported in 37 La. Ann. 874. The Federal question arising upon the record presented for our consideration is, whether the Supreme Court of Louisiana in its determination of the case gave due effect to a certain decree of the Circuit Court of the United States for the Eastern District of Louisiana, in a previous litigation between the same parties. That question is presented upon the following case.

The plaintiff in error is a corporation created by the laws of Louisiana, which, by an act of the legislature of that state, passed March 8, 1869, was invested with the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the city of New Orleans and the parishes of Orleans, Jefferson, and St. Bernard. The validity of this monopoly was sustained by the decision of this court in the *Slaughter-House Cases*, 16 Wall. 36, on the ground that this grant of exclusive right or privilege was a police regulation for the health and comfort of the people within the power of the state legislature, and not in violation of any provision of the Constitution of the United States. The company continued thenceforward to use and enjoy its exclusive

privileges until the adoption by the people of Louisiana of a new state constitution in the year 1879. That constitution contained the following articles:

"ARTICLE 248. The police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the State, shall alone have the power of regulating the slaughtering of cattle and other live-stock within their respective limits; provided no monopoly or exclusive privilege shall exist in this state, nor such business be restricted to the land or houses of any individual or corporation; provided the ordinances designating places for slaughtering shall obtain the concurrent approval of the board of health or other sanitary organization."

"ARTICLE 258. The monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished."

The city of New Orleans, by ordinances adopted in 1881, proceeded to declare, under Art. 248 of the constitution, within what limits in the parish of Orleans animals, intended for food, might be slaughtered, in which the Board of Health of the State of Louisiana concurred. In March, 1880, the Butchers' Union Slaughter-House and Live-Stock Landing Company, the defendant in error, became incorporated under the General Law of Louisiana, and was authorized by its charter "to erect, at any point or place in the parish of Orleans, wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals, for the purpose of carrying on the live-stock landing and slaughter-house business, and for the purpose of sheltering and protecting all such cattle or other animals which may be sent to said company destined for slaughter; and the said company shall, as soon as practicable, build and complete a slaughter-house; also a sufficient number of sheds and stables and other buildings as may be deemed necessary for the carrying on said slaughtering business."

This company having begun to acquire the necessary plant for conducting the live-stock and slaughtering business, in pur-

suance of its charter, the plaintiff in error, on the 23d of November, 1881, filed its bill in the Circuit Court of the United States for the Eastern District of Louisiana against the defendant in error, setting up its exclusive right and privilege as claimed by it under its original charter and grant, alleging that the defendant was about to violate the same, and praying for an injunction to restrain that company from carrying out its purpose. On the 29th of December, 1881, after notice and hearing, the judges of that court granted the injunction as prayed for *pendente lite*. On final hearing on the 8th of May, 1882, this injunction was made perpetual. On May 5, 1884, this decree of the Circuit Court was reversed by this court by a decision reported in 111 U. S. 746, on the ground that the exclusive right originally granted to the plaintiff in error was valid only as an exercise of the police power of the State, and was of that character, having reference to the public health, that it could not be made the subject of contract, protected against subsequent legislation by the Constitution of the United States.

In granting the preliminary injunction referred to, the plaintiff in error was required to and gave an injunction bond in the sum of $8000, with Bertrand Saloy as surety, reciting the allowance of the injunction *pendente lite*, and conditioned to pay to the defendant in said injunction all such damages as it might suffer or had suffered in consequence thereof. The present action was begun in the Civil District Court for the Parish of Orleans on May 28, 1884, by the defendant in error against the plaintiff in error and Bertrand Saloy, by a petition in which a recovery is sought upon the bond against the defendants *in solido* for the sum of $8000, with five per cent. interest from judicial demand for a breach of its condition, and against the company alone for the further sum of $70,000 damages, with five per cent. interest from the date of the verdict, on the alleged ground of a malicious prosecution by the complainant therein of the said bill in equity for an injunction. This cause came on for trial by a jury when there was a verdict against both defendants for $6588.80, with interest, and against the Crescent City Live-Stock Landing and Slaughter-House

Company alone, upon the plea of malicious prosecution, for the sum of $12,500 damages, and the further sum of $2500 attorneys' fees. Upon the trial the defendant relied upon the decree of the Circuit Court of the United States, granting and perpetuating the injunction, as conclusive proof of probable cause for the institution and prosecution of the suit complained of. The rulings of the Civil District Court upon this defence are set out in several bills of exception. In one of them it appears that the judge left it to the jury to determine whether the decree of the Circuit Court constituted probable cause or not, adding that in his opinion it was both remarkable and extraordinary, and, as explanatory of that, the bill of exceptions signed by him contains the following statement: "I described the action of the Federal court as 'remarkable and extraordinary,' because it set at naught the decisions of the state courts of Louisiana, of the Supreme Court of Louisiana, set at defiance the positive mandate of the state constitution, and because it was held by the unanimous Supreme Court of the United States to have involved a usurpation of jurisdiction; such action was truly 'remarkable and extraordinary,' though not without deplorable precedent."

It also appears that the defendants requested the judge to charge the jury as follows:

"A plaintiff, whose asserted right was conferred by an act of legislature and has been in force for a number of years, has a right to test the legality of a subsequent repeal of said right, when the validity of such repeal or modification has not been finally settled, and the plaintiff is advised by competent counsel that the repeal is invalid. In such a case the plaintiff has probable cause for asserting his rights and instituting an action for such purpose. If, in the action instituted, the lower court being the Circuit Court of the United States, presided over by two judges, render a judgment in favor of the plaintiff, the existence of probable cause for instituting such suit is demonstrated by the finding of the judges of the Circuit Court, although their judgment was reversed on appeal."

This charge the judge refused to give, on the ground that it was unsound in law. Judgment was rendered on the verdict

February 24, 1885, and the cause was removed by a suspensive appeal to the Supreme Court of Louisiana for the final decision of that court, by which, on December 14, 1885, it was affirmed.

It is contended by counsel for the defendant in error, that in examining the record in this case, this court will only consider the opinion and judgment of the Supreme Court of Louisiana in order to ascertain if the authority relied upon by the plaintiff in error was wrongfully disregarded by that tribunal, and that without reference to the rulings of the inferior court, the opinion of the Supreme Court being made a part of the record by law for that purpose. Such appears to be the law of Louisiana as recognized by the decisions of this court. Louisiana Code Pract. Art. 905; *Parks* v. *Turner*, 12 How. 39, 43; Hennen's Digest, p. 92, No. 3; *Cousin* v. *Blanc's Executors*, 19 How. 202; *Grand Gulf Railroad and Banking Company* v. *Marshall*, 12 How. 165; *Murdock* v. *City of Memphis*, 20 Wall. 590; *Crossley* v. *City of New Orleans*, 108 U. S. 105; *Caperton* v. *Bowyer*, 14 Wall. 216.

It must, therefore, be conceded that the sole question to be determined is, Did the Supreme Court of Louisiana, in deciding against the plaintiffs in error, give proper effect to the decree of the Circuit Court of the United States, subsequently reversed by this court?

It is argued by counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana by the courts of that state is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final; and that the ruling in question did not deprive the plaintiffs in error of "any privilege or immunity specially set up or claimed under the Constitution or laws of the United States." But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal courts by proper process, although, as was said by this court in *Dupasseur* v. *Rochereau*, 21 Wall. 130, 135,

"no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case, under such circumstances, than is due to the judgments of the state courts in a like case and under similar circumstances." *Embry* v. *Palmer*, 107 U. S. 3. It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question.

The decree of the Circuit Court was relied upon in the state court as a complete defence to the action for malicious prosecution, on the ground that it was conclusive proof of probable cause. The Supreme Court of Louisiana, affirming the judgment of the inferior state court, denied to it, not only the effect claimed, but any effect whatever.

It is conceded that, according to the law of Louisiana, the action for a malicious prosecution is founded on the same principles, and subject to the same defences, as have been established by the common law prevailing in the other states.

In the case of *Hubgh* v. *New Orleans and Carrollton Railroad*, 6 La. Ann. 495; *S. C.* 54 Am. Dec. 565, it was said that "the dispositions of article 2294 are found in the Roman and Spanish laws; so far from being new legislation, that article embodies a general principle as old as the science of jurisprudence itself, and it must still be understood with the limitations affixed to it by the jurisprudence of Rome and Spain. Domat Lois Civiles, tit. Domages causés par des fautes, p. 180, par. 1." In the same case the court said on a rehearing: "The article 2294 of our Code provides that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The provisions of this article, however general and comprehensive its terms may be, are found more than once recited in terms equally general and comprehensive

in the laws of the fifteenth title of the seventh Partida. The article was inserted in the Code of 1809, at a time when the Spanish laws were in force. It was put and retained to this time in the Code, not for the purpose of making any change in the law, but because it was a principle which was in its proper place in a code; a principle which would be equally recognized as a necessary conservative element of society, and equally obligatory whether it was formally enacted in a code or not."

In the case of *Sénécal* v. *Smith*, 9 Rob. La. 418, 420, it had been previously decided that "in cases of this kind it is well settled that malice and the want of probable cause in the original action are essential ingredients. Malice may be expressly proved or it may be inferred from the total want of a probable cause of action; but malice alone, however great, if there be a probable cause upon which the suit or prosecution is based, is insufficient to maintain an action in damages for a malicious prosecution."

In the case of *Gould* v. *Gardner*, 8 La. Ann. 11, it was determined that the defendants in the case were not without probable cause for the arrest of the plaintiff, which was the ground of the action, because they acted by the advice of eminent and learned counsel, though his opinion was held to be erroneous. The court refer to the case of *Stone* v. *Swift*, 4 Pick. 389; *S. C.* 16 Am. Dec. 349, in Massachusetts, and that of *Foshay* v. *Ferguson*, 2 Denio, 619, in New York, as sufficient authority in support of their opinion, and add as follows: "Our codes and statutes have not provided any rules to guide us on the trial of such actions, and we are governed in the absence of positive legislation by the rules laid down in the authorities quoted, because we consider them just and reasonable in themselves." In the opinion in the present case, the Supreme Court of Louisiana say that to sustain the charge of malicious prosecution it is necessary to show: "1st, that the suit had terminated unfavorably to the prosecutor; 2d, that in bringing it the prosecutor had acted without probable cause; 3d, that he was actuated by legal malice, *i.e.*, by improper or sinister motives. The above three elements must concur."

And when there is no dispute of fact, the question of probable cause is a question of law for the determination of the court. *Stewart* v. *Sonneborn*, 98 U. S. 187, 194. Want of probable cause and the existence of malice, either express or implied, must both concur to entitle the plaintiff in an action for a malicious prosecution to recover. So that if probable cause is shown, the defence is perfect, notwithstanding the defendant in instituting and carrying on the action may have been actuated solely by a motive and intent of malice. If he had probable cause to institute his action, the motives by which he was actuated and the purposes he had in view are not material.

How much weight as proof of probable cause shall be attributed to the judgment of the court in the original action, when subsequently reversed for error, may admit of some question. It does not appear to have been judicially determined in Louisiana. In the case of *Griffis* v. *Sellars*, 3 & 4 Devereux & Battle Law, 177; *S. C.* 31 Am. Dec. 422, Ruffin, C. J., said "that probable cause is judicially ascertained by the verdict of the jury and judgment of the court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court." In *Whitney* v. *Peckham*, 15 Mass. 243, such a judgment was held to be conclusive in favor of the existence of probable cause. To the same effect is *Herman* v. *Brockerhoff*, 8 Watts, 240, in an opinion of Chief Justice Gibson. The decision in the case of *Whitney* v. *Peckham*, *ubi supra*, however, was questioned by the Supreme Court of New York in the case of *Burt* v. *Place*, 4 Wend. 591, 598, where Marcy, J., delivering the opinion of the court, said that the Massachusetts decision rested entirely upon *Reynolds* v. *Kennedy*, 1 Wilson, 232, which had been qualified by the decision of Eyre, Baron of the Exchequer, in *Sutton* v. *Johnstone*, 1 T. R. 493, 505, and by what was said by Lord Mansfield and Lord Loughborough in the same case, which came before them on a writ of error. 1 T. R. 544 *et seq.* The effect of these English authorities, as stated by Marcy, J., in *Burt* v. *Place*, *ubi supra*, is as follows: "That if it appears by the plaintiff's own declaration that the prosecution, which he charges to have been malicious, was before

a tribunal having jurisdiction, and was there decided in favor of the plaintiff in that court, nothing appearing to fix on him any unfair means in conducting the suit, the court will regard the judgment in favor of the prosecution satisfactory evidence of probable cause."

In that case the judgment relied upon by the defendant was held not to be conclusive. The reason is stated to be as follows: "Though the plaintiff admits in his declaration that the suits instituted before the magistrate by the defendant were decided against him, he sufficiently countervails the effect of that admission by alleging that the defendant, well knowing that he had no cause of action, and that the plaintiff had a full defence, prevented the plaintiff from procuring the necessary evidence to make out that defence by causing him to be detained a prisoner until the judgments were obtained, and by alleging that the imprisonment was for the very purpose of preventing a defence to the actions."

Commenting on this case, the Court of Appeals of Kentucky in *Spring* v. *Besore*, 12 B. Mon. 551, 555, say: "The principle settled in the case last cited we understand to be that such a judgment will not in every possible state of case be deemed to be conclusive of the question of probable cause; but that, like judgments in other cases, its effect may be destroyed by showing that it was procured by fraud or other undue means." That court proceeds to state the rule as follows: "The correct doctrine on the subject is, in our opinion, that the decree or judgment in favor of the plaintiff, although it be afterwards reversed, is, in cases where the parties have appeared and proof has been heard on both sides, conclusive evidence of probable cause, unless other matters be relied upon to impeach the judgment or decree and show that it was obtained by fraud; and, in that case, it is indispensable that such matter should be alleged in the plaintiff's declaration; for, unless it be done, as the other facts which have to be stated establish the existence of probable cause, the declaration is suicidal. The plaintiff's declaration will itself always furnish evidence of probable cause when it states, as it must do, the proceedings that have taken place in the suit alleged to be malicious, and

shows that a judgment or decree has been rendered against the plaintiff. To counteract the effect of the judgment or decree and the legal deduction of probable cause, it is incumbent upon him to make it appear in his declaration that such judgment or decree was unfairly obtained, and was the result of acts of malice, fraud, and oppression on the part of the defendant, designed and having the effect to deprive him of the opportunity and necessary means to have defeated the suit and obtained a judgment in his favor."

The limitations upon the general principle declared in *Burt* v. *Place*, *ubi supra*, were followed by the Supreme Court of Maine, in *Witham* v. *Gowen*, 14 Maine, 362, and both decisions were referred to in the subsequent case of *Payson* v. *Caswell*, 22 Maine, 212, 226, where the court said: "In these two cases, we have instances of exceptions to the general rule, indicative of the general nature of the characteristics which might be expected to attend them; but the rule itself remains unimpaired. If there be a conviction before a magistrate having jurisdiction of the subject-matter, not obtained by undue means, it will be conclusive evidence of probable cause."

The propriety of this limitation of the rule seems to have been admitted by the Supreme Judicial Court of Massachusetts in *Bacon* v. *Towne*, 4 Cush. 217, 236, though in later cases it reiterated the broader rule as originally stated in *Whitney* v. *Peckham*, *ubi supra*. *Parker* v. *Huntington*, 7 Gray, 36; *S. C.* 56 Am. Dec. 455.

This seems to reconcile the apparent contradiction in the authorities, and states the rule, which we think to be well grounded in reason, fair and just to both parties, and consistent with the principle on which the action for malicious prosecution is founded.

It is, perhaps, not material in this case to define the rule with precision, and to attempt to state with accuracy the precise effect to be given to a judgment or decree of the court as proof of probable cause under all circumstances, because in the present case the decree of the Circuit Court of the United States was adjudged to be entitled to no effect whatever as evidence in support of the defence of the plaintiff in error.

The ground on which the Supreme Court of Louisiana proceeded, as stated in its opinion, is explained to be as follows:

Shortly after the adoption of the Constitution of 1879, the plaintiff in error instituted a suit in the state court of Louisiana, which was finally decided by the Supreme Court of the state in *Crescent City Slaughter-House Co.* v. *The City of New Orleans*, 33 La. Ann. 934. The object of the suit was to obtain a writ of injunction "restraining the city of New Orleans from entertaining any petitions for, and from ever designating any place or places for, the landing, yarding, sheltering, or slaughtering any animal or animals intended for human food in the parishes of Orleans, Jefferson, and St. Bernard, other than at the slaughter-houses and premises of the petitioner, and above the United States barracks on the east or left bank of the Mississippi River, and above the depot of Morgan's Louisiana and Texas Railroad, on the west or right bank or side of the Mississippi River."

There was a judgment dismissing the plaintiff's suit, and dissolving the injunction provisionally granted, from which the plaintiff appealed to the Supreme Court of Louisiana. That court affirmed the judgment, holding that the articles of the new constitution had destroyed the monopoly claimed by the plaintiff, and that this was a valid exercise of power on the part of the State of Louisiana, not in violation of any provision of the Constitution of the United States. Speaking of the action of the present plaintiff in error in bringing that suit, the Supreme Court of Louisiana, in its opinion in the present case, 37 La. Ann. 874, 876, says: "The questions involved were serious and important. Defendant's right to assert judicially the validity of his contract, and to resist by all legal remedies the execution of any state law which impaired it, was unquestioned. The question involved was Federal in its nature, and the courts of the state, and perhaps of the United States, were equally open to it for the vindication of its alleged right; and, in either forum, it was entitled to appeal to the Supreme Court of the United States for the final and conclusive settlement of the question." And, referring to the judgment in that suit, it also says: "It is important to estimate the scope and effect of

this decision. It was an authoritative judicial determination, by a competent court, of questions submitted to it at the instance of the company itself. In denying the rights claimed by the company, and in affirming the right of the city to regulate slaughtering within her limits and to designate places for the conduct of such business, it necessarily affirmed the right of persons complying with such regulations to transact that business at such places, and denied the right of this company to interfere with them. If there was error in the decision, that error could be corrected by one tribunal only, the Supreme Court of the United States. Until the questions involved had been determined differently by that high tribunal, the decision of this court was entitled to be accepted as the law by this litigant. Technical principles of *lis pendens* and *res judicata* might not debar the company from prosecuting another suit against a different party involving the same subject-matter; but if such suit rested exclusively upon the assertion of rights which this court had directly determined that the company did not possess, it could find no protection against the charge of being a malicious prosecution, save in the production of a decision of the Supreme Court of the United States holding that our opinion was error."

The following extracts from the same opinion are on the same point:

"We are bound to hold that there was entire absence of probable cause. The suit involved absolutely nothing but questions of law. Those identical questions had been submitted to this court by this very prosecutor in a case precisely analogous, and had been determined against it. It was thus authoritatively advised what the law was. If it was dissatisfied with the opinion, its remedy was clear by appeal to the United States Supreme Court, and it had actually availed itself of that remedy on writ of error which was pending and undetermined when this suit was brought. It must be carefully observed that, though the Butchers' Union Company was not technically a party to the suit against the city, the questions of right between it and the Crescent City Company were as directly involved as if it had been a party. If the city had the right to

regulate slaughtering within her limits, and to designate places for its lawful conduct, obviously persons complying with such regulations had the right to transact the business. If she had not that right, no person could lawfully slaughter elsewhere than at the old company's slaughter-house."

"But it is claimed that the prosecutor acted under the advice of counsel learned in the law. That is certainly true, and would ordinarily protect. But here the client was in possession of the opinion of this court on the very point in its own case, involving the same subject-matter. It had no need for advice of counsel. That advice was simply that the opinion of this court was error. Counsel had the undoubted right to entertain such opinion, and so to advise its client; the only lawful remedy under such advice consisted in an appeal to the United States Supreme Court. If it chose to act otherwise on such advice, it acted at its peril, and can take no protection therefrom. The only lawful action it could take under such advice had been already taken in the writ of error from the United States Supreme Court."

"Nor does the decision of the judges of the Circuit Court of the United States afford a better shield. They are not vested with authority to review or reverse the decisions of this court. The effect of their action was not only to overrule our opinion, but practically to reverse our decree. For of what avail was the right decreed by us in favor of the city, to regulate slaughtering and to designate places therefor, if persons complying with those regulations could be enjoined by the United States Circuit Court from conducting the business at such places? It is obvious that the entire subject-matter of the injunction suit was embraced in and disposed of by our decree; and that though the Butchers' Union Company was not nominally a party, its rights and those of all persons to transact the business of slaughtering in this city, being subsidiary to and springing directly from the right of the city, were necessarily involved in and protected by our decree." . . .

"But the ground on which we rest our conclusion on the question of probable cause is, that our decree in the suit, to which the defendant corporation was a party, was, until re-

versed, the law to it so far as the subject-matter thereof is concerned; that the prosecution of a suit which had no foundation, except in the assumption that our decree was not law, was without probable cause; and that neither the advice of counsel, nor the opinion of judges of a coördinate court that our decree was error, could furnish any cause whatever for the prosecution of such suit."

It is conceded by the Supreme Court of Louisiana, in this opinion, that its prior judgment in the case between the plaintiff in error and the city of New Orleans could not operate as an estoppel upon the principle of *res judicata*, in the suit which the plaintiff in error brought in the Circuit Court of the United States, the prosecution of which is charged against it as being malicious, because it was between different parties. It is also admitted that the judgment was not a final one, but by reason of the Federal question involved was subject to review and possible reversal by a writ of error from the Supreme Court of the United States. The prosecution of such a writ of error, which was in fact actually sued out but subsequently dismissed, is declared by the Supreme Court of Louisiana to be the only lawful course which the plaintiff in error had a right to pursue. The failure to prosecute that writ of error is charged against the plaintiff in error, so as not only to deprive him of the benefit of the defence of probable cause, but as sufficient proof of malice in the subsequent institution of his suit in the Circuit Court of the United States; and these consequences, in the opinion of the Supreme Court of Louisiana, are not alleviated by the admitted fact that the plaintiff in error acted under the advice of counsel. Notwithstanding such advice, the client itself, the Supreme Court of Louisiana declared, was bound at its peril to take notice of its legal rights as defined in that opinion of the Supreme Court of the state.

It is not shown in the present record on what grounds counsel proceeded in their advice, or the plaintiff in error in failing to prosecute the writ of error from that judgment. It will be observed that the only relief sought in that suit was a writ of injunction against the city of New Orleans from taking the preliminary steps under the ordinances of the city in reference

to entertaining petitions, and designating places, for the prosecution of the business of which it claimed to have a monopoly under its charter.

In a similar case of the *Crescent City Live-Stock Landing and Slaughter-House Company* v. *The Police Jury, Parish of Jefferson, Right Bank*, decided by the Supreme Court of Louisiana, 32 La. Ann. 1192, the plaintiff, who is the plaintiff in error herein, sought to enjoin the defendant from granting permission to any one to establish a slaughter-house in the parish of Jefferson, on the ground that such a grant of authority would be in violation of the exclusive rights given to it under its charter; a case precisely analogous to that between the plaintiff in error and the city of New Orleans, 33 La. Ann. 934. In the case against the Police Jury of Jefferson Parish, the appeal and the petition of the plaintiff were dismissed. In disposing of the case, the court say, p. 1196: "The averments of the petition disclose a clear case of prematurity of complaint. It will be time enough for the plaintiff to apply for an injunction upon a sworn averment of proper facts if, *after* the police jury will have passed the resolution or given the permission, some party assumes to act upon that resolution and permission. For the determination of the motion to dismiss an opinion necessarily had to be expressed, not upon the merits, for none as yet exist, but upon the sufficiency of the sworn averment to justify the injunction."

It might, therefore, on the authority of this decision of the Supreme Court of Louisiana, be argued that the expression of its opinion in the case of *The Crescent City Slaughter-House Company* v. *The City of New Orleans*, 33 La. Ann. 934, was unnecessary to the decision of the cause, and *obiter dictum*, and for aught that appears counsel may have advised that a writ of error to reverse that judgment in the Supreme Court of the United States would fail on the ground that the record did not disclose the existence of a Federal question necessarily to be passed on; for it has been the uniform doctrine of this court that, where it appears that the judgment of the state court must be affirmed on other grounds disclosed in the record, it will not be reversed for an erroneous ruling of the state

court on a Federal question not necessary to the decision of the cause. *Murdock* v. *City of Memphis*, 20 Wall. 590, 634; *Jenkins* v. *Loewenthal*, 110 U. S. 222; *Erwin* v. *Lowry*, 7 How. 172; *Gibson* v. *Chouteau*, 8 Wall. 314.

However that may be, we are of the opinion, on other grounds, that the Supreme Court of Louisiana in this case erred in not giving due effect to the decree in question of the Circuit Court of the United States. The latter is a court coördinate to the Supreme Court of Louisiana in authority, and equal in dignity, being the highest Federal court sitting in that state, whose judgments and decrees are final and conclusive, subject only to review and reversal in the Supreme Court of the United States. In the case in which the decree complained of was pronounced the Circuit Court did not act without jurisdiction, the subject-matter of the suit being a controversy arising under the Constitution of the United States. The argument of the counsel for the defendant in error to the contrary, which deduces what the judge of the inferior court in his charge to the jury alleged to be a usurpation of jurisdiction, merely from the fact that its decree was reversed by this court, could only be true if the general proposition were true that all judgments reversible for error are void for want of jurisdiction. Having jurisdiction of the parties and of the subject-matter of the suit, the judges of the Circuit Court were bound to declare the law of the case between the parties in the light of their own convictions, and under a sense of their official responsibilities, not being under any legal obligation to regard the decision of the Supreme Court of Louisiana upon a question of Federal law as controlling by reason of its authority, whatever respect and deference they might see fit to accord to it by way of persuasion and argument. And their judgment or decree when rendered is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a

defence, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate, and even after reversal it still remains, as in the case of every other judgment or decree in like circumstances, sufficient evidence in favor of the plaintiff who instituted the suit or action in which it is rendered, when sued for a malicious prosecution, that he had probable cause for his proceeding.

Neither was there anything in the situation or conduct of the plaintiff in error that could deprive it of the protection of the decree of the Circuit Court of the United States in this action. The fact that it had exercised an election to bring its suit against the city of New Orleans in the state court could have no legal effect upon its right afterwards to bring a similar suit against other parties in the Circuit Court of the United States. Its right of choice was not exhausted by a single exercise, and justified it in subsequently invoking the jurisdiction of the courts of the United States, no matter with what motive or for what purpose. As we have already seen and declared, the existence of express malice, however flagrant or unjustifiable, could not affect the exercise of this right, or deprive the party of the benefit of the judgment of the court as proof of a probable cause for the institution of the suit. Neither was the plaintiff in error bound to reject the advice of its counsel on the ground of its own presumed knowledge of the law, as declared in the opinion of the Supreme Court of Louisiana in the prior suit. It had a right to test the soundness of that judgment by seeking the jurisdiction of a coördinate court, whose decision would be of equal authority and dignity with that of the Supreme Court of the State, both being final between the parties to the particular litigation until reversed by the Supreme Court of the United States. The plaintiff in error owed no allegiance to the courts of the state greater than that due to the courts of the United States; it had an equal right in both to vindicate what it claimed to

be its rights by remedies appropriate to that purpose, and against all parties infringing them. The fact that the Supreme Court of Louisiana had spoken first gave no additional weight to its decision. Whatever deference may be due to the decisions of the state court of final resort in every case in which it has spoken, and whatever may be the respect to which its decisions upon questions of purely local law established as rules of property may be entitled, they are not authority binding upon the courts of the United States, sitting even in the same state, where the questions involved and decided relate to rights arising under the Constitution and laws of the United States.

But the rule in question, which declares that the judgment or decree of a court having jurisdiction of the parties and of the subject-matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal, was not established out of any special regard to the person of the party. As we have already seen, it will avail him as a complete defence in an action for a malicious prosecution, although it may appear that he brought his suit maliciously for the mere purpose of vexing, harassing, and injuring his adversary. The rule is founded on deeper grounds of public policy in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them. The rule, therefore, has respect to the court and to its judgment, and not to the parties, and no misconduct or demerit on their part, except fraud in procuring the judgment itself, can be permitted to detract from its force. It is equally true and equally well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself. It is an invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly. The record of its proceedings imports verity; its judgments cannot be impugned except by direct process from

Names of Counsel.

superior authority. The integrity and value of the judicial system, as an institution for the administration of public and private justice, rests largely upon this wholesome principle.

That principle has been disregarded in the present case by the Supreme Court of Louisiana in failing to give due effect to the decree of the Circuit Court of the United States as sufficient evidence in support of the defence of the plaintiff in error in this action, so far as it is an action for the recovery of damages for a malicious prosecution.

The judgment of the Supreme Court of Louisiana on the bond itself, for damages occasioned by its breach, against the principal and surety, is not attacked in this proceeding. It is so far affirmed. But that part which constitutes a judgment against the Crescent City Live-Stock Landing and Slaughter-House Company solely, for damages for the malicious prosecution, is reversed, and the cause is remanded for further proceedings therein not inconsistent with this opinion; and it is so ordered.

LITTLE ROCK AND FORT SMITH RAILWAY *v.* HUNTINGTON.

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

Submitted January 6, 1887. — Decided January 24, 1887.

A mortgage of a railroad and of lands granted by Congress to aid in its construction to trustees, which directs the trustees to apply moneys arising from the sale of the lands to the payment of the coupons attached to the bonds secured by the mortgage, also authorizes them to purchase therewith over-due coupons which have been cut from those bonds and have been deposited with the trustees of the mortgage for the purpose of securing scrip issued to the holders of those coupons, with the object of extending the payment of the amount due on them beyond the time of payment named in them.

BILL in equity. The case is stated in the opinion of the court.

Mr. William S. Rogers for appellant.

Mr. C. W. Huntington for appellees.

Opinion of the Court.

MR. JUSTICE FIELD delivered the opinion of the court.

The Little Rock and Fort Smith Railway is a corporation organized under the laws of Arkansas, and the defendants are citizens of Massachusetts, and trustees under a mortgage or deed of trust executed to them by the corporation on the 19th of December, 1874. The bill is filed to enforce the performance of certain trusts devolving upon the defendants under that instrument.

By the act of Congress of July 28, 1866, a grant of land was made to the State of Arkansas, to aid in the construction of a railroad from Little Rock to Fort Smith. The grant was of ten alternate sections of land on each side of the road, with a right of way over land of the United States to the width of two hundred feet.

By legislation of Arkansas, in 1869, the right to the lands thus granted by Congress became vested in the Little Rock and Fort Smith Railway Company. In December following, that corporation executed a mortgage upon its road, equipments, franchises, and property to secure its bonds to be issued thereunder to the amount of $3,500,000, and in June, 1870, it executed a second mortgage upon the same property to secure its bonds to be issued to the amount of five millions of dollars. The bonds were issued, but the company defaulted in their payment, and both mortgages were foreclosed, and the property was sold under a decree of the Circuit Court of the United States for the Eastern District of Arkansas.

The purchasers at such sale, under a statute of Arkansas, organized themselves into a corporation, and adopted as their corporate name that of the Little Rock and Fort Smith Railway, and became vested with all the rights, privileges, powers, and franchises of the former corporation, together with the lands granted to that company by the acts of Congress and of the legislature of Arkansas.

This new company, the plaintiff herein, in order to provide means for the completion and equipment of its road, and for other purposes, issued and negotiated a series of bonds, amounting in the aggregate to three millions of dollars,

payable to bearer at the end of thirty years from January 1, 1874, with interest coupons payable semi-annually at the rate of seven per cent. per annum, free from any United States tax. The bonds were issued in denominations of one thousand dollars each, from No. 1 to 2000 inclusive, and in denominations of five hundred dollars each, from numbers 2001 to 4000 inclusive. To secure their payment, principal and interest, the company executed a mortgage, or deed of trust, bearing date December 19, 1874, upon its road, franchises, rights, and lands, to the defendants, Huntington and Ripley, in trust, among other things, to apply the moneys arising from the lands of the company, after deducting the expenses of executing the trust, as follows:

1st, to the payment of the coupons or interest warrants attached to the bonds, as fast as they shall become due and payable, to the extent that the net earnings from the business of the road shall be insufficient for that purpose.

2d, to the purchasing and cancelling of such outstanding bonds as can be obtained, at their market value, not exceeding, however, a premium of ten per cent.; and

3d, to the payment of such of the bonds as shall not have been purchased in accordance with these provisions, when the same shall become due and payable.

All the trust moneys coming to the trustees, not applied or used in accordance with the above provisions, were to be invested in United States securities, or lent from time to time in such manner as by the law of Massachusetts is permitted to savings banks. The interest derived from such investments or loans was to be applied by the trustees to the payment of the bonds or coupons.

The bill alleges that, after the execution of this mortgage, the company completed its railroad from Little Rock to Fort Smith, within the time, and in the manner required by the acts of Congress and of Arkansas, and thereby became the owner of 1,057,000 acres of land, as certified by the Secretary of the Interior to the state, all of which, and the proceeds of sales, were subject to the trusts and charges imposed by the mortgage or deed of trust; that the corporation has disposed of all

the bonds authorized to be issued under the mortgage, but that of the lands there still remain unsold 623,000 acres; that during the years 1877, 1878, and 1879, and the first six months of the year 1880, the net earnings derived from the operation of the road, even when united with the proceeds of the sales of lands, were insufficient to meet the coupons or interest warrants attached to the bonds maturing on January 1, 1878, July 1, 1878, January 1, 1879, July 1, 1879, and January 1, 1880; and thereupon an agreement was made between the corporation and the holders of the bonds and coupons payable on those dates, by which the holders surrendered to the defendants, trustees, the coupons, and the corporation issued to them negotiable scrip or certificates by which it promised to pay the trustees, or bearer, the amount of the coupons surrendered, in ten years from their maturity, with interest at the rate of seven per cent. per annum, payable semi-annually, the corporation reserving the right to pay the scrip and interest at any time previous to its maturity.

The scrip or certificate also provided that the trustees should hold the coupons surrendered, as collateral security for the payment of the scrip thus issued therefor, and that the coupons should not be surrendered or cancelled until the scrip should be paid. The coupons maturing on July 1, 1883, and January 1, 1884, were also unpaid, and a similar arrangement was made with the holders of these coupons by the issue of scrip for them; so that the whole amount of scrip issued for coupons thus unpaid was $636,000.

The bill also alleges that out of the moneys received from the sale of the lands since the execution of the mortgage, the trustees have bought and cancelled bonds amounting to $536,500, besides appropriating moneys to aid the corporation in paying the interest coupons attached to the bonds; that since the year 1881 the trustees have applied the net proceeds of the sales to the purchase and cancellation of the bonds, and no part thereof to the purchase and cancellation of the said scrip, or the coupons held by them as collateral security for the payment of that scrip; that for several years, the net earnings of the road have been more than sufficient to enable the corpo-

ration to pay its current coupons and the interest upon the scrip; that the corporation has notified the trustees, that it was no longer necessary to retain any portion of the proceeds of sales for the payment of the interest coupons to mature hereafter; that the net earnings of the road would, in all probability, be ample for that purpose, and, by reason of the increased earnings, will continue to be more than ample to pay the coupons as they severally become due and payable; and that the price of the bonds has greatly risen in value, and the premium thereon has varied the past year from thirteen to seventeen per cent., so that under the mortgage the trustees are no longer able to purchase such bonds, being limited by the mortgage to the payment of ten per cent. premium.

The bill also alleges that 623,000 acres of the lands of the company remain unsold; that the trustees hold contracts for lands sold, upon which partial payments have been made, but upon which deeds are not to be executed until the purchase money and interest are fully paid, amounting in the aggregate to more than the sum of $428,691; and that in the ordinary course of business, the trustees and their successors will have large amounts of money from sales thereof, which must be applied by them in accordance with the provisions of the mortgage, and in the order of priority, before the moneys can be invested, as provided therein; that the trustees have refused to apply any of the said money to the payment of the outstanding coupons for which the scrip mentioned was given; that such coupons draw interest at the rate of seven per cent., and any investment of such moneys by the trustees can only be made so as to obtain a much smaller rate of interest, and that, therefore, it would be greatly to the advantage of the corporation, and to the bondholders, that such moneys should be applied to taking up the outstanding coupons. The trustees, in their answer to the demand of the corporation that the moneys be so applied, have expressed a willingness to so apply them, but they entertain doubts as to their authority so to do, unless directed by order of the court.

The mortgage, as is seen by its terms, contemplates that the proceeds of sales of lands shall be applied to the payment

of the interest coupons to the extent that the earnings of the road are insufficient for that purpose. The contract, by which the time to pay those coupons, for which the scrip was issued, was extended for ten years, does not release the corporation from its obligation, provided it is in funds from the earnings of the road and the sales of its lands. The coupons are not cancelled, but are still held as collateral security for the scrip issued. The inability of the company to pay such coupons from the earnings of the road, combined with the proceeds of the sales of the lands, which led to the contract for the scrip, no longer exists, and there is no legal impediment in the way of the trustees taking up such coupons, notwithstanding the contract deferring their compulsory payment for ten years. The money received from the sales of the lands cannot be used in purchasing the bonds of the company, which are now at more than ten per cent. premium, and the trustees are restricted in their payment to that premium. Any investment under the law of Massachusetts would bring them only a moderate interest, probably not exceeding four per cent. The coupons draw seven per cent. There is, therefore, a manifest propriety and justice in the demand of the corporation that the surplus money from the sales of its lands, instead of being thus invested, should be applied to taking up the outstanding coupons. And it is the plain duty of the trustees, in the execution of their trust, to make the proceeds of the sales of lands as available as possible for the extinction of the indebtedness of the corporation, first on its coupons, and then upon its bonds, so long as the same can be bought at a premium not exceeding ten per cent.

The decree of the court is, therefore, reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

HIBERNIA INSURANCE COMPANY *v.* ST. LOUIS TRANSPORTATION COMPANY.

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

Argued January 17, 1887. — Decided January 31, 1887.

In a suit in equity by an insurance company against a transportation company, and the transferee of its property, to recover the amount paid by the insurance company, as insurer of goods alleged to have been lost, in transportation, by the negligence of the transportation company; *Held:* without passing on any other question, that negligence was not proved, and that the loss happened by perils excepted in the contract of transportation.

THIS was a bill in equity. The court below dismissed the bill, and plaintiff appealed. The case is stated in the opinion of the court.

Mr. O. B. Sansum for appellant.

Mr. Given Campbell, for appellees, submitted on his brief.

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 Eastern District of Missouri, by the Hibernia Insurance Company, a Louisiana corporation, against the St. Louis and New Orleans Transportation Company and the Babbage Transportation Company, two Missouri corporations, and Henry Lowery, a citizen of Missouri.

The bill alleges that in August, 1879, the Babbage Company, of which Lowery was president and director, being engaged in transporting merchandise for hire on the Mississippi River from St. Louis to New Orleans by means of certain steam tow-boats and barges which it owned, contracted with the firm of Gordon & Gomila to transport for it from St. Louis to New Orleans a quantity of wheat, "the dangers of the river, fire, and collision only excepted;" that it loaded a part

of the wheat on the barge Sallie Pearce, which it took in tow by its tow-boat John Means; and that, by negligent navigation on the part of the Babbage Company, the barge broke away from the tow-boat, and was allowed to drift down the river until she brought up against a steamboat which was lying at rest along the bank on the Missouri side of the river, and was broken and crushed, so that some of the wheat was lost in the river and some of it was damaged by water.

The bill also alleges that, in September, 1879, one Pleasants owned certain rye, corn, oats, and hay, which were at St. Louis, on the barge Colossal; that the Babbage Company contracted with Pleasants to carry those goods on that barge from St. Louis to New Orleans, "the dangers of navigation, fire, explosion, collision, bridges, and all other known and unknown obstructions excepted;" and that the company, by its tow-boat E. M. Norton, took the barge in tow, and the tow-boat was so negligently managed that she drew the barge against an obstruction then visible and known to the master, pilot, and officers of the tow-boat, and the barge was broken, and allowed by them to remain, without any attempt to rescue the goods, and nearly all of them were lost.

The bill also alleges that the plaintiff, as insurer of the goods in both cases, paid to Gordon & Gomila and Pleasants, $19,633.16.

The bill also alleges that, in January, 1880, the Babbage Company, by Lowery, as its president, sold all its property, consisting of four steam tow-boats and thirteen barges, to the St. Louis Company; that such sale was without consideration, and fraudulent as against the rights of the plaintiff as a creditor of the Babbage Company; and that Lowery and the St. Louis Company had notice of the fraud.

The bill waives an answer on oath, and prays that the court will decree payment of said debt to the plaintiff, with interest; that the St. Louis Company be restrained from disposing of any of said property until the plaintiff's debt shall be paid; and that until that time the plaintiff have a lien on said property.

The defendants demurred to the bill for want of equity; for want of privity between the plaintiff and the defendants; and

for multifariousness. The court, 3 McCrary, 368, dismissed the bill as to Lowery, and overruled the demurrer as to the other defendants, with leave to them to answer, holding that it was not necessary that the plaintiff should recover a judgment at law against the Babbage Company before bringing this suit.

The defendants then put in a plea to that part of the bill which relates to the transfer of the property and asks for relief by a lien and an injunction, denying the fraud and alleging the *bona fides* of the transaction. They, at the same time, put in an answer to the part of the bill not covered by the plea, denying the negligence, and averring that the losses were due to the perils of navigation. There were special replications to the plea and the answer.

Proofs being taken on the plea, the court, 4 McCrary, 432, overruled it, on a hearing, holding that the allegations of the bill involved in the plea were established, and that the debts of the Babbage Company could be enforced in equity against the other company to the extent of the property received by the latter.

The case was afterwards brought to a hearing on proofs on the issues raised by the answer, and the court, 5 McCrary, 397, dismissed the bill. The plaintiff has appealed. The Circuit Court held, as to the Sallie Pearce, that the contract was that of a common carrier; that, as to the Colossal, it was immaterial whether the contract was that of towage merely, or that of a common carrier; and that each disaster was caused by an inevitable accident, falling within the excepted dangers of the river and of navigation, alleged in the bill as forming part of each contract. We concur in this conclusion. In the first case a sand reef had been recently formed in the channel; the pilot of the tow-boat had no reason to suppose it was there; and she was being handled with skill and care when the accident occurred. In the second case, the Colossal was unseaworthy when she started. The tow-boat was prudently navigated, but the river bank had shortly before caved in, and a tree from the land had fallen into the river, its presence being unknown, and the Colossal struck it under water, caus-

ing the accident, there being no want of care, skill, or attention on the part of those in charge of the tow-boat, either before or after the occurrence, in regard to the navigation or the saving of the cargo of the Colossal.

The appellees have contended in this court that the rulings of the Circuit Court as to the demurrer and the plea were erroneous, but, without passing on those questions, we affirm the decree, for the reason stated.

Affirmed.

UNITED STATES *v.* HILL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Argued December 20, 1886. — Decided January 31, 1887.

It was the custom in the United States courts in Massachusetts, from 1839 to December, 1884, known and approved by the judges, for the clerk to charge $3 as fees in naturalization proceedings. The clerk of the District Court never included those fees in his returns. That fact was known to the judges to whom his accounts were semi-annually exhibited, and by whom they were passed without objection in that particular. Relying on that custom, and believing that those fees formed no part of the emoluments to be returned, the clerk of the District Court appointed in 1879 did not include those fees in his accounts. This was known to the district judge when he examined and certified the accounts, and his accounts so made out, to July, 1884, were examined and adjusted by the accounting officers of the Treasury. Under a rule made by the District Court in 1855, the clerk had charged and received the $3 as a gross sum, for examining, in advance of their presentation to the court, the application papers, and reporting to the court whether they were in conformity with law; and had made no division for specific services, according to any items of the fee bill in §§ 823 *et seq.* of the Revised Statutes. In a suit brought in December, 1884, on the official bond of the clerk, against him and his surety, to recover the amount of the naturalization fees; *Held:*

(1) The provision in § 823, taken from § 1 of the act of February 26, 1853, c. 80, 10 Stat. 161, that the fees to clerks shall be "taxed and allowed," applies, *prima facie*, to taxable fees and costs in ordinary suits between party and party, prosecuted in a court; and there is no specification of naturalization matters in the fees of clerks.

(2) The statute being of doubtful construction as to what fees were to be returned, the interpretation of it by judges, heads of departments, and accounting officers, contemporaneous and continuous, was one on which the obligors in the bond had a right to rely, and, it not being clearly erroneous, it will not now be overturned.

THIS was an action at law to recover from the defendants in error, fees which it was claimed the clerk of the District Court of the United States for the District of Massachusetts should have accounted for, the defendants being the clerk and his bondsman. Judgment for defendants to review which this writ of error was sued out. The case is stated in the opinion of the court.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. John Lowell for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 5th of February, 1879, Clement Hugh Hill was duly appointed clerk of the District Court of the United States for the District of Massachusetts, by the judge of that court. On the same day he and William Goodwin Russell and another person executed a joint and several bond to the United States in the penal sum of $20,000, conditioned that Hill, "by himself and by his deputies," should "faithfully discharge the duties of his office, and seasonably record the decrees, judgments, and determinations of the said court, and properly account for all moneys coming into his hands, as required by law." The statute requiring a bond, in force at the time, was § 3 of the act of February 22, 1875, c. 95, 18 Stat. 333, which required the clerk to give a bond, with sureties, "faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court of which he is clerk."

This suit was brought by the United States against Hill and Russell on said bond by a writ dated December 4, 1884, claiming $22,000 damages. The declaration alleges, as a breach of the bond, that Hill "has not properly accounted for

all moneys coming into his hands, as required by law, according to the condition of said bond." The answer of the defendants denies that allegation, and avers that Hill "has made full and sufficient returns of all moneys received by him, as required by law, and that he owes no sum of money to the said United States."

The following agreed statement of facts was filed July 1, 1885, signed by the attorneys for the respective parties, and upon it the case was, by written agreement, submitted to the decision of the court:

"The defendant Hill was appointed clerk of said court on the fifth day of February, 1879, and duly qualified as clerk, and the defendants gave the bond, a copy of which is annexed to the declaration. As clerk, he has made half-yearly returns of fees and emoluments received by him, but he has not included in the same the amounts received by him for the naturalization of aliens in the District Court.

"It has been the custom in the United States Courts in the District of Massachusetts, for a long time, not less than forty-five years before the date of the writ in the present action, and known and approved by the judges, for the clerk to charge one dollar as a fee for a declaration of intention to become a citizen, and two dollars as a fee for a final naturalization and certificate thereof; and the clerk of the District Court has never included these in the fees and emoluments returned by him, and this has been known to the judges to whom the accounts have been semi-annually exhibited, and by whom they were passed without objection in this particular. Following this custom, and believing and being informed that these fees formed no part of the emoluments to be returned to the government, the defendant Hill has not included these amounts in his accounts, and this was known to the judge when his accounts were examined, and he made on each a certificate in the form hereto annexed; and his accounts, so made out, up to July 1, 1884, have been examined and adjusted by the accounting officers of the Treasury Department.

"The clerks of the several courts of the state of Massachusetts made similar charges for like services, and made no

returns to the treasurers of the counties of the fees so received until the passage of the statute of the State of 1879, c. 300.

"If, upon the facts before stated and agreed, the court shall be of opinion that the said fees, charged by the defendant Hill, in respect to naturalizations, or any part thereof, should have been returned in his accounts to the United States as part of the emoluments of the clerk, from which his compensation is to be taken, in accordance with § 833 of the Revised Statutes, and that the settlements and adjustments of his several accounts, as above mentioned, constitute no defence to this action, the case shall be sent to an assessor to ascertain the amount due the United States, in accordance with the law as laid down by the court, unless the parties shall, within fifteen days after the announcement of the opinion of the court, agree upon the amount.

"The blanks used for the report of clerks' fees and emoluments, and the blanks used in naturalization of aliens, may be considered as part of the record of the case.

"The instructions of the Department of Justice to the several clerks, dated January, 1879, may be read for any purpose for which they are properly applicable; but neither the defendant Hill nor his deputy, Mr. Bassett, has any recollection of receiving or seeing such a circular before October, 1884.

"The court may draw such inferences from the above facts as a jury might."

Section 833 of the Revised Statutes provides that every clerk of a District Court shall, "on the first days of January and July, in each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such return the fees and emoluments payable under the bankrupt act. . . . Said returns shall be verified by the oath of the officer making them."

Section 839 of the Revised Statutes provides, that "no clerk

of a District Court . . . shall be allowed by the Attorney General . . . to retain of the fees and emoluments of his office, . . . for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk, . . . or exceeding that rate for any time less than a year."

Section 844 provides, that every clerk shall, "at the time of making his half-yearly return to the Attorney General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him."

Section 845 provides, that in every case where the return of a clerk "shows that a surplus may exist, the Attorney General shall cause such returns to be carefully examined, and the accounts of disbursements to be regularly audited by the proper officer of his department, and an account to be opened with such officer in proper books to be provided for that purpose."

The foregoing provisions of §§ 833, 839, 844, and 845 were taken from § 3 of the act of February 26, 1853, c. 80, 10 Stat. 165, 166, the supervision being changed from the Secretary of the Interior to the Attorney General by § 15 of the act of June 22, 1870, c. 150, establishing the Department of Justice. 16 Stat. 164.

Section 846 provides, that the accounts of clerks "shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in the case of other public accounts." This provision was taken from § 1 of the act of August 16, 1856, c. 124, 11 Stat. 49.

The blank used for the report of clerks' fees and emoluments, and the oath appended to the report and the certificate

of the judge upon it, were in the following form, as contained in the record:

"[Blank for emolument return, to be filled up when a return is due, and forwarded to the Attorney General of the United States, with the necessary vouchers. Should the return be verified before any officer other than a judge or clerk of a court of the United States, the additional certificate of authentication should be appended, as the printed instructions of July 13, 1870, require. Similar blanks will be furnished for each semi-annual return.]

Return of fees and emoluments of , clerk of the Court of the United States for the district of , from to , and of moneys paid out by him during the same period for the expenses of his office; also of the receipt or non-receipt of fees and emoluments previously returned by him as "not received."

DISTRICT COURT.	Dollars.	Cents.
Fees and emoluments earned from the United States, received		
Do. do. do. do. do. not received		
Fees and emoluments earned from individuals, received		
Do. do. do. do. not received		
Do. do. do. do. in cases in bankruptcy, received		
Do. do. do. do. do. do. not received		
Total gross emoluments earned in the District Court $		

OFFICE EXPENSES PAID OUT OF GROSS EMOLUMENTS, AS AUTHORIZED BY LAW AND REGULATIONS.	District Court.	
Amount paid for rent of office	Voucher No. 1	
Do. do. furniture for office	do. 2	
Do. do. clerk hire	do. 3	
Do. do. fuel	do. 4	
Do. do. lights	do. 5	
Do. do. stationery	do. 6	
Total amount of office expenses	$	

RECAPITULATION.	District Court.
Total amount of earnings, received and not received, brought down	
Deduct amount paid for necessary office expenses	
Net amount of emoluments earned	
Deduct maximum personal compensation	
Balance due to the United States $	
Fees and emoluments heretofore returned as "not received" for the half year ending on the day of , 188 , received	
Fees and emoluments heretofore returned as "not received" for the half year ending on the day of , 188 , received	
Fees and emoluments heretofore returned as "not received" for the half year ending on the day of , 188 , received	
Fees and emoluments heretofore returned as "not received" for the half year ending on the day of , 188 , received	

I, , clerk of the Court of the United States for the district of , do solemnly swear that the foregoing account is, in all respects, just and true, according to my best knowledge and belief; and that I have neither received, directly or indirectly, nor directly or indirectly agreed to receive, or be paid, for my own or another's benefit, any other money, article, or consideration than therein stated; nor am I entitled to any emoluments for the period therein mentioned other than those therein specified; and that I have taken all reasonable pains to collect from individuals amounts due to the United States for services in my office: So help me God.

_____ _____.

Signed and sworn to before me this day of , 188 .

_____ _____.

I, , judge of the Court for the district of , do hereby certify that I have carefully examined the vouchers referred to in the foregoing return; that the disbursements charged therein for clerk hire and office expenses were necessary to the convenient transaction of the business of the clerk's office; and that the sums paid therefor are, in my opinion, reasonable.

_____ _____.

NOTE 1. — No money can be paid from the Treasury to any clerk while his emolument return shall remain in arrear."

On the foregoing facts and statutes it was contended by the United States, before the Circuit Court, held by the circuit judge and the district judge, that the sums received as fees in naturalization proceedings were "fees and emoluments" within the meaning of § 833, and ought to have been included by the clerk in his returns, on the ground that they were received for services rendered by the clerk in his official capacity, and he was, therefore, bound to account for them, whether they were or were not chargeable under § 828, prescribing fees for clerks. The Circuit Court held that the action

could not be maintained, and entered a judgment for the defendants, to review which the United States have brought a writ of error.

The opinion of the Circuit Court, which accompanies the record, and is reported in 25 Fed. Rep. 375, gives the following statement as to the former and the existing legislation of Congress on the subject and as to the action of the courts and of the Executive Departments of the government: "By the act of March 3, 1791, 1 Stat. 217, § 1, the compensation of the clerks was fixed at five dollars a day for attending court, and their travel. To this was added by the act of May 8, 1792, 1 Stat. 277, § 3, such fees as were allowed in the Supreme Courts of the state, with a provision that for discharging duties not performed by the clerks of the state courts, and for which the laws of the state made no allowance, the court might allow a reasonable compensation. Under these acts the clerks were allowed to retain all their fees, and were not required to render any account of them to the government. The first law requiring returns to be made was the act of March 3, 1841, 5 Stat. 427. This act established the compensation of clerks of courts at $4500 a year, above clerk hire and office expenses, payable from fees only, and required them to pay the overplus into the public treasury, under such rules and regulations as might be prescribed by the Secretary of the Treasury. The next in order of time was the act of May 18, 1842, 5 Stat. 483. That act required the clerks to make to the Secretary of the Treasury semi-annual returns, embracing all the fees and emoluments of their office, of every name and character, distinguishing those received or payable under the bankrupt act from those received or payable for any other service. It authorized the clerk of the District Court to retain from the fees and emoluments of his office, above office expenses and clerk hire, as his personal compensation, $3500 a year, and required him to pay the surplus into the Treasury. It has been stated that the provision in this act as to bankruptcy fees was inserted to change the law, as ruled by Judge Story, that the clerks were not bound to account for fees earned under the bankrupt act of August 19, 1841.

The act of March 3, 1849, 9 Stat. 395, § 4, establishing the Department of the Interior, transferred the supervision of the accounts of clerks to the Secretary of the Interior. Until the act of February 26, 1853, 10 Stat. 161, the official fees of the clerks remained in substance as fixed by the acts of 1791 and 1792. The act of 1853 was the first uniform statute regulating the fees of the clerks and other officers of the courts throughout the United States. It established the present fee-bill, and is reproduced in §§ 823 to 857 of the Revised Statutes. Its provisions in regard to returns to be made by the clerks were the same as in the act of 1842, except that they were to be made to the Secretary of the Interior, as directed by the act of 1849, instead of to the Secretary of the Treasury. Since the act of June 22, 1870, creating the Department of Justice, the returns have been made to the Attorney General, and supervision of these accounts has been exercised by that officer of the government."

Referring then to the fee-bill of February 26, 1853, as found in §§ 823 *et seq.* of the Revised Statutes, the court proceeds: "Upon an examination of the statute it will be seen that it applies to taxable costs in all ordinary litigation, whether at law or in equity or admiralty, and undoubtedly governs the taxation in all such actions, suits, and proceedings, civil and criminal, *in personam* and *in rem*, in the courts of the United States. But it has not usually been considered, at least in this district, as applying to certain special and peculiar cases, of which the courts have jurisdiction, where only the party asking for the right or privilege is before the court, and from the nature of the case no costs are taxable as in ordinary litigated suits. Of such a character are proceedings under the naturalization laws, under the shipping commissioner's act, and applications to be admitted to practice as an attorney. Thus Judge Shepley early refused to allow the clerk to tax costs by the fee-bill on applications under the shipping commissioner's act of June 7, 1872, 17 Stat. 272, Rev. Stat. § 4544, for the money and effects of deceased seamen deposited in the Circuit Court by the shipping commissioner.

"In respect to naturalization cases, it has never been hitherto understood, either by the judges or the departments, that the fees of the clerk were for services rendered in his official capacity. At times, especially before elections, these applications are extremely numerous. The papers are usually prepared by the parties themselves or their friends, or more frequently by agents of candidates. The hearings are *ex parte*, at no stated times, and it is rare that any person appears in opposition. It has, therefore, been necessary, both in the interest of the applicants, and for the due and orderly execution of the law, and to enable the court to dispose of the cases, that the papers should be looked over and corrected by some person familiar with the law and practice, and in many instances that the witnesses should be examined before the cases were presented to the court for final action. It was for this service that the clerk has been allowed to make these charges to the parties. These are duties which the court has the undoubted right to have performed by some other person than the presiding judge. In these cases the clerk acts rather as a person appointed to assist the court in exercising its functions, like a master or examiner in an equity cause, or an assessor in admiralty, or an auditor in a suit at law. It is the universal practice of all courts of large jurisdiction to appoint special officers, at the expense of the parties, to make inquiries, investigate details, examine papers, take accounts, make computations, and perform ministerial acts. Their reports, when returned into court and accepted, become part of the case, and form the basis of the orders and decrees of the court in the cause.

"It was with this view, to regulate the practice in naturalization cases, and define the duties required of the clerk, that Judge Sprague, in 1855, adopted the following rules, which have ever since been in force:

"'Ordered, by the court, that applications by aliens to be admitted to become citizens of the United States shall be presented to the court while in session, and that proof of the facts whereof the court is required by law to be satisfied, shall be made by at least two credible and disinterested wit-

nesses, who are citizens of the United States, to be produced and examined in open court.

"'Ordered, that before such applications are presented, all necessary papers shall be filed with the clerk, who shall report to the court, when the application is made, that he has examined the same, and whether they are all in due form and in conformity with the requirements of law, or how otherwise.'"

This fact, as to these rules made in 1855, was not made a part of the agreed statement of facts, but the counsel in the cause, in this court, stipulated in open court, that the fact should be taken as agreed.

The opinion of the Circuit Court then proceeds: "It is for services rendered under these rules, and as a special officer of the court, and not as clerk, that these fees have been permitted. They were not duties pertaining to the office of clerk. They could as well have been performed by any other person designated by the court for the purpose; as by the district attorney, or a commissioner of the Circuit Court, or an attorney, or any suitable person not an officer of the court.

"Reference has been made to the circular of Attorney General Devens of January 14, 1879, issued to the clerks. In it he says, referring to § 833: 'This language embraces every possible fee or emolument accruing to you by reason of your official capacity, and does not allow the withholding of any. Whatever is done by you that you could not do if out of office has an official color and significance that brings it within the compass of the language of the statute.' This is undoubtedly a forcible and accurate statement of the meaning of the statute. But the naturalization fees do not come within this rule. They did not accrue to the clerk by reason of his official capacity, and were for work which might as well have been done by him when out of office as when in. It is also to be noticed that this circular calls upon the clerks for 'a statement of sums received for searches, for all copies for naturalization papers and oaths, and all other sums received through your office,' but makes no mention in terms of naturalization fees. Regul'ns Dept. Justice, 1884, p. 223.

"No complaint of these fees has ever come to the ear of the court from any quarter. On the contrary, this service performed by the clerks has been of great advantage to those seeking to be admitted as citizens. It has had the effect, as originally intended, to simplify the process of becoming a citizen, and to make it more expeditious and inexpensive. It saves the parties the expense of employing an attorney, and the fee charged therefor is much less than would be allowed by the fee-bill, if the application is to be treated and entered on the docket of the court as an ordinary suit. In rejected cases no fee has been charged. This practice has prevailed for more than forty years, ever since the act of 1842, which first required returns, and has been perfectly well known to everybody conversant with the courts. It was begun by Judge Story and Judge Sprague, and has had the approval of all the judges of this district since their day. It has also had the sanction successively of the Department of the Treasury, the Department of the Interior, and the Department of Justice. Until this suit was brought it has never been called in question by any accounting officer of the government; nor has Congress seen fit to put a stop to it by legislation. This construction of the statute in practice, concurred in by all the Departments of the government, and continued for so many years, must be regarded as absolutely conclusive in its effect. *Edwards' Lessee* v. *Darby*, 12 Wheat. 206; *United States* v. *Temple*, 105 U. S. 97; *Ruggles* v. *Illinois*, 108 U. S. 526; *United States* v. *Graham*, 110 U. S. 219.

"It was stated at the bar that a bill was introduced in the last Congress to require the clerks to make returns of all fees which they should receive for naturalizations and as masters and commissioners, but failed to become a law. If a change in the practice should be thought desirable, it is obvious that it should be made by Congress, and not by the courts.

"It is also to be noticed as significant, that the clerks of the courts of Massachusetts, under a fee-bill much like ours, and a statute requiring them to make to the county treasurer yearly a return 'of all fees received by them for their official acts and services,' were never required to include in their returns

the fees received in naturalization cases. Rev. Stat. of 1836, c. 88, § 15 ; Gen. Stat. of 1860, c. 121, § 22. This was changed by the act of 1879, c. 300, which defined what the fees in such cases should be, and directed the clerks to include them in their returns.

"The decision of the court is, that, upon the agreed facts in this case, this action cannot be maintained."

Viewing the whole subject in the light in which it appears on the face of the statute, in regard to the fees of the clerk, we are met by the fact that § 823 of the Revised Statutes, taken from § 1 of the act of February 26, 1853, c. 80, 10 Stat. 161, provides that "the following, and no other, compensation shall be taxed and allowed" to clerks of the District Courts. This applies *prima facie* to taxable fees and costs in ordinary suits between party and party, prosecuted in a court. There is no specification of naturalization matters in the fees of clerks. From as early as December, 1839, the practice set forth in the agreed statement of facts has obtained in the District Court in Massachusetts, of charging the fees of $1 and $2, as gross sums, in naturalization proceedings, without any division for specific services, according to any items of the fee-bill. The act of March 3, 1841, before referred to, the first one on the subject of returns, implied that there should be reports of "fees and emoluments" by the clerk to the Secretary of the Treasury. The act of May 18, 1842, provided for semi-annual returns to that officer, and included, specifically, fees and emoluments under the bankrupt act. But the clerk never has included in these returns his fees and emoluments for naturalization proceedings, and his action from 1842 to and including 1884 has been with the knowledge of the successive district judges, to whom his accounts have been semiannually exhibited. From 1842 to 1849 these accounts went to the Secretary of the Treasury; from 1849 to 1870, to the Secretary of the Interior; and since 1870 they have gone to the Attorney General. From 1856 the statute has required that these accounts, before going forward, "shall be examined and certified by the district judge," and that, after being sent to the several heads of departments, they shall be subject to revis-

ion on their merits by the accounting officers of the Treasury Department. The agreed statement of facts shows that this course has been pursued; that the district judge has examined and certified the accounts, knowing that they did not include naturalization fees; and that those accounts have been revised on their merits by these accounting officers, for this long series of years, and been examined and adjusted by them with the naturalization fees not included.

With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the Treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right to rely on that interpretation in giving the bond; and the semiannual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees excluded, down to and including the one last rendered five months before this suit was brought, a court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction. This principle has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive, and administrative.

In *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210, it was said: "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." To the same effect are *United States* v. *Dickson*, 15 Pet. 141, 145; *United States* v. *Gilmore*, 8 Wall. 330; *Smythe* v. *Fiske*, 23 Wall. 374, 382; *United States* v. *Moore*, 95 U. S. 760, 763;

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United States v. *Pugh*, 99 U. S. 265, 269; *Hahn* v. *United States*, 107 U. S. 402, 406; and *Five per cent. Cases*, 110 U. S. 471, 485. In the case of *Brown* v. *United States*, 113 U. S. 568, the same doctrine was applied, the cases in this court on the subject being collected, and it being said, that a "contemporaneous and uniform interpretation" by executive officers charged with the duty of acting under a statute "is entitled to weight" in its construction, "and in a case of doubt ought to turn the scale." A still more recent case on the subject is *United States* v. *Philbrick*, *ante*, 52, where this language is used: "A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned."

Judgment affirmed.

PHŒNIX LIFE INSURANCE COMPANY *v.* RADDIN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Argued December 20, 21, 1886. — Decided January 31, 1887.

Answers to questions propounded by insurers in an application for life insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant.

Where upon the face of an application for life insurance, a direct question of the insurers appears to be not answered at all, or to be imperfectly answered, the issue of the policy without further inquiry is a waiver of the want or imperfection of the answer, and renders the omission to answer more fully immaterial.

A policy of life insurance stated that it was issued and accepted by the assured upon certain express conditions, one of which was that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void." The application contained a

Argument for Plaintiff in Error.

number of printed questions "to be answered by the person whose life is proposed to be insured," and "declared that the above are fair and true answers to the foregoing questions," and that it was agreed by the applicant "that this application shall form the basis of the contract for insurance," "and that any untrue or fraudulent answers, or any suppression of facts," should avoid the policy. One of those questions was: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies?" To this question the applicant answered, "$10,000, Equitable Life Assurance Society." A policy of that society was in fact the only other existing insurance. *Held*, that the answers were not warranties, but representations; and that the issue of a policy, without further inquiry, was a waiver of the right of the insurers to require further answers as to the particulars mentioned in this question, and estopped them to set up that the omission, though intentional, to disclose unsuccessful applications for additional insurance was material and avoided the policy.

A bill of exceptions should not contain the whole charge of the court to the jury, but should only state distinctly the several matters of law excepted to.

A bill of exceptions cannot be sustained to an instruction or to a refusal to instruct in matter of law, without showing that there was evidence to which the instruction given or refused was applicable.

The acceptance by insurers of payment of a premium, after they know that there has been a breach of a condition of the policy, is a waiver of the right to avoid the policy for that breach.

Where the declaration in an action on a policy of insurance alleges that the consideration of the contract was the payment of a certain premium at once, and of future annual premiums, and the policy given in evidence is expressed to be made "in consideration of the representations made in the application for this policy" and of the sums paid and to be paid for premiums, and the application contains no promise or agreement of the assured, there is no variance.

This was an action at law to recover upon a policy of life insurance issued by the plaintiff in error. Verdict for the plaintiff below, and judgment on the verdict. The defendant below sued out this writ of error. The case is stated in the opinion of the court.

Mr. M. F. Dickinson, Jr., for plaintiff in error, cited: *Woodruff* v. *Wentworth*, 133 Mass. 309; *Stone* v. *White*, 8 Gray, 589; *Pierce* v. *Charter Oak Insurance Co.*, 138 Mass. 151; *Shultz* v. *Mutual Life Insurance Co.*, 6 Fed. Rep. 672; *Cazenove* v. *British Assurance Co.*, 6 C. B. N. S. 437; *S. C.* on appeal,

29 Law Journal, N. S. (C. P.) 160; *Wright* v. *Equitable Life Assurance Co.*, 50 How. Pr. 367; *Thompson* v. *Weems*, 9 App. Cas. 671; *Jeffries* v. *Life Insurance Co.*, 22 Wall. 47; *Ætna Life Insurance Co.* v. *France*, 91 U. S. 510; *Insurance Co.* v. *Trefz*, 104 U. S. 197; *Carpenter* v. *Providence Washington Insurance Co.*, 16 Pet. 495; *London Assurance Co.* v. *Mansel*, 16 Ch. D. 363; *McDonald* v. *Law Union Insurance Co.*, L. R. 9 Q. B. 328; *Edington* v. *Ætna Life Insurance Co.*, 77 N. Y. 564; *S. C.* 100 N. Y. 536; *Rivaz* v. *Gerussi*, 6 Q. B. D. 222; *McLanahan* v. *Universal Insurance Co.*, 1 Pet. 170; *New York Life Insurance Co.* v. *Fletcher*, 117 U. S. 519; *McCoy* v. *Metropolitan Insurance Co.*, 133 Mass. 82; *Batchelder* v. *Queen Insurance Co.*, 135 Mass. 449; *Fowkes* v. *Manchester & London Insurance Co.*, 3 Fost. & Fin. 440; *S. C.* 3 B. & S. 915; *Dilleber* v. *Home Life Insurance Co.*, 69 N. Y. 256; *Connecticut Life Insurance Co.* v. *Union Trust Co.*, 112 U. S. 250; *N. Y. Mutual Life Insurance Co.* v. *Armstrong*, 117 U. S. 591; *Moulor* v. *Insurance Co.*, 101 U. S. 708; *In re General Provincial Life Assurance Co.*, 18 Weekly Reporter, 396; *American Insurance Co.* v. *Mahone*, 56 Miss. 180; *Roehner* v. *Knickerbocker Life Insurance Co.*, 63 N. Y. 160; *Railroad Co.* v. *Dubois*, 12 Wall. 47; *Taylor* v. *Ely*, 25 Conn. 250; *Insurance Co.* v. *Wolff*, 95 U. S. 326; *Devens* v. *Mechanics' & Traders' Insurance Co.*, 83 N. Y. 168; *Bennecke* v. *Insurance Co.*, 105 U. S. 355.

Mr. Robert M. Morse, Jr. (*Mr. William M. Richardson* was with him on the brief), for defendant in error, cited: *Hampshire Bank* v. *Billings*, 17 Pick. 87; *Stone* v. *White*, 8 Gray, 589; *American Insurance Co.* v. *Mahone*, 56 Miss. 180; *Connecticut Insurance Co.* v. *Luchs*, 108 U. S. 498; *Liberty Hall Association* v. *Housatonic Insurance Co.*, 7 Gray, 261; *Bardwell* v. *Conway Insurance Co.*, 122 Mass. 90; *Hall* v. *Peoples' Insurance Co.*, 6 Gray, 185; *Lorillard Fire Insurance Co.* v. *McCulloch*, 21 Ohio St. 176; *Towne* v. *Fitchburg Insurance Co.*, 7 Allen, 51; *Brennan* v. *Security Insurance Co.*, 4 Daly, 296; *Fowkes* v. *Manchester Insurance Co.*, 3 Fost. & Fin. 440; *Hoddson* v. *Guardian Life Insurance Co.*,

97 Mass. 144; *Frost* v. *Saratoga Insurance Co.*, 5 Denio, 154; *S. C.* 49 Am. Dec. 234; *Ames* v. *New York Union Insurance Co.*, 14 N. Y. 253; *Shearman* v. *Niagara Insurance Co.*, 46 N. Y. 526; *Bevin* v. *Conn. Insurance Co.*, 23 Conn. 244; *Bouton* v. *American Insurance Co.*, 25 Conn. 542; *Walsh* v. *Ætna Insurance Co.*, 30 Iowa, 133; *Insurance Co.* v. *Slockbower*, 26 Penn. St. 199; *North Berwick Co.* v. *New England Fire and Marine Co.*, 52 Maine, 336; *Reynolds* v. *Commercial Insurance Co.*, 47 N. Y. 597; *Kennedy* v. *Green*, 3 Myl. & K. 699; *Viele* v. *Germania Insurance Co.*, 26 Iowa, 9; *Von Bories* v. *United Insurance Co.*, 8 Bush, 133; *Westchester Co.* v. *Earle*, 33 Mich. 143; *Williamsburg Co.* v. *Cary*, 83 Ill. 453; *Anson* v. *Winnesheils Co.*, 23 Iowa, 84; *Jewett* v. *Home Insurance Co.*, 29 Iowa, 562; *Security Co.* v. *Fay*, 22 Mich. 467; *Horwitz* v. *Equitable Insurance Co.*, 40 Missouri, 557; *Pitney* v. *Glens Falls Co.*, 65 N. Y. 6; *Pechner* v. *Phœnix Insurance Co.*, 65 N. Y. 195; *Hadley* v. *Fire Ins. Co.*, 55 N. H. 110; *Fishbeck* v. *Phœnix Insurance Co.*, 54 Cal. 422.

Mr. Justice Gray delivered the opinion of the court.

This was an action brought by Sewell Raddin, and prosecuted by his administrator, upon a policy of life insurance, dated April 25, 1872, the material parts of which were as follows:

"This policy of assurance witnesseth, that the Phœnix Mutual Life Insurance Company of Hartford, Conn., in consideration of the representations made to them in the application for this policy, and of the sum of one hundred and fifty-two dollars and ten cents, to them duly paid by Sewell Raddin, father, and of the semi-annual payment of a like amount on or before the twenty-fifth day of April and October in every year during the continuance of this policy, do assure the life of Charles E. Raddin, of Lynn, in the county of Essex, State of Massachusetts, in the amount of ten thousand dollars, for the term of his natural life."

"This policy is issued and accepted by the assured upon the following express conditions and agreements," namely, among

others, that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void."

The application was signed by Sewell Raddin, both for his son and for himself, and contained twenty-nine printed "questions to be answered by the person whose life is proposed to be insured, and which form the basis of the contract," three of which, with the written answers to them, and the concluding paragraph of the application, were as follows:

"10. Is the party addicted to the habitual use of spirituous liquors or opium?	No.
"28. Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy?	$10,000, Equitable Life Assurance Society.
"29. Is the party and the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy, and forfeit all payments thereon?	Yes.

"It is hereby declared, that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that this application shall form the basis of the contract for insurance, which contract shall be completed only by delivery of policy, and that any untrue or fraudulent answers, any suppression of facts, or should the applicant become, as to habits, so far different from

condition now represented to be in, as to make the risk more than ordinarily hazardous, or 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."

It was admitted at the trial that all premiums were paid as they fell due; that Charles E. Raddin died July 18, 1881; and that at the date of this policy he had an endowment policy in the Equitable Life Assurance Society for $10,000, which was afterwards paid to him.

One of the defences relied on at the trial was that the answer to question 28 in the application was untrue, and that there was a fraudulent suppression of facts material to the insurance, because the plaintiff, by his answer to that question, "$10,000, Equitable Life Assurance Society," intended to have the defendant understand that the only application which had been made to any other company for assurance upon the life of his son was one made to the Equitable Life Assurance Society, upon which that society had issued a policy of $10,000; whereas in fact the plaintiff, within three weeks before the application for the policy in suit, had made applications to that society and to the New York Life Insurance Company for additional insurance upon the son's life, each of which had been declined.

The defendant offered to prove that the two other applications were made and declined as alleged, and that the facts as to the making and the rejection of both those applications were known to the plaintiff, and intentionally concealed by him, at the time of his application to the defendant; and upon these offers of proof asked the court to rule, First, that the answer to question 28 was untrue, and therefore no recovery could be had on this policy; Second, that there was a suppression of facts by the plaintiff, and therefore he could not recover; and Third, "that the answer to question 28 must be construed to be an answer to all the clauses of that question, and as such was misleading, and amounted to a concealment of facts which the defendant was entitled to know and the plaintiff was bound to communicate."

But the court excluded all the evidence so offered, declined to give any of the rulings asked for, and ruled "that if the answer to one of the interrogatories of question 28 was true, there would be no breach of the warranty; that the failure to answer the other interrogatories of question 28 was no breach of the contract; and that if the company took the defective application, it would be a waiver on their part of the answers to the other interrogatories of that question."

The jury having returned a verdict for the plaintiff in the full amount of the policy, the defendant's exceptions to the refusal to rule as requested and to the rulings aforesaid present the principal question in the case.

The rules of law which govern the decision of this question are well settled, and the only difficulty is in applying those rules to the facts before us.

Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. *Moulor* v. *American Ins. Co.*, 111 U. S. 335; *Campbell* v. *New England Ins. Co.*, 98 Mass. 381; *Thomson* v. *Weems*, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet. 495; *Jeffries* v. *Life Ins. Co.*, 22 Wall. 47; *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484; *Macdonald* v. *Law Union Ins. Co.*, L. R. 9 Q. B. 328; *Edington* v. *Ætna Life Ins. Co.*, 77 N. Y. 564, and 100 N. Y. 536.

Where an answer of the applicant to a direct question of

the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. *Cazenove* v. *British Equitable Assurance Co.*, 29 Law Journal (N. S.) C. P. 160, affirming *S. C.* 6 C. B. N. S. 437. But where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial. *Connecticut Ins. Co.* v. *Luchs*, 108 U. S. 498; *Hall* v. *People's Ins. Co.*, 6 Gray, 185; *Lorillard Ins. Co.* v. *McCulloch*, 21 Ohio St. 176; *American Ins. Co.* v. *Mahone*, 56 Mississippi, 180; *Carson* v. *Jersey City Ins. Co.*, 14 Vroom, 300, and 15 Vroom, 210; *Lebanon Ins. Co.* v. *Kepler*, 106 Penn. St. 28.

The distinction between an answer apparently complete, but in fact incomplete and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. *Towne* v. *Fitchburg Ins. Co.*, 7 Allen, 51. But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. *Nichols* v. *Fayette Ins. Co.*, 1 Allen, 63.

In the contract before us, the answers in the application are nowhere called warranties, or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued;" and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must therefore be considered, not as warranties which

are part of the contract, but as representations collateral to the contract, and on which it is based.

The 28th printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the number of policy." The only answer written opposite this question is "$10,000, Equitable Life Assurance Society."

The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer.

But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object, the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance and in what company, and thus renders the fourth interrogatory irrelevant. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the 28th question, to determine that it was immaterial, for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclu-

sively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional.

The case of *London Assurance* v. *Mansel*, 11 Ch. D. 363, on which the insurers relied at the argument, did not arise on a question including several interrogatories as to whether another application had been made, and with what result, and the amount of existing insurance, and in what company. But the application or proposal contained two separate questions; the first, whether a proposal had been made at any other office, and, if so, where; the second, whether it was accepted at the ordinary premium, or at an increased premium, or declined; and contained no third question or interrogatory as to the amount of existing insurance, and in what company. The single answer to both questions was, "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." There being no specific interrogatory as to the amount of existing insurance, that answer could apply only to the question whether a proposal had been made, or to the question whether it had been accepted, and at what rates, or declined; and as applied to either of those questions it was in fact, but not upon its face, incomplete and therefore untrue. As applied to the first question, it disclosed only some and not all of the proposals which had in fact been made; and as applied to the second question, it disclosed only the proposals which had been accepted, and not those which had been declined, though the question distinctly embraced both. That case is thus clearly distinguished in its facts from the case at bar. So much of the remarks of Sir George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued without further inquiry, can hardly be reconciled with the uniform current of American decisions.

For these reasons, our conclusion upon this branch of the case is that there was no error, of which the company had a

right to complain, either in the refusals to rule, or in the rulings made.

Another defence relied on at the trial was that after the issue of the policy Charles E. Raddin became, as to habits of using spirituous liquors, so far different from the condition he was represented to be in at the time of the application, as to make the risk more than ordinarily hazardous, and thus to render the policy null and void.

The bill of exceptions, after showing that in support of this defence the defendant introduced evidence, which it is now unnecessary to state, because the exception to its admission was abandoned at the argument, contains this statement: "In rebuttal of the foregoing defence of change of habits on the part of the assured after the issuing of the policy, the plaintiff not only denied the fact, but offered evidence tending to show that the defendant was informed of such change in habits prior to its receipt of the last premium, and that it gave no notice to Sewell Raddin of its intention to cancel the policy. Evidence to the contrary was introduced by the defendant; and the questions of change of habits, knowledge thereof by the company, notice to Sewell Raddin, receipt of premium after knowledge, and waiver, were all submitted to the jury."

The whole charge to the jury is made part of the bill of exceptions, in accordance with a practice which this court for more than half a century has emphatically condemned, and has by repeated decisions, as well as by express rule, constantly endeavored to suppress. As long ago as 1822, Mr. Justice Story, speaking for the whole court, said: "The charge is spread *in extenso* upon the record, a practice which is unnecessary and inconvenient, and may give rise to minute criticisms and observations upon points incidentally introduced, for purposes of argument or illustration, and by no means essential to the merits of the case." *Evans* v. *Eaton*, 7 Wheat. 356, 426, 427. Opinions to the same effect have been delivered in many later cases. *Carver* v. *Jackson*, 4 Pet. 1, 80, 81; *Ex parte Crane*, 5 Pet. 190; *Conard* v. *Pacific Ins. Co.*, 6 Pet. 262, 280; *Magniac* v. *Thompson*, 7 Pet. 348, 390; *Gregg* v. *Sayre*, 8 Pet. 244, 251; *Stimpson* v. *West Chester Co.*, 3 How. 553; *Zeller* v. *Eck-*

ert, 4 How 289, 297; *United States* v. *Rindskopf*, 105 U. S. 418. And in 1832 this court adopted a rule, which, with slight verbal changes, has ever since remained in force, by which it was ordered, not only that the judges of the Circuit and District Courts should not allow any bill of exceptions containing the charge of the court at large to the jury in trials at common law, upon any ground of exception to the whole of such charge; but also, "that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court." Rule 38 of 1832, 6 Pet. iv and 1 How. xxxiv; Rule 4 of 1858 and 1884, 21 How. vi and 108 U. S. 574.

The disregard of this rule has caused the principal embarrassment in dealing with the question now under consideration.

The substance of the instructions to the jury on this part of the case was as follows: The judge directed the jury that if they should find that the assured was addicted to the habitual use of spirituous liquors at the date of the policy, or his habits afterwards changed in this respect so as to make the risk more than ordinarily hazardous, they would consider whether there had been a waiver on the part of the insurance company. The judge then told the jury that the plaintiff not only claimed that any misrepresentation as to the habits of the assured, or failure to inform the company of a change in those habits, had been waived by the company by accepting payment of a premium on or about April 25, 1881, after it had knowledge of the habits of the assured, or of the change in those habits; but further claimed that mere silence of the company, after knowledge of such change in habits, was a waiver of the violation of the provision of the policy. And the judge did charge the jury upon both the supposed grounds of waiver, instructing them that if the defendant had knowledge of the change in the habits of the assured before receiving the premium of April 25, 1881, the acceptance of that premium would be a waiver, which would estop the company to set up that the policy was forfeited for a breach of that provision; and further instructing them that if the company, having knowledge of the change in

the habits of the assured, did not give notice to the plaintiff of that change, and he was prejudiced in any way by the failure of the company to give such a notice, and by reason of this silence of the company did any act, or omitted to do any act, which prejudiced him, there was a like waiver and estoppel on the part of the company.

The bill of exceptions, after setting out the charge of the court, proceeds as follows: "To so much of the foregoing instructions as related to notice and waiver the defendant excepted, and asked the court to instruct the jury — 1. That no notice of the cancellation of the policy or termination of the risk was necessary, if the jury find the fact to be that the habits of the assured had so far changed from the condition represented to be in as to make the risk more than ordinarily hazardous. 2. That even if any notice were necessary at all, under any circumstances, until the company had completed its investigations, if the company acted in good faith and with reasonable despatch, they were not bound to give the notice; also that the receipt of the last premium, April 25, 1881, pending such investigations, would not amount to a waiver, especially if a much larger sum was tendered back when full knowledge was had by the company. The court refused these requests, and the defendant excepted thereto."

But the bill of exceptions does not state what the investigations and the tender were which are mentioned in the second request for instructions, or at what time or for what purpose either was made; nor does it show that any evidence had been introduced of prejudice to the plaintiff in consequence of the defendant's silence, or any other evidence upon the question of waiver, except that already mentioned, namely, that "the plaintiff offered evidence tending to show that the defendant was informed of such change in habits prior to its receipt of the last premium, and that it gave no notice to Sewell Raddin of its intention to cancel the policy," and that "evidence to the contrary was introduced by the defendant."

It does not therefore appear that the instructions requested, or the instructions given, except so far as they related to the effect of accepting payment of the last premium with previous

knowledge of the habits of the assured, had any application to the case on trial. Except as just mentioned, the bill of exceptions is in the same condition as that of which Mr. Justice Miller delivering a former judgment of this court, said: "There is in no part of this bill of exceptions any statement of the evidence. There is no statement that any evidence was offered, or that any was objected to. With the exception of the reference to it in the charge of the court, there is nothing to show what was proved, or what any of the evidence tended to prove. The prayers for instruction, therefore, may have been hypothetical and wholly unwarranted by any testimony before the jury." *Worthington* v. *Mason*, 101 U. S. 149, 151.

It follows that the only question upon the instructions of the court to the jury, which is open to the defendant on this bill of exceptions, is whether, if insurers accept payment of a premium after they know that there has been a breach of a condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. Upon principle and authority, there can be no doubt that it is. To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens. *Insurance Co.* v. *Wolff*, 95 U. S. 326; *Wing* v. *Harvey*, 5 D., M. & G. 265; *Frost* v. *Saratoga Ins. Co.*, 5 Denio, 154; [*S. C.* 49 Am. Dec. 234]; *Bevin* v. *Connecticut Ins. Co.*, 23 Conn. 244; *Insurance Co.* v. *Slockbower*, 26 Penn. Stat. 199; *Viele* v. *Germania Ins. Co.*, 26 Iowa, 9; *Hodsdon* v. *Guardian Ins. Co.*, 97 Mass. 144.

The only objection remaining to be considered is that of variance between the declaration and the evidence, which is thus stated in the bill of exceptions: "After the plaintiff had rested, the defendant asked the court to rule that there was a variance between the declaration and the proof, inasmuch as the declaration stated the consideration of the contract to be the payment of the sum of $152.10 and of an annual premium of $304.20, while the policy showed the consideration to be the representations made in the application as well as payment

of the aforesaid sums of money, and that an amendment to the declaration was necessary; but this the court declined to rule, to which the defendant excepted."

But the "consideration," in the legal sense of the word, of a contract is the *quid pro quo*, that which the party to whom a promise is made does or agrees to do in exchange for the promise. In a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the consideration on the part of the assured is his payment of the whole premium at the inception of the contract, or his payment of part then and his agreement to pay the rest at certain periods while it continues in force. In the present case, at least, the application is collateral to the contract, and contains no promise or agreement of the assured. The statements in the application are only representations upon which the promise of the insurer is based, and conditions limiting the obligation which he assumes. If they are false, there is a misrepresentation, or a breach of condition, which prevents the obligation of the insurer from ever attaching, or brings it to an end; but there is no breach of any contract or promise on the part of the assured, for he has made none. In short, the statements in this application limit the liability of the insurer, but they create no liability on the part of the assured. The expression at the beginning of the policy, that the insurance is made "in consideration of the representations made in the application for this policy," and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such.

Judgment affirmed.

BOFFINGER *v.* TUYES.

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

Argued January 14, 17, 1887. — Decided January 31, 1887.

The payment, after an adverse decree in the appellate court, of an agreed sum in compromise and settlement of his liability, by a surety on an appeal bond to the attorney of record in the suit, fully authorized by his principal to make the settlement and compromise, and a written receipt, signed by the attorney as attorney of record, stating that the money is paid "in full satisfaction of the decree rendered against" the surety, constitute an accord and satisfaction which can be set up in an action against the surety on the appeal bond; and proof that the proposition for compromise was made by defendant and accepted by plaintiff in the original suit, with the expectation that the litigation would be terminated, and that, notwithstanding this, other parties had taken a further appeal to this court to which the surety was not a party, is not admissible to vary the force of the satisfaction.

This was an action against sureties in an appeal bond. Judgment for defendants, to review which plaintiffs sued out this writ of error. The case is stated in the opinion of the court.

Mr. O. B. Sansum for plaintiffs in error.

Mr. Richard H. Browne for defendants in error. *Mr. Charles E. Schmidt* and *Mr. Charles B. Singleton* were with him on the brief.

Mr. Justice Matthews delivered the opinion of the court.

In a maritime cause of collision arising on the waters of the Mississippi River, the owners of the steamboat Sabine filed their libel in the District Court of the United States for the Eastern District of Louisiana, against the steamboat Richmond, to recover damages for the loss alleged to have been occasioned by the fault of the latter. The owners and claimants of the Richmond, being the plaintiffs in error in this

cause, defended against the libel filed by the owners of the Sabine, and also filed a cross libel, alleging damage to the Richmond in the collision caused by the fault of the Sabine, and claiming damages therefor. A decree was rendered in this cause June 5, 1873, against the steamboat Sabine and her owners, Sarah C. Shirley, R. F. Fuller, and America B. Selby, and Nathaniel C. Selby, her husband, together with Alfred Moulton, Charles Cavaroc, Jules Tuyes, and Achille Chiapella, the four last named being sureties for the owners of the Sabine in a bond for the sum of $8000, conditioned to pay any damages adjudged in favor of the owners of the Richmond as cross libellants in the suit, which the libellants had been required by the court to give. The amount of the decree against the owners of the Sabine, as principals, was $9750 damages, besides costs, and against each of the four named sureties the sum of $2000, that being the amount limited in the obligation as the several liability of each. From this decree all the parties appealed to the Circuit Court of the United States for the Eastern District of Louisiana. For the purpose of perfecting the appeal, Fuller, Moulton, Cavaroc, Tuyes, and Chiapella executed and filed an appeal bond in the sum of $20,000, the condition of which was that if they should prosecute their appeal to effect, and answer all damages and costs, and satisfy whatever judgment might be rendered against them if they failed to make their appeal good, the obligation should be void; and on this bond J. W. Hincks and Pierre S. Wiltz, two of the defendants in error, were sureties, each in the sum of $5000. The cause was heard on this appeal in the Circuit Court on the 11th of March, 1876, when a decree was rendered in the cause, dismissing the original libel, maintaining the cross libel, and condemning the original libellants, the owners of the steamboat Sabine, together with their sureties in the original bond of $8000, viz., Moulton, Cavaroc, Tuyes, and Chiapella, to pay to the owners of the steamboat Richmond as damages the sum of $7392.60, with costs. The decree of the Circuit Court as against Moulton, Cavaroc, Tuyes, and Chiapella, sureties as aforesaid, was several as against each in the sum of $2000, that being the

amount for which they respectively bound themselves. From this decree of the Circuit Court the owners of the steamboat Sabine, the original libellants, together with the Merchants' Mutual Insurance Company, the Mechanics' and Traders' Insurance Company, the Factors' and Traders' Insurance Company, the New Orleans Mutual Insurance Company, the Sun Mutual Insurance Company, the New Orleans Insurance Association, the Crescent Mutual Insurance Company, and the Commercial Insurance Company, all which insurance companies were libellants and intervenors in certain other similar causes consolidated with that of the original libel of the owners of the Sabine against the Richmond, joined in an appeal to the Supreme Court of the United States from the several decrees rendered in the consolidated causes, including that in which the present defendants in error were parties. The bond given for the prosecution of that appeal to the Supreme Court was in the sum of five hundred dollars, and did not operate as a supersedeas. The defendants in error in this cause were not parties to this appeal. The appeal from the decree of the Circuit Court was heard at the October term, 1880, of the Supreme Court, when it was ordered and decreed that the decree of the Circuit Court appealed from should be and the same was affirmed. Subsequently an execution was issued on the decree of the Circuit Court, running against Moulton, Cavaroc, Tuyes, and Chiapella, for the sum of $7292.60, with interest at five per cent. per annum from March 11, 1876, and costs. Motions were made on May 3, 1881, on behalf of Moulton and Tuyes, defendants in that execution, to quash the same on the ground that the said decree, as against each of the said sureties, had been satisfied and discharged. These motions came on to be heard June 16, 1881, on consideration whereof they were allowed, and the writ of *fieri facias* quashed, and the marshal ordered to desist from any further proceedings thereunder.

The plaintiffs in error thereafter, on the 7th of March, 1882, being the owners of the steamboat Richmond or their representatives, commenced this action against the defendants in error, as parties to the appeal bond given for the prosecution

of the appeal from the original decree of the District Court to the Circuit Court. The defendants rely upon two defences: 1st, That the matters in controversy were finally adjudged in their favor by the Circuit Court on the motion to quash the execution issued against them on its decree, so as to constitute an estoppel upon the principle of *res judicata;* 2d, That the decrees of the Circuit Court against them respectively were discharged by payments made and accepted in full satisfaction thereof, by way of compromise, prior to the appeal taken by the other parties to the Supreme Court of the United States. The cause came on to be heard before the Circuit Court on May 29, 1883, when the parties, having duly waived the intervention of a jury, submitted the cause to the court; on consideration whereof, the court rendered judgment in favor of the defendants. The object of the present writ of error is to reverse that judgment.

It appears from the bill of exceptions taken on the trial that the plaintiffs below, to maintain the issues on their part, put in as evidence in said cause the appeal bond, decree and final judgment, and the mandate of the Supreme Court of the United States, as the same are described and referred to in the plaintiffs' petition, and also the amount of costs taxed in the cause, amounting to the sum of $1593.45, and rested their case. Thereupon the defendants, to maintain the issues on their part, put in evidence, among other matters, the following:

1st. The decree rendered by the District Court against the owners of the Sabine in favor of the cross libellants, the owners of the Richmond, showing the amount decreed against the sureties on the bond of $8000 to be the sum of $2000 each.

2d. The decree of the Circuit Court in the same cause in the amount of $7392.60 *in solido* against the owners of the steamer Sabine, and against the sureties on the original bond for $8000 in the sum of $2000 each.

3d. The petition and allowance of the appeal from that decree to the Supreme Court of the United States, together with the appeal bond for the prosecution thereof.

4th. The record of the proceedings in the Circuit Court on the motion to quash the execution, together with the judg-

ment of the court allowing said motion and quashing the said execution.

5th. Four written papers signed by Kennard, Howe & Prentiss, attorneys of record for the owners of the steamer Richmond in the proceedings in admiralty, showing payments made by the parties respectively in satisfaction of the decree of the Circuit Court against them, which papers are as follows:

"U. S. Circuit Court.

"Sarah C. Shirley et als. *v.* St'r Richmond.

"Rec'd, New Orleans, July 3d, 1876, from Jules Tuyes, Esq., security on the bond given by libellants in the above cause to respond to the cross libel filed by N. S. Green et al., claimants of the steamer Richmond, the sum of eleven hundred and sixty-six $\frac{66}{100}$ dollars in full satisfaction of decree rendered against him in above entitled cause, and I hereby subrogate him to the rights of N. S. Green and owners of the st'r Richmond.

(Signed) "Kennard, Howe & Prentiss,

"*Att'ys for Owners of Richmond.*"

"Received, New Orleans, Sept. 28th, 1876, from Home Ins. Co., fifteen hundred dollars in full of all claims against said company arising out of a certain bond given in case No. 7057, U. S. Circuit Court (admiral appeal), entitled Sarah C. Shirley & others *v.* St'r Richmond & others, and Merchants' Mutual Ins. Co. *v.* St'r Sabine & others (consolidated); said bond, signed for $2000 by Alf. Moulton for the Home Co., being given to secure the payment of whatever judgment the Richmond and owners, cross libellants, should obtain against the Sabine owners. The above sum is in full settlement as a compromise of the Home Ins. Co.'s liability.

(Signed) "Kennard, Howe & Prentiss,

"*Att'ys for Richmond & Owners.*"

"U. S. Circuit Court.

"Sarah C. Shirley et als. *v.* St'r Richmond.

"Received, New Orleans, July 3d, 1876, from the New Orleans Insurance Association, for account of Mr. C. Cavaroc,

security on the bond given by libellants in the above cause to respond to the cross libel filed by N. S. Green & al., claimants of the st'r Richmond, the sum of $1166.66 dollars, in full satisfaction of decree rendered against said C. Cavaroc in above entitled cause, and I hereby subrogate the said New Orleans Insurance Association to the rights of N. S. Green and owners of the st'r Richmond.

"$1166.66. (Signed) KENNARD, HOWE & PRENTISS,
"*Att'ys for Owners of Richmond.*"

"U. S. Circuit Court.

"Sarah C. Shirley & als. *v.* St'r Richmond.

"Received, New Orleans, July 3d, 1876, from Mr. A. Chiapella, security on the bond given by libellants in the above cause to respond to the cross libel filed by N. S. Green & al., claimants of the st'r Richmond, the sum of eleven hundred and sixty-six $\frac{66}{100}$ dollars, in full satisfaction of decree rendered against him in above entitled cause, and I hereby subrogate him to the rights of N. S. Green and owners of the st'r Richmond.

(Signed) "KENNARD, HOWE & PRENTISS,
"*Att'ys for Owners of Richmond.*"

It was then proved by John Kennard, a member of the firm of Kennard, Howe & Prentiss, that he signed the papers by the firm name of Kennard, Howe & Prentiss, who were the attorneys for the steamer Richmond; that he received the sums of money in the said papers severally mentioned, and that he executed the said papers under plenary authority from the plaintiffs to make the compromise. The plaintiffs then offered to prove by the same witness that the proctors for the owners of the steamer Sabine opened a negotiation with him to compromise said case, and offered to pay the sum of $5000 for a compromise of the litigation then pending between the parties, and threatened an appeal from the decree and judgment of the Circuit Court, which had been rendered in favor of the owners of the steamer Richmond, unless said money should be accepted and said compromise effected; and that for the pur-

pose of ending said litigation he accepted said money and compromised said case; that it was expressly agreed by the parties to that cause that said litigation was then ended, and that no appeal should be taken from the said decree and judgment of the Circuit Court. To this offer and evidence the defendants objected on the ground that the papers in evidence constituted a contract in writing between the parties, and that no parol evidence impeaching them could be received. The court sustained the objection, and refused to hear the evidence, to which ruling the plaintiffs excepted.

It is not important to determine what effect, if any, should be given to the proceedings and order of the Circuit Court on the motion of the defendants Tuyes and Moulton to quash the execution issued on the decree against them. It does not appear from the record of these proceedings on what ground the judgment of the court was placed, and in its terms it is not final, as it merely quashes the particular writ of execution then in the marshal's hands, and directs him to take no further proceedings thereunder. If it had been based upon a finding of a payment of the decree, or of an accord and satisfaction equivalent to payment, and had directed satisfaction of the decree to be entered of record, as it clearly had power to do in such a proceeding, the judgment would have been conclusive as a defence to the bond in suit, notwithstanding the summary character of the proceeding. *United States* v. *McLemore*, 4 How. 286; *Perkins* v. *Fourniquet*, 14 How. 328. But the introduction of the record of these proceedings as evidence did not prejudice the plaintiffs in error, for the other evidence in the cause, and which no doubt is the same on which the Circuit Court acted in that proceeding, shows an accord and satisfaction equivalent to a payment of the decree, and, in equity, to a satisfaction and discharge. It is so expressed in each of the papers executed at the time, which, although they are in one sense receipts acknowledging the payment of money, are also written evidence of an executed agreement by which the money was received in full payment and settlement of the decree and of the bond given for its payment now sued on. It is shown that the attorneys for the

owners of the Richmond, who signed those receipts, were fully authorized to do so. The contract in each case is with the individual defendant for a satisfaction of the decree rendered against him severally. The payment and receipt of the money in pursuance of the agreement amounted to a release of errors, so that there was a valuable consideration to sustain the contract whereby a less sum than the amount due by the decree was received in full payment.

The offer on the part of the plaintiffs in error to prove by parol another condition of the contract, viz., that the other defendants, the owners of the steamboat Sabine, and the intervenors and other parties, the several insurance companies who had become parties to the appeal, should not take and perfect an appeal to the Supreme Court of the United States, was rightly rejected, because such parol evidence necessarily varied and contradicted the written agreement of the parties. The papers in evidence established a complete accord and satisfaction fully performed, in pursuance of an agreement to extinguish the liability of the defendants by reason of the original decree, and so to satisfy the obligation of the bond on which they are sued. The right of the defendants to appeal from the decree, and the fact that they had declared their intention to do so, created such a dispute in respect to their liability as made it a proper subject of compromise. A compromise was made and fully performed on their part; they paid the money, which was received in payment of the decree, and took no appeal. It is not now open to the plaintiffs in error to treat this payment merely as a credit on account and hold the defendants to their original liability. *United States* v. *Child*, 12 Wall. 232; *Oglesby* v. *Attrill*, 105 U. S. 605.

The technicality difficulty, that there can be no satisfaction and discharge of a judgment or decree, except by matter of record, *Mitchell* v. *Hawley*, 4 Denio, 414; *S. C.* 47 Am. Dec. 260, cannot be interposed. At common law actual payment of a debt of record could not be pleaded in bar of an action for the recovery of the debt. This has been changed by statute both in England and in this country, and no reason can be assigned why an accord and satisfaction should not have

Counsel for Plaintiffs in Error.

the same effect. In the present case the action is not on the decree, but on the appeal bond, and for the recovery of damages arising from the breach, as to which matters *in pais*, such as payment or accord and satisfaction, were always a good plea.

Judgment affirmed.

MEYERS *v.* BLOCK.

MEYERS *v.* LEVI.

ERROR TO THE SUPREME COURT OF LOUISIANA.

Argued December 15, 16, 1886. — Decided January 31, 1887.

An injunction bond in an action in the District Court of the United States for the District of Louisiana conditioned that the obligors "will well and truly pay the" obligee, "defendant in said injunction, all such damages as he may recover against us in case it should be decided that the said writ of injunction was wrongfully issued," which bond was made under an order of court, "that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from the effects of said injunction" is a sufficient compliance with the order of the court, and when construed with reference to the rule prevailing in the Federal courts (contrary to that prevailing in the state courts of Louisiana), that without a bond and in the absence of malice no damages can be recovered in such case, means that the obligors will pay such damages as the obligee may recover against them in a suit on the bond itself, whether incurred before or after the giving of the bond.

Bein v. *Heath*, 12 How. 168, distinguished.

These were actions at law in a state court of Louisiana against the obligors on an injunction bond given in an action brought in the District Court of the United States for the District of Louisiana. Judgments for plaintiff, which were affirmed by the Supreme Court of the state on appeal. Defendants sued out these writs of error. The facts which make the Federal question are stated in the opinion of the court.

Mr John H. Kennard, for plaintiffs in error. *Mr. William Wirt Howe* was with him on the brief.

Opinion of the Court.

Mr. Gus. A. Breaux for defendants in error.

Mr. Justice Bradley delivered the opinion of the court.

These are suits on injunction bonds given by the plaintiffs in error to the defendants in error respectively, Friedlander being a surety.

On the 20th of January, 1874, Meyers & Levi, Lehman, Godchaux & Co., and Michael Frank filed a petition in the District Court of the United States for the District of Louisiana to have their alleged debtors, Block Brothers, a firm composed of Simon and Joseph Block, declared bankrupts; and the petition charged, amongst other things, that the alleged bankrupts had, on the 9th of January preceding, sold a certain store of goods, situated at Opelousas, to Solomon Isaacs, their brother-in-law, with intent to defraud their creditors. At, or immediately after, the filing of the petition in bankruptcy, the petitioning creditors filed a special petition for an injunction to prevent Isaacs from disposing of the store or its contents. A similar petition was filed against David Block, a brother of the members of the firm of Block Brothers, alleging that the bankrupts had sold to him another store of goods at Opelousas with intent to defraud their creditors. Writs of arrest and provisional seizure were issued against the bankrupts, and injunctions against Solomon Isaacs and David Block, in accordance with the prayers of the several petitions. Applications were immediately made by the parties to set these proceedings aside, and such a showing was presented to the District Court that on the 31st of January the following order was made, to wit:

"The rules to set aside the arrest, provisional seizure and injunction came up, . . . when, after hearing the pleadings, evidence and arguments, it is ordered by the court that the writs of arrest and provisional seizure be set aside, but that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from the effects of said injunction in such sum as will be fixed by the court upon ascertaining the value of the property, and to that

end the parties shall take their evidence before Register Kellogg."

Evidence having been taken under this order, the court, on the 7th of February, 1874, made the following order, to wit:

"After hearing counsel on both sides, it is ordered by the court that the complaining creditors do give bond and security in the sum of $5000 in favor of Solomon Isaacs, and another bond in the sum of $1500 in favor of David Block, to save the parties harmless from the effects of the injunction issued in this cause."

Bonds were accordingly given in pursuance of these orders, and the injunctions were retained. Motions to dissolve them, however, were pressed, and after a large amount of evidence had been taken and laid before the court, they were dissolved on the merits on the 18th and 20th of March, 1874.

The bonds referred to were executed for the respective penalties required, but the conditions did not follow the precise terms of the orders. The bond given to Isaacs (with which that given to Block corresponded) was in the following words, to wit:

"Know all men by these presents that we, Meyers & Levi, Meyer Weill, Michael Frank, and Samuel Friedlander, are held and firmly bound, jointly and severally, unto Solomon Isaacs in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said Solomon, &c. Dated 19th February, 1874.

"Whereas the said Meyers & Levi, Meyer Weill, and Michael Frank have presented a petition to the honorable the District Court of the United States for the District of Louisiana, praying for a writ of injunction against the said Solomon Isaacs: Now, the condition of the above obligation is, that we, the above bounden Meyers & Levi, Meyer Weill, and Michael Frank, and ———, will well and truly pay to the said Solomon Isaacs, the defendant in said injunction, all such damages as he may recover against us in case it should be decided that the said writ of injunction was wrongfully issued."

(Signed) "Meyer Weill, M. Frank, Lehman, Godchaux & Co., Meyers & Levi, Sam'l Friedlander."

Opinion of the Court.

In January, 1875, suits were brought on these bonds by Solomon Isaacs and David Block, respectively, in the Sixth District Court for the parish of Orleans, to recover the damages sustained by reason of the injunctions, and on the 30th day of March, 1876, judgment was rendered in favor of Isaacs for the sum of $3250, with interest from judicial demand, and costs; and on the 22d of November, 1877, judgment was rendered in favor of Block for $1500, (the whole penalty of the bond,) with interest and costs.

These judgments were severally appealed to the Supreme Court of Louisiana, and, after much consideration, were affirmed. The cases are now here on writs of error to the latter court; and the same errors are assigned in both cases, namely:

First. The Supreme Court of Louisiana erred in subjecting the plaintiffs in error to the law and jurisprudence of Louisiana, when they were parties to an injunction bond given in equity in and by order of the Federal court.

Second. The Supreme Court of Louisiana erred in holding that the bond was regular.

Third. The Supreme Court of Louisiana erred in holding that an action could be maintained on the bond in suit before its condition was broken.

Fourth. The Supreme Court of Louisiana erred in holding that the bond in suit, construed with the order requiring it, could cover and bind the obligors for damages which had been sustained before it was given.

For supporting the first three assignments of error, reliance is mainly placed on the case of *Bein* v. *Heath*, 12 How. 168. There an injunction had been obtained in the Circuit Court of the United States for the Eastern District of Louisiana to suspend proceedings of seizure and sale under a mortgage, and to obtain the injunction the complainants were required, by order of the court, to give bond, with sureties, to answer all damages which the defendant might sustain in consequence of said injunction being granted, should the same be thereafter dissolved. The bond given was conditioned that the principal and sureties would pay to the defendant in the injunction (the plaintiff in the case of seizure and sale) all such damages as

she might recover against them in case it should be decided that the said injunction was unlawfully obtained; being in nearly the same form as the bonds now in controversy. The case proceeded to hearing, and a decree was made establishing the mortgage and dissolving the injunction, which decree was affirmed on appeal to this court. The mortgage debt was over $11,000, besides interest and costs. The property mortgaged was sold for $7000. Suit was then brought, in the same court, on the injunction bond, the plaintiff claiming not only damages for expense and delay, but ten per cent. per annum on the amount of the debt. The cause was tried by the court without a jury. On the trial, the court allowed the plaintiff, in proof of damages sustained, to give evidence of counsel fees and other expenses incurred by the plaintiff before the injunction was issued, and of the value of lawyers' services in this court not paid for, and of the amount of the rents and profits of the mortgaged premises pending the suit; to all of which exceptions were taken; and judgment was rendered for the penalty of the bond, the court being of opinion that the damages from the injunction were greater than that amount.

This court, on writ of error brought, reversed the judgment, Chief Justice Taney delivering the opinion. The bond was regarded by this court as a departure from the order requiring it, and as being in effect equivalent to an injunction bond given to suspend seizure and sale under the Louisiana practice, which operates as a security for the debt, as well as the damages arising from the injunction, the same as a recognizance in error in the English practice. Such a bond requires a recovery against the parties before the condition is broken; that is, a judgment for the debt in suit. This the court considered as entirely different from the bond required by a court of equity as a condition of granting an injunction, and different from the bond required by the order of the court in that case. "In proceeding upon such a bond," said the Chief Justice, "the court would have no authority to apply to it the legislative provisions of the state. The obligors would be answerable for any damage or cost which the adverse party sustained by reason of the injunction, from the time it was issued until

it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit." The Chief Justice also referred to the fact that no recovery had been had against the parties — nothing but a seizure and sale of the mortgaged premises — and a dissolution of the injunction; and, therefore, as the court construed the bond, the contingency on which the obligors agreed to pay had not happened, and the condition of the bond was not broken. Under the construction given to the bond in that case, the court could not well do otherwise than reverse the judgment of the Circuit Court.

But, according to our view, the bonds sued on in the cases before us do not demand any such construction. It is plain that they could not be intended as security for any debt or demand in litigation, but as security only for the damages that might be sustained by the issuing of the injunctions. The condition is to pay "all such damages as he [Isaacs, in the one case, and Block, in the other] may recover against us in case it should be decided that the said writ of injunction was wrongfully issued." Recover, how? By the law of Louisiana damages may be recovered for suing out an injunction without just cause, independently of a bond. 3 La. 291. But this cannot be done in the United States courts. Without a bond no damages can be recovered at all. Without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything. When, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them, it must mean that they will pay such damages as he may recover by a suit on the bond itself. Otherwise it is senseless and vain. Construed in this way, it is in strict conformity with the order which required it. It is in this way that the bonds in question were finally construed by the

Supreme Court of Louisiana, and we think that its construction was right. In its opinion in the Block case the court says: "Under our construction we find no difference in the obligation of parties 'to save David Block harmless from the effects of an injunction issued against him,' and the obligation contracted in this bond, 'to pay to David Block, the defendant in said injunction, all such damages as he may recover against the obligors in case it should be decided that the said writ of injunction was wrongfully issued.' We, therefore, hold that the bond in this case did comply with the condition prescribed in the judge's order, and that it was a valid bond." The court not only construed the bonds in this way, but decided the cases upon this view as to their meaning and effect, awarding to the plaintiffs respectively only such damages as arose from the effects of the respective injunctions. The actions were brought to recover such damages. The petition in each case set forth the facts, showing the injuries which the plaintiff sustained as the immediate result of the injunction, and based his claim to a recovery entirely on the damages arising from such injuries. The evidence was directed to the establishment of these facts, and conformed to the allegations of the petition. The court, in its opinion in the case of David Block, after showing that the bond must be construed as intended to cover these damages, says: "After a careful examination and consideration of the evidence in the record, we are satisfied that plaintiff suffered damages to the full extent of the amount allowed him by the lower court. The judgment appealed from is therefore affirmed." In the case of Isaacs, the court at first reversed the judgment of the inferior tribunal, conceding that the order of the District Court required security for the entire damages, past as well as future, but considering the bond as not framed in conformity with it, and as not covering any damages but such as arose after it was given, as to which there was no distinct evidence. Supposing, however, that damages might be recovered against the plaintiffs in the injunction independently of the bond, the court reserved to Isaacs the right to bring a suit for that purpose. But on a rehearing of the case, and after the argument and

decision in the Block case, the court came to a different conclusion, and held that the bond was in substantial conformity with the order, and was to be construed as intended to save the parties harmless from the effects of the injunction, adopting in all things the views expressed in the opinion in the Block case. It then adds: "This leaves open for consideration the question of the *quantum* of damages allowed by the judgment appealed from. We have gone over the evidence on this point with care and deliberation, and reviewed all the authorities cited bearing on this point, the same in both cases, and are satisfied that the amount awarded by the judgment is fully justified and sustained by the proof and the law." The court thereupon set aside its former judgment and affirmed that of the inferior court.

The fourth assignment of error is that the court erred in holding that the bond, construed with the order requiring it, bound the obligors for damages sustained before it was given. The solution of the question raised by this assignment depends upon the fair construction of the order, and of the bond given in pursuance of it, and read (as it should be read) in the light of it. The order was "that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from *the effects of said injunction*." The last words clearly mean *all the effects* of the injunction. The condition of the bond was, to pay "all such damages as he [the obligee] may recover against us in case it should be decided that the said writ of injunction was wrongfully issued." It seems plain to us that all the damages arising from the wrongful issue of the injunctions were intended to be covered by the bond as well as by the order; in other words, that the bond was intended and understood as a compliance with the requirements of the order. That is the natural and obvious meaning of its language when the two are read together; and the parties signing the bond must be presumed to have been cognizant of the order under which it was given.

It is unnecessary to review the authorities on this subject. It is undoubtedly true, that a surety cannot be held beyond

the terms or legal effect of his engagement; and when that has respect to the conduct or fidelity of the principal, or to any other matter usually contemplated as arising in the future, it is to be interpreted prospectively, and not retrospectively. But if, from the nature of the case, the subject of guaranty is a past transaction in whole or in part, and the language of the engagement, taken in its natural sense or legal effect, is broad enough to cover it, such language may properly be construed to do so.

As to the power of a court of equity to impose any terms in its discretion as a condition of granting or continuing an injunction, there can be no question. This subject is considered in the case of *Russell* v. *Farley*, 105 U. S. 433.

We see no error in the judgments of the Supreme Court of Louisiana in these cases, and they are affirmed, with costs.

Affirmed.

UNITED STATES *v.* RAMSAY.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 20, 1886. — Decided January 17, 1887.

On the 29th April, 1871, A gave notice to a collector of internal revenue of frauds upon the revenue by a railroad company, whereby it had become liable to penalties. In consequence of this information an action was commenced for the recovery of the penalties, which resulted in a compromise in June, 1874, and the payment of a sum by the company in discharge of its liability. A applied for the informer's share of this sum under the provisions of § 179, act of June 30, 1864, 13 Stat. 305, as amended by the act of July 13, 1866, 14 Stat. 145. It was conceded that A was the informer as claimed, and that he was entitled to the amount claimed, if the duty and power to make the payment were not taken away by § 39 of the act of June 6, 1872, 17 Stat. 256, repealing those previous provisions. Payment was refused at the treasury, whereupon claimant brought suit in the Court of Claims, and obtained judgment for the recovery of his claim. On appeal this court affirms that judgment by a divided court.

SECTION 179 of the act of June 30, 1864, 13 Stat. 305, as amended by the act of July 13, 1866, 14 Stat. 145, was as

Statement of Facts.

follows: "That, where it is not otherwise provided for, it shall be the duty of the collectors, in their respective districts, and they are hereby authorized, to prosecute for the recovery of any sum or sums that may be forfeited; and all fines, penalties, and forfeitures which may be imposed or incurred shall and may be sued for and recovered, where not otherwise provided, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred, or before any court of competent jurisdiction. And where not otherwise provided for, such share as the Secretary of the Treasury shall, by general regulations, provide, not exceeding one moiety, nor more than five thousand dollars in any one case, shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty, or forfeiture, who shall first inform of the cause, matter, or thing whereby such fine, penalty, or forfeiture shall have been incurred; and when any sum is paid without suit, or before judgment, in lieu of fine, [penalty,] or forfeiture, and a share of the same is claimed by any person as informer, the Secretary of the Treasury, under general regulations to be by him prescribed, shall determine whether any claimant is entitled to such share as above limited, and to whom the same shall be paid, and shall make payment accordingly. It is hereby declared to be the true intent and meaning of the present and all previous provisions of internal revenue acts granting shares to informers, that no right accrues to or is vested in any informer in any case until the fine, penalty, or forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid, when the informer shall become entitled to his legal share of the sum adjudged or agreed upon and received: *Provided*, That nothing herein contained shall be construed to limit or affect the power of remitting the whole or any portion of a fine, penalty, or forfeiture conferred on the Secretary of the Treasury by existing laws."

The Secretary of the Treasury, after the passage of the

above act, issued a circular fixing the amount of informers' shares, one of which was forwarded to the deceased husband of the claimant Ramsay at his request.

Section 39 of the act of June 6, 1872, which took effect August 1, 1872, was as follows:

"That so much of section one hundred and seventy-nine of the act of July thirteenth, eighteen hundred and sixty-six, as provides for moieties to informers be, and the same is hereby, repealed; and the commissioner of internal revenue, with the approval of the Secretary of the Treasury, is hereby authorized to pay such sums, not exceeding in the aggregate the amount appropriated therefor, as may in his judgment be necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law; and for this purpose there is hereby appropriated one hundred thousand dollars, or so much thereof as may be necessary, out of any money in the treasury not otherwise appropriated."

Section 46 of the same act of June 6, 1872, 17 Stat. 258 was as follows: "Sec. 46. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed: Provided, That all the provisions of said act shall be in force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts, the right to which has already accrued, or which may hereafter accrue, under said acts, and for maintaining, continuing, and enforcing liens, fines, penalties, and forfeitures incurred under and by virtue thereof. And this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved, and all suits and prosecutions for acts already done in violation of any former act or acts of Congress relating to the subjects embraced in this act may be commenced or proceeded with in like manner as if this act had not been passed."

The allegations in the claimants' petition were as follows: "The claimant Sarah E. Ramsay is the widow in community of G. Alexander Ramsay, late of the parish of Orleans, in the

state of Louisiana, deceased, and the claimant Anna E. Wagner is the daughter and sole heir of said G. Alexander Ramsay, and these claimants have been recognized as such widow and heir by the civil district court for the said parish of Orleans, and have been put in possession by said court, of all the property, real, personal, and mixed, of said Ramsay, together with all his rights of action, including particularly this claim, and are the legal representatives of said G. Alexander Ramsay in his personal estate. . . ."

"Said G. Alexander Ramsay, on the 29th day of April, in the year 1871, being cognizant of the fact that the Houston and Texas Central Railway Company, a corporation of the state of Texas, had committed frauds upon the internal revenue of the United States, and was indebted to the United States in a large amount for back taxes, and that by its said frauds and non-payment of taxes it had become liable to heavy penalties, to wit, in the sum of forty thousand dollars, and having, upon inquiry made by him, been furnished by the commissioner of internal revenue with a circular issued by the Secretary of the Treasury, prescribing the rewards to be paid to informers who should give information in regard to cases of that character, did inform the said commissioner of internal revenue of the frauds and delinquencies aforesaid; and thereupon the attorney of the United States for the eastern district of Texas brought suits in the name of the United States, in the district court of the United States for said district, against the said Houston and Texas Central Railway Company for forty penalties of one thousand dollars each, which said suits were compromised in June, 1874, before judgment, by the payment by said railroad company to the United States of fifteen thousand six hundred and ninety-four dollars and three cents, which sum was divided or distributed into the following items: Five thousand dollars as or in lieu of penalties; five thousand five hundred and twenty-one dollars and eighty-seven cents for tax unpaid; one thousand eight hundred and thirty-four dollars and ninety-five cents for interest thereon, and three thousand three hundred and thirty-seven dollars and twenty-one cents for costs of court.

"Thereafter, in 1875 and 1876, the said G. Alexander Ramsay made application to the Secretary of the Treasury for a share of said sum so received in compromise, but no decision was made by the said Secretary of the Treasury on his said application, and the said application remained pending in the said Treasury Department before the said Secretary until the year 1885, when said Ramsay applied to the Secretary of the Treasury to take up said claim to ascertain as required by law whether the said Ramsay was or was not the informer, to determine the share falling due to him as such under the terms of the aforesaid circular, and having determined these questions, either to order the claim paid or to refer the claim, under § 1063 of the Revised Statutes of the United States, to this court for adjudication. Said Secretary having been thus requested to decide this question, did, on the sixth day of November, in the year 1885, adjudicate and decide that the said Ramsay was the first informer against the aforesaid railway company; that the information given by him led to the recovery from said company of penalties amounting to five thousand dollars; and that the informer's share of that amount was one thousand seven hundred dollars. Said Secretary, however, while making the said award, declared that he preferred not to order the payment of the said amount without a judicial construction from this court of the question whether the 179th section of the act of June 30th, 1864, as amended by the act of July 13th, 1866, was or was not repealed by the 39th section of the act of June 6th, 1872, as to cases in which information had been given prior to the passage of the last-named act. But the said Secretary made his decision as aforesaid, upon the question of fact as to the proper informer with the avowed object and purpose of obtaining from this court a judicial construction of the said 39th section of the act of June 6th, 1872, which construction as applied to the present case this petition is now filed to obtain. The claimants therefore claim, under and by virtue of the said decision and award made by the Secretary of the Treasury, which decision is annexed to this petition and made a part thereof, one thousand seven hundred dollars. In case, how-

ever, this honorable court shall decide that these claimants are not limited in the amount by the terms of the award of the said Secretary of the Treasury, then these claimants claim that the amount of the said G. Alexander Ramsay's share should be computed upon the entire amount obtained by the United States from said railway company, and the claimants aver that the amount prescribed by the original circular of August 14th, 1866, was the sum of two thousand eight hundred and fifty dollars on the first twelve thousand dollars, and five per cent. on all over twelve thousand dollars, making the share of said Ramsay on the said fifteen thousand six hundred and ninety-four dollars and three cents, the sum of three thousand and thirty-four dollars and seventy cents, which amount they claim.

"The said G. Alexander Ramsay, in his lifetime, after failing to obtain satisfactory action from the Treasury Department, did, on the third day of September, 1877, file a claim in this honorable court to recover the amount of his share as informer, which claim, for the reason that the Secretary of the Treasury had not yet ascertained and decided that said Ramsay was the informer in the case, or whether there was any informer, was by this honorable court on the 5th day of May, 1879, dismissed for want of jurisdiction. A bill for the relief of the said Ramsay has been several times presented in Congress, but no action taken thereon until the first session of the 48th Congress, when the same was referred to this honorable court, under the act of March 3d, 1883, for a finding of facts, and a finding of facts was on the 15th day of May, 1884, made by this court and reported to Congress, and thereafter, on the 5th day of July, 1884, a favorable report was made on his claim by the Committee on Claims of the House of Representatives, but was not acted upon by the said House.

"No other action than as aforesaid has been had on this claim in Congress or by any of the departments.

"The claimants are the sole owners of this claim, and the only persons interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

"The claimants are justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets. The claimants are, and said G. Alexander Ramsay was, citizens of the United States, and have at all times borne true allegiance to the Government thereof, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimants believe the facts as stated in this petition to be true. And the claimants demand judgment for three thousand and thirty-four dollars and seventy cents ($3034.70)."

The "decision and award of the Secretary" of the Treasury annexed to the claimant's petition was as follows:"

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"*Washington, D. C., November* 6, 1885.

"GEORGE A. KING, Esqr.,
"*Attorney for G. Alexander Ramsay,*
"1420 *New York Avenue, Washington, D.C.:*

"SIR: In your letter of the 31st ultimo, in behalf of your client, G. Alexander Ramsay, you state that all you ask is 'that you, Mr. Secretary, will adjudicate and decide upon the evidence before you a plain, simple question of fact, never before considered or decided in any manner by yourself or any of your predecessors, or any of your or their assistants, namely, whether Mr. Ramsay was, or was not, the first informer whereby the sum of $5000.00 penalties, and $10,694.03 tax, interest, and costs, were recovered from the Houston and Texas Central Railway Company, for frauds upon the revenue; and that having decided this question, you will refer the case to the Court of Claims, under § 1063 of the Revised Statutes, for trial and adjudication.'

"In reply, I have to say that the claim of your client referred to, although presented to the Secretary of the Treasury in the year 1875, as shown by the records of this office, has never been formally rejected by any Secretary of the Treasury.

"The records show also that no Secretary of the Treasury has ever ascertained and determined whether there was any

informer in the case referred to, nor has it ever been determined and declared formally by any Secretary whether your client, Mr. Ramsay, was or was not the first informer in this case.

"All that is shown by the records of this office on this point is that Mr. Ramsay was notified by the Commissioner of Internal Revenue that he was not entitled to the share for which he made application, because the act of June 6, 1872, repealing informers' shares, went into effect before the case in which he claimed the share had been compromised, and that the claim was merely marked 'too late,' that no finding or award was made, and that no letter of rejection was written by the Secretary to the claimant.

"In this state of the case I see no objection to complying with your request, so far as to state that it clearly appears from the evidence on file in this case that your client, George Alexander Ramsay, was the first informer against the Houston and Texas Central Railway Company, and that the information given by him led to the recovery from said company of penalties amounting to $5000.00.

"The informer's share of that amount would have been $1700.00, under the schedule of shares prescribed by the Secretary of the Treasury in a circular issued by him, August 14, 1866, pursuant to the authority conferred by § 179 of the act of June 30, 1864, 13 Stat. 305, as amended by the act of July 13, 1866, 14 Stat. 145. This amount was not paid, because said § 179 was repealed by § 39 of the act of June 6, 1872, 17 Stat. 256, which took effect August 1, 1872, § 47, and the Department held, under the wording of said § 179, viz.: 'That no right accrues to or is invested in any informer in any case until the fine, penalty, or forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid,' that unless the amount of the fine, penalty, or forfeiture had been both fixed and paid to the Government prior to August 1, 1872, no share of the same could be paid to the informer, and that as the case in question was not compromised until in 1874, Mr. Ramsay was not entitled to receive the allotted share.

"That the present Secretary is not bound to accept and act upon this construction of the law is made plain by the decision of the Supreme Court of the United States in the case of the *United States* v. *MacDaniel*, 7 Pet. 1, wherein it is said: 'It will not be contended that one Secretary has not the same power as another to give a construction to an act which relates to the business of his Department.'

"Nevertheless, as the construction referred to has been applied, as I am informed, to a large number of cases, and has been acquiesced in from 1875 to the present time, I prefer not to set it aside without the authority of a judicial construction, and therefore I decline to award or order the payment of the share claimed by Mr. Ramsay in this case.

"It is presumed that upon this official action your client will now be in a condition to prosecute his claim in the Court of Claims, and that that court will have full jurisdiction of the case.

"Very respectfully,

"D. MANNING,

"*Secretary.*"

The defendants to this petition filed a general demurrer as follows:

"And now come the said defendants, by their Attorney General, and demurring to the petition in this cause, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

"ROBERT A. HOWARD,

"*Assistant Attorney General.*"

The Courts of Claims rendered judgment for the whole amount of the claim, from which the United States took this appeal.

Mr. Attorney General and *Mr. F. P. Dewees* for appellant.

Mr. George A. King and *Mr. William W. Handlin* for appellees.

Mr. Chief Justice Waite announced that the judgment of the Court of Claims was

Affirmed by a Divided Court.

EVERHART *v.* HUNTSVILLE COLLEGE.

CLAY *v.* HUNTSVILLE COLLEGE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

Argued January 20, 1887. — Decided January 31, 1887.

An averment that the complainant in a bill of equity "resides" in a state is not an averment that he is a citizen of the state, so as to give a Circuit Court of the United States jurisdiction over the subject-matter by reason of citizenship of the parties.

When the jurisdiction of a Circuit Court depends upon the citizenship of the parties, and that court takes jurisdiction and renders judgment, and the record in this court in error or on appeal fails to show the requisite citizenship, the judgment will be reversed and the case remanded by this court on its own motion, and the party in default adjudged to pay costs here.

THESE two causes were argued and submitted together. The case is stated in the opinion of the court.

Mr. Milton Humes for appellant Everhart.

Mr. Samuel F. Rice for appellant Clay.

Mr. John D. Brandon for appellees. *Mr. D. D. Shelby* and *Mr. L. P. Walker*, also for appellees, submitted on their brief.

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

These are appeals from a decree dismissing the original bill and a cross-bill in a suit begun in the Circuit Court of the United States for the Northern District of Alabama, by George M. Everhart against the Huntsville Female Academy, George W. F. Price, Martha T. Rison, Myra J. Erwin, Robert M. Erwin, William H. Erwin, Joseph B. Erwin, and Marcus A. Erwin, and in which Hugh L. Clay, as administrator *de bonis non* of Abraham R. Erwin, deceased, was afterwards

added as a defendant, but on looking into the record we find no sufficient evidence of the jurisdiction of the Circuit Court, which depends alone on the citizenship of the parties. It is stated in the original bill that Everhart is a resident of Wisconsin, and the same fact is also shown by the testimony, but this, as it has often been held, is not enough. An averment of residence is not the equivalent of an averment of citizenship for the purposes of jurisdiction in the courts of the United States. According to the pleadings the Huntsville Female Academy is an Alabama corporation, and the other defendants are residents of either Alabama or Tennessee. The decree dismissing both the original and cross-bills is reversed, because the record fails to show the jurisdiction of the Circuit Court, but as the fault rests alone on Everhart, the complainant in the original bill, whose duty it was to put on record the facts necessary to show the jurisdiction, the reversal will be at his costs in this court. This whole subject has already been considered twice during the present term; once in *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237, and again in *Peper* v. *Fordyce*, 119 U. S. 469. The reasons for our judgment sufficiently appear in the opinions delivered in those cases. If on the return of the case to the Circuit Court it is made to appear that the citizenship necessary for the jurisdiction existed at the time the suit was brought, it will be for that court to determine whether an amendment of the pleadings ought to be allowed, so as to cure the present defects.

The decree of the Circuit Court is reversed, at the costs of the appellant Everhart, and the cause remanded for further proceedings not inconsistent with this opinion.

KING BRIDGE COMPANY *v.* OTOE COUNTY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Submitted January 7, 1887. — Decided January 31, 1887.

An order drawn upon a county treasurer by county officials in favor of A or order unindorsed, and a like order in favor of A, both assigned by A to B for a valuable consideration, constitute no cause of action in B's favor on which B can maintain an action in a Circuit Court of the United States on the ground of citizenship, if A could not maintain the action there on the same ground; and if, in such action in B's favor A's necessary qualification of citizenship does not affirmatively appear in the record in this court, the judgment below will be reversed whether the question of jurisdiction be made or not, and plaintiff in error adjudged to pay costs in this court.

This action was brought, November 10, 1885, by the King Iron Bridge and Manufacturing Company, a corporation of Ohio, against Otoe County, in the State of Nebraska, to recover the amount of two county warrants or orders, each signed by the chairman of the county commissioners of the county and countersigned by the county clerk. One was dated October 9, 1878, and directed the "Treasurer of Otoe County to pay to Z. King, or order, sixteen hundred and five dollars, and charge to account of special bridge fund," and the other, dated January 9, 1879, directed the "Treasurer of Otoe County to pay to Z. King, sixteen hundred and five dollars, and charge to account of special bridge fund." The first one being presented for payment on the 23d of October, 1878, was indorsed by the treasurer, "Presented and not paid for want of funds." The other was presented on the 15th of January, 1879, and received a like indorsement. The petition stated, in respect of each warrant, that it had been for a valuable consideration "sold, transferred and delivered" by Z. King to the plaintiff, who sues as the holder and owner thereof.

Judgment was asked for $3210, with ten per cent. interest on $1605 thereof from October 23, 1878, and for $1605 with like interest from January 15, 1879.

The defence was the limitation of five years prescribed by the local law for an action "upon a specialty, or any agreement, contract, or promise in writing or foreign judgment." The court below overruled a demurrer to the answer and dismissed the action.

Mr. N. S. Harwood and *Mr. John H. Ames* for plaintiff in error.

Mr. John C. Watson for defendant in error.

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

This case was argued upon the question of limitation. But we have no occasion to consider that question; for it does not appear that the Circuit Court had jurisdiction of the action. Unless the contrary appears affirmatively from the record, the presumption, upon writ of error or appeal, is that the court below was without jurisdiction. *Robertson* v. *Cease*, 97 U. S. 646; *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 283; *Börs* v. *Preston*, 111 U. S. 252; *Continental Life Ins. Co.* v. *Rhoads*, 119 U. S. 237. That the point as to jurisdiction was not made here by either party is immaterial, because, as said in *Mansfield, &c., Railway Co.* v. *Swan*, 111 U. S. 379, 382, "the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes." See also *Hancock* v. *Holbrook*, 112 U. S. 229, 231.

The act of March 3, 1875, § 1, excludes from the cognizance of a circuit or district court of the United States "any suit founded on contract in favor of an assignee, unless a suit might

have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange." One of the warrants is payable to Z. King, and the other to Z. King, or order. The latter is not indorsed by him in blank or to the order of the plaintiff. Plainly, therefore, upon any view of the statute, the plaintiff, as the holder or owner of the warrants, could not maintain a suit in the court below, unless King could have sued in that court, had he not sold the warrants. But it does not appear that King could have maintained the suit. There is no averment as to his citizenship, nor does his citizenship otherwise appear from the record. We must, therefore, presume, on this writ of error, that the Circuit Court was without jurisdiction.

It will be for the court below to determine whether an amendment of the pleadings upon the point of jurisdiction will be proper.

The plaintiff in error must pay the costs in this court. *Peper* v. *Fordyce*, 119 U. S. 469; *Everhart* v. *Huntsville College*, *ante*, 223.

Reversed.

UNITED STATES *v.* PACIFIC RAILROAD.

PACIFIC RAILROAD *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Submitted January 10, 1887. — Decided January 31, 1887.

The United States are not responsible for the injury or destruction of private property caused by their military operations during the late civil war; nor are private parties chargeable for works constructed on their property by the United States to facilitate such operations.

Accordingly, where bridges on the line of a railroad were destroyed during the civil war by either of the contending forces, their subsequent rebuilding by the United States as a measure of military necessity, without the request of, or any contract with, the owner of the railroad, imposes no liability upon such owner.

Opinion of the Court.

THESE were appeals from the Court of Claims. The case is stated in the opinion of the court.

Mr. Attorney General and *Mr. E. M. Watson* for the United States.

Mr. John F. Dillon and *Mr. James Coleman* for the Pacific Railroad Company.

MR. JUSTICE FIELD delivered the opinion of the court.

The Pacific Railroad Company, the claimant in this case, is a corporation created under the laws of Missouri, and is frequently designated as the Pacific Railroad of that state, to distinguish it from the Central Pacific Railroad Company incorporated under the laws of California, and the Union Pacific Railroad Company incorporated under an act of Congress, each of which is sometimes referred to as the Pacific Railroad Company.

From the 14th of August, 1867, to the 22d of July, 1872, it rendered services by the transportation of passengers and freight, for which the United States are indebted to it in the sum of $136,196.98, unless they are entitled to offset the cost of labor and materials alleged to have been furnished by them, at its request, for the construction of certain bridges on the line of its road. The extent and value of the services rendered are not disputed. It is only the offset or charge for the bridges which is in controversy; and that charge arose in this wise: During the civil war, the State of Missouri was the theatre of active military operations. It was on several occasions invaded by Confederate forces, and between them and the soldiers of the Union conflicts were frequent and sanguinary. The people of the state were divided in their allegiance, and the country was ravaged by guerilla bands. The railroads of the state, as a matter of course, were damaged by the contending forces; as each deemed the destruction of that means of transportation necessary to defeat or embarrass the movements of the other. In October, 1864, Sterling Price, a noted Confederate officer, at the head of a large force, invaded the state and advanced rapidly towards St. Louis, approach-

ing to within a few days' march of the city. During this invasion, thirteen bridges upon the main line and southwestern branch of the company's road were destroyed. General Rosecrans was in command of the Federal forces in the state, and some of the bridges were destroyed by his orders, as a military necessity, to prevent the advance of the enemy. The record does not state by whom the others were destroyed; but their destruction having taken place during the invasion, it seems to have been taken for granted that it was caused by the Confederate forces, and this conclusion was evidently correct. All the bridges except four were rebuilt by the company. These four were rebuilt by the government, and it is their cost which the government seeks to offset against the demand of the company. Two of the four (one over the Osage River and one over the Moreau River) were destroyed by order of the commander of the Federal forces. The other two, which were over the Maramec River, it is presumed, were destroyed by the Confederate forces.

Soon after the destruction of the bridges, and during the same month, General Rosecrans summoned to an informal conference, in St. Louis, several gentlemen regarded as proper representatives of the railroad company, being its president, the superintendent and the engineer of the road, and several of the directors. The court below makes the following finding as to what there occurred:

"By General Rosecrans it was stated that the immediate rebuilding of the bridges was a military necessity; that he should expect and require the company to do all in their power to put the roads in working order at the earliest possible moment; and that he intended to have what work they did not do done by the government, and withhold from the freight earnings of the road a sum sufficient to repay the government for such outlays as in law and fact it should be found entitled to have repaid.

"The gentlemen present assured General Rosecrans, that they would do all in their power to rebuild the bridges and put the roads in working order at the earliest moment, but they at the same time represented that several of the bridges,

as they believed, had been destroyed by the proper military authority of the United States, and that in such cases the government was properly responsible for the loss, and should replace the bridges. Those which the public enemy had destroyed they conceded that the company should replace.

"General Rosecrans replied in substance: 'Gentlemen, the question of the liability of the government for repairing damages to this road is one of both law and fact, and it is too early now to undertake the investigation of that question in this stirring time. I doubt myself whether all the damages which you say the government should be responsible for, will be found liable to be laid to the charge of the government. Nevertheless, whatever is fair and right I should like to see done. You tell me now, and I have been informed by some of your representatives individually, that the company's means are insufficient to make these large repairs and make them promptly. Therefore, I want to say to you that, as a military necessity, we must have the work done, and shall be glad to have the company do everything it can, and I will undertake to have the remainder done, and we will reserve out of the freights money enough to make the government good for that to which it shall be found to be entitled for rebuilding any or all of the bridges, and we will return the freights to you or settle with you on principles of law and equity.'

"The gentlemen interested in the company reiterated their view of the case, that the company should pay for bridges destroyed by the public enemy, and that the government should replace at its own cost the bridges destroyed by its own military authorities."

The court also finds that these mutual representations and assurances were not intended or understood on either side to form a contract or agreement binding on the government or the company; that no formal action upon them was taken by the board of directors; and that there was no proof that they were ever communicated to the directors, except as may be inferred from subsequent facts and circumstances mentioned; but that the company, through its directors and officers, promptly exerted itself, to its utmost power, to restore the

roads to running order, and to that end coöperated with the government.

At the same time, General Rosecrans informed the Secretary of War that the rebuilding of the bridges was "essential, and a great military necessity" in the defence of the state, and requested that Colonel Myers should be authorized "to have them rebuilt at once, the United States to be reimbursed the cost out of freight on the road." The Secretary referred the matter to the Quartermaster General, who recommended that General McCallum, Superintendent of Military Roads, be directed to take the necessary measures immediately for that purpose. The Secretary approved the recommendation, and General McCallum was thereupon ordered to cause the bridges to be rebuilt by the quickest and surest means possible. It does not appear that the company had any notice of these communications or of the order.

The bridge over the Osage River was destroyed on the 5th of October, 1864, by order of the officer commanding the central district of Missouri, acting under instructions from General Rosecrans to "use every means in his power to prevent the advance of the enemy." The court finds that the destruction was ordered for that purpose, and that the exigency appeared to the officer, and in fact was, of the gravest character, and an imperative military necessity. The government rebuilt the bridge, at an expense of $96,152.65; and this sum it seeks to charge against the company.

The bridge across the Moreau was also destroyed by command of the same officer, under the same military exigency. The company commenced its reconstruction, but, before it was completed, the work was washed away by a freshet in the river. The government afterwards rebuilt it at an expense of $30,801; and this sum it also seeks to charge against the company.

The two bridges across the Maramec were destroyed during the invasion, as already stated, but not by the forces of the United States. They were, however, rebuilt by the government as a military necessity, at an expense of $54,595.24; and this sum, also, it seeks to charge against the company. The

Court of Claims allowed the cost of three of the bridges to be charged against the company, but rejected the charge for the fourth — the one over the Osage River. The United States and the claimant both appealed from its judgment; the claimant, because the cost of the three bridges was allowed; the United States, because the charge for one of the four was disallowed.

The cost of the four bridges rebuilt by the government amounted to $181,548.89. The question presented is, whether the company is chargeable with their cost, assuming that there was no promise on its part, express or implied, to pay for them. That there was no express promise is clear. The representations and assurances at the conference called by General Rosecrans to urge the rebuilding of the bridges were not intended or understood to constitute any contract: and it is so found, as above stated, by the court below. They were rebuilt by the government as a military necessity to enable the Federal forces to carry on military operations, and not on any request of or contract with the company. As to the two bridges destroyed by the Federal forces, some of the officers of the company at that conference insisted that they should be rebuilt by the government without charge to the company, and, though they appeared to consider that those destroyed by the enemy should be rebuilt by the company, there was no action of the board of directors on the subject. What was said by them was merely an expression of their individual opinions, which were not even communicated to the Board. Nor can any such promise be implied from the letter of the president of the company to the Quartermaster General in November, subsequent to the destruction of the bridges, informing him that the delay of the War Department in rebuilding them had prompted the company to "unusual resources"; that it was constructing the bridges over the Gasconade and the Moreau Rivers, and that the only bridge on the main line to be replaced by the government was the one over the Osage River, the company having replaced all the smaller, and was then replacing all the larger ones. The letter only imparts information as to the work done and to be done in rebuilding the bridges

on the main line. It contains no promise, as the court below seems to have thought, that, if the government would rebuild the bridge over the Osage River, it should be reimbursed for any other it might rebuild on the main line of the company. Nor do we think that any promise can be implied from the fact that the company resumed the management and operation of the road after the bridges were rebuilt; but on that point we will speak hereafter. Assuming, for the present, that there was no such implication, we are clear that no obligation rests upon the company to pay for work done, not at its request or for its benefit, but solely to enable the government to carry on its military operations.

It has been held by this court in repeated instances that, though the late war was not between independent nations, yet, as it was between the people of different sections of the country, and the insurgents were so thoroughly organized and formidable as to necessitate their recognition as belligerents, the usual incidents of a war between independent nations ensued. The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. Their adoption was seen in the exchange of prisoners, the release of officers on parole, the recognition of flags of truce, and other arrangements designed to mitigate the rigors of warfare. The inhabitants of the Confederate States on the one hand, and of the states which adhered to the Union on the other, became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other. *Brown* v. *Hiatts*, 15 Wall. 177, 184.

The war, whether considered with reference to the number of troops in the field, the extent of military operations, and the number and character of the engagements, attained proportions unequalled in the history of the present century. More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and

efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the government. By the well settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss. *Salus populi* is then, in truth, *suprema lex.*

These views are sustained in treatises of text-writers, by the action of Congress, and by the language of judicial tribunals. *Respublica* v. *Sparhawk*, 1 Dall. 357; *Parham* v. *The Justices*, 9 Geo. 341; *Taylor* v. *Nashville & Chattanooga Railroad*, 6 Coldwell, 646; *Mayor* v. *Lord*, 18 Wend. 126.

Vattel, in his Law of Nations, speaks of damages sustained by individuals in war as of two kinds — those done by the state and those done by the enemy. And after mentioning those done by the state deliberately and by way of precaution, as when a field, a house, or a garden, belonging to a private person, is taken for the purpose of erecting on the spot a town rampart or other piece of fortification; or when his standing corn or his storehouses are destroyed to prevent their being of use to the enemy; and stating that such damages are to be made good to the individual, who should bear only his quota of the loss, he says: "But there are other damages, caused by inevitable necessity, as, for instance, the destruction caused by the artillery in retaking a town from the enemy. These are merely accidents; they are misfortunes which chance deals out to the proprietors on whom they happen to fall. The sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will admit of it; but *no*

action lies against the state for misfortunes of this nature — for losses which she has occasioned, not wilfully, but through necessity and by mere accident, in the exertion of her rights. The same may be said of damages caused by the enemy. All the subjects are exposed to such damages; and woe to him on whom they fall! The members of a society may well encounter such risk of property, since they encounter a similar risk of life itself. Were the state strictly to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted, and every individual in the state would be obliged to contribute his share in due proportion, a thing utterly impracticable."[1] Book III, c. 15, § 232.

Three cases in Congress, one before the House of Representatives in 1797, and two before the Senate, one in 1822 and one in 1872, illustrate this doctrine. In the first of these a Mr. Frothingham, of Massachusetts, presented a petition to the House of Representatives, asking compensation for a dwelling-house, the property of his mother, burned at Charlestown, in March, 1776, by order of General Sullivan, then commanding the American troops at that place. The Committee on Claims, to whom it was referred, made a report that they found that the house for which compensation was sought was, with several other buildings in the vicinity, at that time in possession of the British troops; and that, for

[1] Mais d'autres dommages sont causés par une nécessité inévitable: tels sont, par exemple, les ravages de l'artillerie, dans une ville que l'on reprend sur l'ennemi. Ceux-ci sont des accidents, des maux de la fortune, pour les propriétaires sur qui ils tombent. Le souverain doit équitablement y avoir égard, si l'état de ses affaires le lui permet; mais on n'a point d'action contre l'État pour des malheurs de cette nature, pour des pertes qu'il n'a point causeés librement, mais par nécessité et par accident, en usant de ses droits. J'en dis autant des dommages causés par l'ennemi. Tous les sujets sont exposés à ces dommages; malheur à celui sur qui ils tombent! On peut bien, dans une société, courir ce risque pour les biens, puisqu'on le court pour la vie. Si l'État devait à la rigueur dédommager tous ceux qui perdent de cette manière, les finances publiques seraient bientôt épuiseés; il faudrait que chacun contribuât du sien, dans une juste proportion; ce qui serait impraticable. Vattel Droit des Gens, Liv. 3, c. 15, § 232; Vol. 3, p. 115, ed. Pradier-Fodéré, Paris, 1863.

the purpose of dislodging them, the general sent a party of troops with orders to set fire to the buildings, which was done accordingly; and that they apprehended that the loss of houses and other sufferings by the general ravages of war had never been compensated by this or any other government; that in the history of our Revolution, sundry decisions of Congress against claims of this nature might be found; and that the claim presented rested upon the same basis with all others where sufferings arose from the ravages of war. As the government had not adopted a general rule to compensate individuals who had suffered in a similar manner, the committee were of opinion that the prayer of the petitioner could not be granted; and no further action was had upon the claim. American State Papers, Class XIV, Claims, p. 199.

In the second of the cases referred to, a Mr. Villiers, of Louisiana, presented a petition to the House of Representatives, stating that during the invasion of the British in 1814–15, after the enemy had landed near the city of New Orleans, in order to prevent him from bringing up his cannon and other ordnance to the city, General Morgan, commanding the Louisiana militia, caused the levee to be cut through, at or near the plantation of the petitioner, whereby the greater part of his plantation was inundated, and remained so till after the departure of the invading army from the state; that in consequence the petitioner had suffered great losses in the destruction of his sugar cane, cane plants, and in the expenses of repairing the levee, appraised at $19,250; for which he prayed compensation. The Committee on Claims, to whom the petition was referred, recommended that its prayer should not be granted, on the ground that the losses were sustained in the necessary operations of war, for which the United States were not liable; and their recommendation was adopted. American State Papers, Class XIV, Claims, p. 835; Annals of Congress, 17th Cong., 1st Sess., Part 1, p. 311.

The third of the cases referred to is that of J. Milton Best, which was much discussed in the Senate. His claim was for the value of a dwelling-house and contents destroyed by order of the officer commanding the Union forces in defence of the

city of Paducah, Kentucky, in March, 1864. The city being attacked by the Confederates in force, the Federal troops, numbering seven hundred, were withdrawn into Fort Anderson. The claimant's house, which was about one hundred and fifty yards from the fort, was taken possession of by the sharpshooters of the enemy, who did great execution picking off men at the guns within the defences. They were driven from the house by shells from the fort and gunboats, and late that night the Confederates retired from their assault without success. They appeared with reinforcements the next morning, and the Union officer, regarding his command in great peril, his ammunition being nearly exhausted, gave orders for the destruction of all houses within musket-range of the fort. The claimant's loyalty was unquestioned. The officers in command at the post from time to time during the war testified to his reliability and the effective aid he rendered the Union cause.

The Senate Committee on Claims reported the case as one presenting the "simple question of who shall pay for the destruction of a loyal citizen's property, destroyed by the order of a commanding officer to save his imperilled army, at the claimant's home, a place never in possession of the enemy, and in a nonseceding state." Upon this question they say: "It appears to your committee that the facts establish a just claim against the government for private property taken and destroyed to prevent a greater destruction of its own property and the massacre of its troops."

They reported that "the injuries to the claimant's house, by shelling out the rebels in the battle of the 25th of March [the day preceding the destruction of the property], may be regarded as a casualty by the general ravages of war, which might properly be deducted from the amount of loss proved by claimant," and they made what they deemed a proper deduction on that account in the bill presented by them for the payment of the damages. The bill was intended to cover the value of his property at the time it was burned to prevent its use by the reinforced enemy on the following day. In the debate which followed, it was contended by advocates of the bill, that while the damage by shelling from our own fort

during the battle came within the ravages of war, the subsequent burning of the house to prevent its being used by the sharpshooters of the enemy was a taking by the government of private property for public use, for which compensation should be made.

The bill passed in the Senate January 5, 1871, but was not acted upon by the House during that Congress. It again passed in the Senate, April 8, 1872, and in the House, May 18, 1872. It was vetoed by the President June 1, 1872. In his message to the Senate the President, after speaking of the claim as one for compensation on account of the ravages of war, and observing that its payment would invite the presentation of demands for very large sums of money against the government for necessary and unavoidable destruction of property by the army, said: "It is a general principle of both international and municipal law that all property is held subject, not only to be taken by the government for public uses, in which case, under the Constitution of the United States, the owner is entitled to just compensation, but also subject to be temporarily occupied, or even actually destroyed, in times of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to compensate the owner. The temporary occupation of, injuries to, and destruction of property caused by actual and necessary military operations, is generally considered to fall within the last-mentioned principle. If a government makes compensation under such circumstances, it is a matter of bounty rather than of strict legal right." Cong. Globe, 42d Cong., 2d Sess., Part V, p. 4155.

The message was referred to the Committee on Claims, and on the 7th of February, 1873, it was reported back with a recommendation that the bill be passed, the objections of the President to the contrary notwithstanding. On the 24th of the same month, the bill was reached on the calendar and was passed over upon objection. No further action was ever taken upon it in the Senate, and consequently it never reached the House.

The claim has been repeatedly presented to Congress since,

but has never been considered by either House. The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the government is not responsible is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, "a matter of bounty rather than of strict legal right."

In what we have said as to the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell* v. *Harmony*, 13 How. 115, 134; *United States* v. *Russell*, 13 Wall. 623.

While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government.

It is true that in some instances the works thus constructed may, afterwards, be used by the owner; a house built for a barrack, or for the storage of supplies, or for a temporary fortification, might be converted to some purposes afterwards by the owner of the land, but that circumstance would impose no liability upon him. Whenever a structure is permanently affixed to real property belonging to an individual, without his consent or request, he cannot be held responsible because of its subsequent use. It becomes his by being annexed to the soil; and he is not obliged to remove it to escape liability. He is not deemed to have accepted it so as to incur an obligation to pay for it, merely because he has not chosen to tear it down, but has seen fit to use it. *Zottman* v. *San Francisco*, 20 Cal. 96, 107. Where structures are placed on the property of another, or repairs are made to them, he is supposed to have the right to determine the manner, form, and time in which the structures shall be built, or the repairs be made, and the materials to be used; but upon none of these matters was the company consulted in the case before us. The government regarded the interests only of the army; the needs or wishes of the company were not considered. No liability, therefore, could be fastened upon it for work thus done.

We do not find any adjudged cases on this particular point; whether the government can claim compensation for structures erected on land of private parties, or annexed to their property, not by their request, but as a matter of military necessity, to enable its armies to prosecute their movements with greater efficiency; and we are unable to recall an instance where such a claim has been advanced.

It follows from these views, that the government can make no charge against the railroad company for the four bridges constructed by it from military necessity. The court will leave the parties where the war and the military operations of the government left them.

The judgment of the Court of Claims must, therefore, be reversed, and judgment be entered for the full amount claimed by the railroad company for its services; and it is so ordered.

Counsel for Appellant.

United States v. *Atlantic and Pacific Railroad Company.* Same counsel as in the last case. Mr. Justice Field delivered the opinion of the court. It is agreed by counsel of the parties that this case involves the same question as that decided in *United States* v. *Pacific Railroad*, and, therefore, on the authority of that decision, the judgment below is

Affirmed.

QUINCY *v.* STEEL.

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

Submitted January 4, 1887. — Decided January 31, 1887.

The city of Quincy, Illinois, in 1877 contracted with an Illinois corporation to supply it with gas for four years. Disputes arose, payments were in arrear, and in May, 1881, the city notified the company that it would be no longer bound by the contract. A, a citizen of Alabama, on the 13th August, 1885, filed a bill in equity in the Circuit Court of the United States for the Southern District of Illinois, setting forth that the company had a claim against the city recoverable at law, that he had at different times tried to induce the directors to enforce it, that he was, and for more than four years had been, a stockholder in the company, that he had not succeeded in inducing the directors to institute suit, that his last request was made August 1, 1885, that the claims were about to be barred by the statute of limitations, and he asked for a mandamus to compel the payment of the company's debt. The respondent demurred. This court sustains the demurrer, on the ground that the real contest being between two Illinois corporations, the proper remedy was an action at law by one of those corporations against the other upon the contract, and that A has not, by the averments in his bill, brought himself within the directions prescribed by Equity Rule 94, 104 U. S. ix–x, respecting suits brought by stockholders in a corporation against the corporation and other parties, founded on rights which might be properly asserted by the corporation.

This was a bill in equity. Respondent demurred. Decree for complainant, from which respondent appealed. The case is stated in the opinion of the court.

Mr. George A. Anderson, *Mr. Joseph N. Carter*, *Mr. William H. Govert*, and *Mr. L. H. Berger* for appellants.

Mr. William McFadon for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the Southern District of Illinois.

James W. Steel, the complainant in the Circuit Court, is a citizen of Alabama, and he brings his bill against the city of Quincy, a municipal corporation of the State of Illinois, and the Quincy Gas Light and Coke Company, also a corporation of that state. He sets out a contract between the city of Quincy and the gas company, dated February 14, 1877, the only parts of which in this connection of any importance being that the gas company was to furnish a certain number of lighted lamps for the streets of said city, for which the city agreed to pay a fixed price per annum. This contract was to continue for five years. The city failed to pay the full amount due for gas in any one year, but paid a part of the bill on each year as long as the gas company continued to furnish the gas. On May 11, 1881, the city passed an ordinance declaring that it no longer recognized as binding the agreement between it and the gas company, under which the gas had been furnished, and notifying the company of that fact. The company, however, continued to furnish gas until November, 1883.

Instead of a suit by the gas company against the city of Quincy, in an action at law to enforce the rights of the company by a judgment, and by an appropriate writ of mandamus if the city did not pay the judgment, the present suit is brought by Mr. Steel in his own name, on the ground that he is a stockholder in the gas company; and, as the allegations on this branch of the subject, on which he relies as his authority to maintain this suit, are important, they are given here verbatim from the bill.

He says "that your orator is advised and believes, and so states the fact to be, that the said company has a just and valid claim against said city of Quincy, and one recoverable in the courts by some suit or suits in the name of said company; that your orator has at different times endeavored to

induce the board of directors of said company to institute a suit or suits to recover the said claim against said city; that your orator now is, and for more than four years last past has been, a stockholder in said company; that he now has, and during the entire period last aforesaid has had, seventy-five shares of the capital stock of said company; that said last-named endeavors have been made while your orator was said stockholder; that so far, and up to now, your orator has not succeeded in persuading said directors to institute as aforesaid; that your orator, on August 1, 1885, caused to be addressed to said board a communication in writing, directing and requiring said board to resolve to at once institute suit against said city of Quincy, in the name of said company, in such court or courts as were proper, for the recovery of said claim; that said board of directors laid said communication upon the table, as your orator is informed and believes, and therefore so states, and refused to agree to comply with the request therein contained; that whatever claim said company has by reason of the matters and things above alleged will be barred in considerable part before a meeting of the stockholders of said company will occur; that a part of said claim either has been or is about to be barred by the statute of limitations; that further delay in bringing suit will result in a part of said claim being barred by the statute of limitations; and that this suit is brought in good faith, and for the collection of, and to compel the collection of, what your orator believes to be a meritorious claim."

The decree of the court below was rendered on a demurrer to the bill filed by the city of Quincy, which, being overruled, the city refused to plead further, and decree was thereupon rendered against it. This decree, made on the 1st day of March, 1886, among other things, "orders, adjudges, and decrees that said The Quincy Gas Light and Coke Company have and recover of said defendant city of Quincy the sum of $36,116.21." It then makes provision for the enforcement of this decree by certain orders concerning future annual appropriations to be made by the city for payment out of its annual tax levy.

Opinion of the Court.

We are of opinion that the demurrer of the city of Quincy should have been sustained, for the reason that Mr. Steel shows no sufficient ground why he should have been permitted as a stockholder of the gas company to sustain this bill. In order to do this the circumstances must be such as to justify the court, in the interest of justice, to override two cardinal principles of Federal jurisprudence. One of these is, that the litigants in the Federal courts, where the right to sustain such litigation depends upon the citizenship of the parties, shall be citizens of different states. In this case the real right of action and the real contest before the court, if it had proceeded, would have been between the two corporations, organized under the laws of Illinois, and existing and doing business in the same place, to wit, the gas company and the city of Quincy. By sustaining this bill the gas company recovers a judgment in terms against the city for the amount in controversy under the contract.

The other principle which it is necessary to override is, that in the Federal courts the distinction between actions at law and suits in equity has always been kept up. In the present case it is but a plain suit to recover damages on a written contract by the one corporation against the other on account of a violation of that contract, except as Mr. Steel endeavors to bring himself into the case as having rights which he cannot enforce in a court of law. It is purely and simply a suit to recover money on a written contract in an action in the nature of assumpsit.

If, therefore, Mr. Steel, by virtue of being a citizen of Alabama, has any right to prosecute this suit in a court of the United States, and in a court of equity instead of a court of law, it is very obvious that he should make this right plain.

Prior to 1875 cases had come into the courts of the United States, especially into the Circuit Courts, where citizenship had been simulated, and parties improperly made or joined either as plaintiffs or defendants, for the purpose of creating a case cognizable in the Circuit Courts originally, or removable thereto from the state courts; and as it very frequently occurred that both plaintiffs and defendants were willing to seek that court

in preference to the state courts, it had been found very difficult to prevent these improper cases from being tried in those courts. In the act of March 3, 1875, an attempt was made to correct this evil, and by the fifth section of that act it was declared "that if, in any suit commenced in a Circuit Court, or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from whence it was removed, as justice may require."

In the cases of *Hawes* v. *Oakland*, 104 U. S. 450, and *Huntington* v. *Palmer*, 104 U. S. 482, the question of the growth of the form of invoking Federal jurisdiction, where it does not otherwise exist, by the attempt of a corporation which cannot sue in the Federal court to bring its grievance into that court by a suit in the name of one of its stockholders who has the requisite citizenship, was very much considered. In order to give effect to the principles there laid down this court at that term adopted Rule 94 of the Rules of Practice for Courts of Equity of the United States, which is as follows:

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and

the causes of his failure to obtain such action." 104 U. S. ix–x.

The bill in the present case, although verified by oath, is far from complying with the letter or the spirit of this rule. It does not contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, although the allegation on that subject includes a part of the time in which the city of Quincy failed to pay for its gas; but inasmuch as the sworn allegation in the bill was made on the 18th day of August, 1885, and he there swears that he had been the owner of the stock on which he brings this suit over four years, it is easy to suppose that he acquired this stock after the 11th day of May, 1881, on which day the city by its official action notified the gas company that it repudiated the contract and would no longer be bound by it. And it is not an unreasonable supposition that the gas company, forseeing litigation which it might be desirable for that company to have carried on in a Federal court, immediately after receiving notice of that resolution had this stock placed in the hands of Mr. Steel for the purpose of securing that object, and though the suit was delayed for two or three years, it was probably because the city continued to pay some part of the demand for the gas furnished by the company. The bill does not contain the allegation expressly prescribed by this rule, that "the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance." The allegation of the bill, "that this suit is brought in good faith, and for the collection of, and to compel the collection of, what your orator believes to be a meritorious claim," is by no means the equivalent of this provision of the rule, for it may very well be understood that the party who is seeking to enforce a debt which he believes to be due is acting in good faith for the purpose of compelling its collection, while he may be well aware that he is imposing upon the court to which he actually resorts a jurisdiction which does not belong to it.

The rule also requires that he must set forth with particularity his efforts to secure action on the part of the managing

directors or trustees of the corporation of which he is a member, and, if necessary, of the shareholders, and the causes of his failure to obtain such action. In the case before us he seems to have made but a single effort to induce the directors of the gas company to institute a suit against the city to recover the money, and this was by a communication in writing addressed to the board, August 1, 1885. No copy of that letter is produced, but it is said that the board of directors laid the communication on the table. No copy of the order of the board upon that subject is produced; no effort at conversation with any of the directors, or any earnest effort of any kind upon his part to induce the directors to bring the suit is shown in the bill; no attempt to call the attention of the shareholders to this matter during the four years in which he said he was a shareholder, and during which time the city was failing to pay its debt to the gas company, nor any effort at any of the meetings of the shareholders or of the directors to induce them to enforce the rights of the company against the city, is shown. The most meagre description possible of a bare demand in writing, made sixteen days before the institution of this suit, is all we have of the efforts which he should have made to induce this corporation to assert its rights. This letter was addressed to the board of directors, August 1, 1885, from what point is not stated, but it may reasonably be inferred that it was from Alabama, of which state he was a citizen. The bill itself is sworn to the 13th day of August thereafter. How long a time was left for the consideration of this question by the board of directors, and what earnest efforts Mr. Steel may have made to induce their favorable action, may be easily inferred from the speed with which the bill was sworn to in Alabama and filed after he addressed his letter to the board. The inference that the whole of this proceeding was a preconcerted and simulated arrangement to foist upon the Circuit Court of the United States jurisdiction in a case which did not fairly belong to it, is very strong.

In the case of *Hawes* v. *Oakland*, 104 U. S. 450, 461, in speaking of this perfunctory effort to induce the trustees of the corporation to act, it is said: "He (the plaintiff) must make

an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders, as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." Again it is said: "He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. . . . No attempt to consult the other shareholders to ascertain their opinions or obtain their action. But within five days after his application to the directors this bill is filed."

In the case of *Huntington* v. *Palmer*, 104 U. S. 482, 483, the court says: "Although the company is the party injured by the taxation complained of, which must be paid out of its treasury if paid at all, the suit is not brought in its name, but in that of one of its stockholders. Of course, as we have attempted to show in the case just mentioned, *Hawes* v. *Oakland*, this cannot be done without there has been an honest and earnest effort by the complainant to induce the corporation to take the necessary steps to obtain relief." See *Detroit* v. *Dean*, 106 U. S. 537.

We think upon the face of the bill in this case there is an entire absence of any compliance with the rule of practice laid down for equity courts in such cases, and of any evidence of an earnest and honest effort on the part of the complainant to induce the directors of the gas company to assert the rights of that corporation. On the contrary, the clear impression left upon reading the bill is, that it is an attempt to have a plain common law action tried in a court of equity, and the rights of parties decided in a court of the United States who have no right to litigate in such a court, and that there is no sufficient reason in the bare fact that Mr. Steel is a stockholder in the corporation which justifies such a proceeding.

If other evidence were wanting of the soundness of our in-

ferences on this subject, it is to be found in the fact that while the decree in this case was rendered, on the 1st day of March, 1886, a suit was commenced by the gas company against the city of Quincy, on the same causes of action, in the Circuit Court of Adams County, in the State of Illinois, on the 31st day of March of the same year. This fact was brought to the attention of the Circuit Court of the United States at the same term in which the decree now appealed from was rendered, by a petition to vacate and set aside the decree, which that court overruled. It seems very obvious that the gas company, having obtained through the instrumentality of this collusive suit by Mr. Steel a decree settling its rights against the city of Quincy, then brought in its own name a suit in the state court, which it had not dared to do until those rights were adjusted in a court of the United States.

We are of opinion that the demurrer to the plaintiff's bill ought to have been sustained and the bill dismissed. The decree is, therefore, reversed, and the case remanded to the Circuit Court with instructions to that effect.

UNITED STATES *v.* DUNN.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 3, 1887. — Decided February 7, 1887.

Service by an officer of the navy as an enlisted man in the marine corps is to be credited to him in calculating his longevity pay under the act of March 3, 1883, 22 Stat. 472, 473, c. 97.

The marine corps is a military body, primarily belonging to the navy, and under control of the Naval Department, with liability to be ordered to service in connection with the army, and in that case under the command of army officers.

THIS was an appeal from the Court of Claims. The case is stated in the opinion of the court.

Mr. Attorney General and *Mr. F. P. Dewees* for appellant.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellee.

Mr. Justice Miller delivered the opinion of the court.

The plaintiff brought her suit as administratrix of the estate of George Dunn, her husband, who died on the 29th of September, 1884, to recover the difference between what was paid her and what she claimed should have been paid on account of his service as gunner in the navy from the 11th day of April, 1878, until the 10th day of December, 1883. The Court of Claims gave her a judgment for $2238.10. This judgment was rendered upon the following finding of facts:

"1. George Dunn, the claimant's intestate, was appointed a gunner in the navy, April 11, 1871, and served as such until January 1, 1883. He was subsequently retired, and has since died.

"2. Prior to his appointment in the navy, he had served in the marine corps. He entered this corps first, June 10, 1843, in the eleventh year of his age, as a boy bound for ten years and twenty-two days to learn music, and June 22, 1844, was rated as a fifer; discharged September 8, 1848.

"Reënlisted September 9, 1848, for four years; discharged June 8, 1849, by order of the Secretary of the Navy, as a minor.

"Reënlisted August 10, 1849, for four years, as a fifer; discharged June 9, 1853.

"On the same day, to wit, June 9, 1853, he reënlisted for four years, as a fifer; discharged April 1, 1854, under a surgeon's certificate.

"Reënlisted August 31, 1854, for four years, as a fifer; discharged February 24, 1857, under a surgeon's certificate.

"Reënlisted May 19, 1857, for four years, as a fifer; discharged September 1, 1862, under a surgeon's certificate.

"The times of actual service from his first enlistment, June 10, 1843, to his last discharge, September 1, 1862, amounts to sixteen years five months and twenty-six days.

"3. Between the dates of his first enlistment and September 3, 1853, he served on board United States vessels of war, under the command of navy officers, for five years and two months.

"Where and under what command the remainder of his service was rendered does not appear.

"*Conclusion of Law.*

"Upon the foregoing findings of facts the court decides as conclusion of law —

"That the sixteen years five months and twenty-six days of service, shown in Finding 2 to have been rendered by claimant's intestate as an enlisted man in the marine corps, should be credited to him in calculating longevity pay under the act of March 3, 1883. 22 Stat. 473.

"By so crediting this service the claimant is entitled to recover the sum of $2238.10."

The controversy arises upon the construction to be given to the following clause in the act, making appropriation for the naval service, passed March 3, 1883. 22 Stat. 473. Section 1 of that statute makes provision for the payment of the officers of the navy, of which George Dunn, the plaintiff's intestate, was one at that time. After reciting the officers, clerks, and other persons, including naval cadets, whose compensation is embraced in the aggregate sum of three hundred thousand dollars, the section uses this language: "And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service."

The plaintiff asserted that in adjusting her claim for her husband's service with the accounting officers of the department she was entitled to the benefit of this provision on account of the service found to have been rendered by him in the second subdivision of the facts as found by the court. These accounting officers refused to make this allowance be-

cause, as they said, the services thus rendered were in the Marine Corps and not in the army or navy.

It must be conceded that the Marine Corps, a military body in the regular service of the United States, occupies something of an anomalous position, and is often spoken of in statutes which enumerate "the Army, the Navy, and the Marine Corps," or "the Army and the Marine Corps," or "the Navy and the Marine Corps," in a manner calculated and intended to point out that it is not identical with either the army or the navy. And this argument is the one very much pressed to show that service in the Marine Corps is not service in the army or in the navy. On the other hand, the services rendered by that corps are always of a military character, and are rendered as part of the duties to be performed by either the army or the navy. If there are services prescribed for that corps by the statutes of the United States, or the regulations of either the army or the navy, which are not performed in immediate connection with the army or the navy, and under the control of the heads of the army or navy, either civil or military, we have not been made aware of it. The military establishment of this country is divided by the general laws of the United States into the army and the navy, and over each of these one of the great heads of departments, called secretaries, is appointed to preside, to manage and to administer its affairs. The administrative functions of the executive are mostly under the President, distributed and allotted among the seven great departments, at the head of each of which is a minister for that department. Such is the theory of the distribution of executive administration established by the statutes of the United States.

The Marine Corps is a military body designed to perform military services; and while they are not necessarily performed on board ships, their active service in time of war is chiefly in the navy, and accompanying or aiding naval expeditions. In time of peace they are located in navy yards mainly, although occasionally they may be used in forts and arsenals belonging more immediately to the army. The statutes of the United States, in prescribing the duties which they may be required

to perform, have not been very clear in any expression which goes to show how far these services are to be rendered under the control of the officers of the navy or of the army. It is clear that they may be ordered to service in either branch; but we are of opinion that, taking all these statutes and the practice of the government together, they are a military body, primarily belonging to the navy, and under the control of the head of the naval department, with liability to be ordered to service in connection with the army, and in that case under the command of army officers.

Section 1599 of the Revised Statutes of the United States enacts that no person under twenty or over twenty-five years of age shall be appointed from civil life as a commissioned officer of the Marine Corps until his qualifications for such service have been examined and approved under the directions of the Secretary of the Navy; and § 1600, immediately following, provides that all marine officers shall be credited with the length of time that they have been employed as officers or enlisted men in the volunteer service of the United States. Sections 1613, 1614, 1615, and 1616 very clearly place the non-commissioned officers, musicians, or privates of the Marine Corps under the orders of the Secretary of the Navy, with reference to their performance in the Capitol grounds, or the President's grounds, and with reference to their rate of pay and their rations. Section 1621 declares that the Marine Corps shall at all times be subject to the laws and regulations established for the government of the navy, except when detached for service with the army by order of the President, and, when so detached, shall be subject to the rules and articles of war prescribed for the government of the army. Section 1623, which relates to the retirement of officers with rank and pay, enacts that, in the case of an officer of the Marine Corps, the retiring board shall be selected by the Secretary of the Navy, under the direction of the President. Two-fifths of the board shall be selected from the medical corps of the navy, and the remainder from the officers of the Marine Corps.

It seems to us that these provisions of the Revised Statutes, bringing together the enactments of Congress on the subject

of the Marine Corps, show that the primary position of that body in the military service is that of a part of the navy, and its chief control is placed under the Secretary of the Navy, there being exceptions, when it may, by order of the President, or some one having proper authority, be placed more immediately, for temporary duty, with the army, and under the command of the superior army officers.

This view of the subject was taken by this court in the case *Wilkes* v. *Dinsman*, 7 How. 89. Dinsman was a private in the Marine Corps under Commodore Wilkes in the exploring expedition, and his term of service having expired he entered into a contract for reënlistment to serve until the return of the vessel. The act which authorized his reënlistment applied to seamen and to service of anybody enlisted for the navy. Dinsman was subjected to severe discipline by the orders of Commodore Wilkes, for which he brought this suit in the nature of an action of trespass, and alleged that after the expiration of his service he was not lawfully reënlisted, as he was not a seaman when enlisted for the navy, by reason of his being in the Marine Corps. The court examined into this question and held that he belonged at that time to the navy, saying, among other things: "Though marines are not, in some senses, 'seamen,' and their duties are in some respects different, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the government of the naval code as to punishment, and persons amenable to the Navy Department. Their very name of 'marines' indicates the place and nature of their duties generally. And, beside the analogies of their duties in other countries, their first creation here to serve on board ships expressly declared them to be a part 'of the crews of each of said ships.' Act of 27th March, 1794, 1 Stat. 350, § 4. Their pay was also to be fixed in the same way as that of the seamen, § 6, p. 351. So it was again by the act of April 27, 1798, 1 Stat. 552. And they have ever since been associated with the navy, except when specially detailed by the President for service in the army. . . . Thus paid, thus serving, and thus governed like and with the navy, it is

certainly no forced construction to consider them as embraced in the spirit of the act of 1837 by the description of persons 'enlisted for the navy.'"

And referring to the act of June 30, 1834, the provision of which is found in § 1621 of the Revised Statutes, "that the said corps shall at all times be subject to and under the laws and regulations which are or may hereafter be established for the better government of the navy," the opinion says that this strengthens the conclusion of the court, and that that corps thus in some respects became still more closely identified with the navy.

Whatever view may be taken, it cannot be considered as a distinct military organization, independent of the departments of the army and navy, and under the supervision and control of neither of them, having no superior outside of its own officers, except the President. Such a position is at war with the whole policy of the distribution of power among the executive departments, as we have already shown; and while it may be true that it is not so exclusively a part of the navy as ships and navy yards are, yet its general supervision and control remain with the Navy Department.

We think that the act of 1883, under which this suit is brought, providing for a credit for the actual time of service in the army or navy, or both, is comprehensive enough to include the services of George Dunn, recited in the second finding of the court, as they *must* have been rendered either in the one or the other, — either in the army or the navy, — and if rendered in either, or part in one and part in the other, they still entitle the claimant to receive compensation on the basis of services coming within the statute.

The judgment of the Court of Claims is affirmed.

INDIANAPOLIS ROLLING MILL *v.* ST. LOUIS, FORT SCOTT & WICHITA RAILROAD.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Submitted January 7, 1887. — Decided January 31, 1887.

The president of a manufacturing corporation who is also its superintendent, having general authority to contract by parol contract without the corporate seal for making and delivering its manufactured goods, has like authority, unless the power is withdrawn, to authorize the termination and release of such a contract.

A board of directors of a corporation to whom the president of the company communicates his execution of a contract on the part of the corporation, which is within its corporate powers but unauthorized by the board, will be presumed to ratify his act unless it dissents within a reasonable time; and a delay in the disaffirmance of six months after knowledge of the act is an unreasonable delay.

This was an action at law on a contract for the sale and purchase of railroad iron. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. H. C. McDougal for plaintiff in error.

Mr. John F. Dillon and *Mr. J. H. Richards* for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Kansas.

The plaintiff in error, which was also the plaintiff below, is a corporation existing under the laws of Indiana, and doing business in that state. The defendant in error is a corporation of the State of Kansas. The latter company, while building its railroad, contracted, on the 8th day of October, 1881, with the former for the purchase of iron rails. The contract was

for ten thousand tons, to be delivered, during the period between October and June inclusive, on board of the railroad cars at Indianapolis. A jury was waived and the case was tried before the court, which made a finding of facts on which it declared the law to be for the defendant, and rendered judgment accordingly.

During the trial the defendant company produced a release, apparently executed by the plaintiff company, from the obligation of the contract to receive and pay for the iron, except so far as it had been fulfilled, and upon the validity of this release the decision depends.

It appears from the facts found by the court that the plaintiff was in the habit of receiving payment for iron delivered, by drafts on the defendant, payable in New York, and that Moran Brothers were the financial agents of the defendant, through whom such payments were made; that drafts to the amount of $54,000 were due on the 4th day of October, 1882, and the company, being hard pressed for money, asked an extension of payment, which was granted for four months; that when these drafts again fell due they were protested for nonpayment, and the defendant company was insolvent, which fact was well known to the plaintiff. It appears, also, that Mr. Thomas, who was the treasurer of the plaintiff company, visited New York and called upon the firm of Moran Brothers, at whose banking-house said drafts were payable, and endeavored to induce them to pay the drafts, but that Moran Brothers, who had no funds of the defendant's at the time, declined to do so, but finally said: "We, Moran Brothers, will pay these drafts if you will sign a release for the balance of the contract." To this Mr. Thomas replied that he was not authorized to execute such a release, but he communicated with Mr. Jones, who was the president and superintendent of the company, and obtained from him authority to accept the money and sign the release. This was accordingly done, the release being dated "New York, 8th February, 1883," and signed "Indianapolis Rolling Mill Co., by J. Thomas, treasurer."

It is said by the plaintiff that Mr. Thomas had no authority to execute this release, or to make this contract, and, there-

fore, it is void. Bearing upon this proposition, it is found as a matter of fact by the court, that Mr. Jones was president and Mr. Thomas treasurer at the time of this transaction. The original contract for the sale of the iron is executed by Mr. Jones, as president, without the seal of the company, and there is no evidence of any resolution of the board of directors authorizing or approving that contract. The by-laws of the plaintiff corporation, as the court finds, declare that the superintendent, who in this case was Mr. Jones, "shall have charge of the works, property, and operations of the company, and shall employ all operatives and certify all wages due and other expenditures to the secretary, . . . and shall, with the approval of the president, buy and sell material and make all contracts for the same, and for work," &c. And the court further finds that under this by-law Mr. Jones had the power to buy and sell material, and to make all contracts for the same. Another by-law declares that "the superintendent and all other persons shall in all cases be subject to the control of the board of directors, in everything where the board shall elect to exercise such control;" and the court finds that, in the making of the original contract sued on, and in the extension of the time for the payment of drafts, as hereinafter mentioned, the board of directors of plaintiff did not at any time or in any way elect to exercise the control over its officers given said board by said by-laws.

The court further finds "that, after the return of Mr. Thomas from the city of New York to Indianapolis, some time in March, there was a meeting of the board of directors of plaintiff, at which the validity of the release executed by Mr. Thomas was discussed; but the records do not show that at that particular meeting any definite action was taken; that the directors at that meeting did in fact agree to submit the question to counsel of plaintiff, let him investigate it, and then act upon his advice; that about two years after this meeting and a year and a half after this suit was commenced, a *nunc pro tunc* entry was made upon the records of plaintiff of the proceedings of plaintiff's board of directors, which showed a repudiation upon the part of the board of directors of the

release so executed, and that this suit was originally instituted in this court at the first term thereof after the execution of the release."

We concur with the court below that on the facts thus stated the release was a valid release. Its execution was of that class of business which, under the by-laws of the corporation and the course of business between these parties, had been confided to the president and superintendent, both of which offices were held by Mr. Jones. The direction given by Mr. Jones to the treasurer, Mr. Thomas, both of whom were also directors in the corporation, was within the line of his authority. He had under this same authority, without any express resolution or ratification of the board of directors, made the contract on which this suit is brought; and it would seem that, not being under seal, a simple contract concerning the ordinary business of the company, the same power which enabled him to make it was sufficient to enable him to release it, unless the power had been withdrawn.

Another principle leads to the same result. These by-laws show that the board of directors retained the power in their hands to control the president and superintendent in any transaction, whenever it was thought proper to do so. This matter was reported to the directors; they had a meeting upon the subject some six weeks after the whole thing had been consummated, and after they had received the benefit of the release by the payment of their drafts. The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that if they had the right to disaffirm it they should do it promptly, and, if after a reasonable time they did not so disaffirm it, a ratification would be presumed. In regard to this it appears that the board, when notified of what had been done by their agents, did not disaffirm their action at that time, but that the act or resolution of disaffirmance was passed about two years after notice of the transaction, and that if the suit brought in this case can be considered as an act of disaffirmance, it came too late, as it was commenced some six months after they had knowledge of the release. As was stated in the somewhat analogous

case of the *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 592, "the authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party, with whom that right is optional, is aware of the facts which gave him that option, are numerous. . . . The more important are as follows: *Badger* v. *Badger*, 2 Wall. 87; *Harwood* v. *R. R. Co.*, 17 id. 78; *Marsh* v. *Whitmore*, 21 id. 178; *Vigers* v. *Pike*, 8 Cl. & Fin. 650; *Wentworth* v. *Lloyd*, 32 Beav. 467; *Follansbee* v. *Kilbreth*, 17 Ill. 522; *S. C.* 65 Am. Dec. 691." See also *Gold Mining Co.* v. *National Bank*, 96 U. S. 640; *Law* v. *Cross*, 1 Black, 533.

It is said that the release was without consideration, because Moran Brothers had the means in their hands to pay the drafts, of the property of the defendants, but we think the finding of facts clearly disproves that; indeed, the court found, as a matter of fact, that the defendants were then insolvent, and that Moran Brothers had no funds in their hands out of which they could have paid the drafts. It is obvious, therefore, that the consideration for this release was the voluntary payment by Moran Brothers of the existing protested drafts of the plaintiff company out of their own means and not out of the means of the defendant corporation. We think this was a sufficient consideration to support the release.

The judgment of the Circuit Court is, therefore, affirmed.

BEARD *v.* NICHOLS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Argued December 22, 1886. — Decided January 31, 1887.

Webbing made of india-rubber, wool, and cotton, and known as "wool elastic webbing," is not dutiable as webbing made of wool, or of which wool is a component material, at fifty cents per pound and in addition thereto fifty per cent. ad valorem; but as webbing composed wholly or in part of india-rubber, at thirty-five per cent. ad valorem.

Opinion of the Court.

THIS was an action at law to recover back duties alleged to have been illegally exacted. Judgment for plaintiff, to review which defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Solicitor General for plaintiff in error.

Mr. Charles Levi Woodbury for defendants in error.

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

The single question in this case is as to the duty payable in the latter part of 1878 and the early part of 1879 on "webbing made of india-rubber, wool, and cotton," and known as "Wool elastic webbing," as distinguished from "Union elastic webbing," made of rubber, silk, and cotton, and "Cotton elastic webbing," made of rubber and cotton. It is used for gores and gussets in the manufacture of Congress boots, and, without the rubber, would not be adapted to that use. In its manufacture it is not wrought by hand or braided by machinery, but is woven in a loom.

In the court below, three clauses of § 2504 of the Revised Statutes were brought under consideration, to wit:

First. Schedule L, "Wool and woollen goods," Rev. Stat. p. 472: "Webbings, beltings, bindings, braids, galloons, fringes, gimps, cords, cords and tassels, dress trimmings, head-nets, buttons, or barrel buttons, or buttons of other forms for tassels or ornaments, wrought by hand or braided by machinery, made of wool, worsted, or mohair, or of which wool, worsted, or mohair is a component material: fifty cents per pound, and, in addition thereto, fifty per centum ad valorem."

Second. Schedule M, "Sundries," Rev. Stat. p. 477: "India-rubber, articles composed of. — Braces, suspenders, webbing, or other fabrics, composed wholly or in part of india-rubber, not otherwise provided for, thirty-five per centum ad valorem."

Third. Schedule L, "Wool and woollen goods," Rev. Stat. p. 471: "Woollen cloths, woollen shawls, and all manufactures of wool of every description, made wholly or in part of wool,

not herein otherwise provided for: fifty cents per pound, and, in addition thereto, thirty-five per centum ad valorem."

In this court, however, it was conceded by the Solicitor General, in his argument for the collector, that, as the third clause does not specifically provide for webbing, and both the others do, that clause would not be relied on here. The precise question to be determined is, therefore, whether these goods are dutiable as "webbing . . . composed wholly or in part of india-rubber," at thirty-five per cent. ad valorem, or as "webbing . . . made of wool, . . . or of which wool . . . is a component material," at fifty cents per pound, and, in addition thereto, fifty per cent. ad valorem. The collector exacted the larger duty, and this suit was brought to recover back the difference between that and the smaller one. The court below gave judgment against the collector, and, to reverse that judgment, this writ of error was sued out.

In the tariff act of August 30, 1842, c. 270, § 5, subdivision Tenth, 5 Stat. 555, was this provision: "On india-rubber oil-cloth, webbing, shoes, braces, or suspenders, or other fabrics or manufactured articles composed wholly or in part of india-rubber, thirty per centum ad valorem." In the act of July 30, 1846, c. 74, § 11, Schedule C, 9 Stat. 44, this was the language: "Braces, suspenders, webbing, or other fabrics, composed wholly or in part of india-rubber, not otherwise provided for." The same provision was made in the act of March 2, 1861, c. 68, § 22, 12 Stat. 191, and in the act of July 14, 1862, c. 163, § 13, 12 Stat. 556, which increased the duties on these articles five per centum ad valorem. In the last of these acts, § 8, p. 552, was the following provision: "On manufactures of india-rubber and silk, or of india-rubber and silk and other materials, fifty per centum ad valorem." These provisions of the acts of 1861 and 1862 were reënacted in substantially the same language as part of the Revised Statutes. That in relation to manufactures of india-rubber and silk, and india-rubber and silk and other materials, is found in § 2504, immediately preceding the second of the clauses above referred to.

In 1873, while the acts of 1861 and 1862 were in force, and before the enactment of the Revised Statutes, Davies & Co.

imported into New York "suspenders or braces manufactured of rubber, cotton, and silk," and the collector exacted a duty of fifty per centum ad valorem as upon a manufacture of india-rubber and silk and other materials; but this court held in *Arthur* v. *Davies*, 96 U. S. 135, that they were only dutiable at the rate of thirty-five per centum ad valorem, as suspenders or braces composed wholly or in part of india-rubber, and that they were not "otherwise provided for," as manufactures of india-rubber and silk and other materials, because for thirty years before the importation in that case, "and in four different statutes, braces and suspenders, composed wholly or in part of india-rubber, had been a subject of duty *eo nomine*." During the same year Faxon, Elms & Co. imported into Boston from Liverpool webbing which was a manufacture of india-rubber, silk, and cotton, known as "Union Gusset," "Union Web," or "Union Elastic Web," and used in the manufacture of the gores or gussets of Congress boots. In this case, also, the collector exacted a duty of fifty per centum ad valorem, under § 8 of the act of 1862, as on manufactures of india-rubber and silk and other materials, but this court held at its October term, 1878, in *Faxon* v. *Russell*, not reported, on the authority of *Arthur* v. *Davies*, that the goods were only dutiable as webbing composed wholly or in part of india-rubber.

These cases, with which we are entirely satisfied, are conclusive upon the questions here involved. Ever since 1842 "webbing" composed wholly or in part of india-rubber has been a subject of duty *eo nomine*, and it is no more otherwise provided for, as webbing composed wholly or in part of wool than it would be as a manufacture of india-rubber and silk, or of india-rubber and silk and other materials, if silk had been one of its component parts.

The judgment is affirmed.

SCHLESINGER *v.* BEARD.

SCHLESINGER *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Argued January 13, 1887. — Decided January 31, 1887.

Punchings and clippings of wrought iron boiler plates and of wrought sheet iron, left after the completion of the process of the manufacture of the boiler plates into boilers, and of the ends of bridge-rods and beams of wrought iron, cut off to bring the rods and beams to the required length and to remove imperfections, were in "actual use," within the meaning of the statute, in the manufacture of those respective things, and on importation into the United States are subject to duty as "wrought scrap iron."

Two actions at law: the first to recover back duties alleged to have been illegally exacted; the second, to recover additional duties after delivery of the goods. Judgment against the importers, who sued out these writs of error. The case is stated in the opinion of the court.

Mr. L. S. Dabney and *Mr. William S. Hall* for plaintiff in error.

Mr. Solicitor General for defendant in error.

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

These cases involve substantially the same questions, and may be considered together. One is a suit by Naylor & Co., importers, against Beard, the collector of customs in Boston, to recover back duties alleged to have been illegally exacted, and the other is a suit by the United States against the same importers to recover additional duties assessed on the liquidation of an entry after the delivery of the goods upon payment of estimated duties.

Opinion of the Court.

The facts are these: In October, 1879, Naylor & Co., imported into the port of Boston from England 170 tons of wrought scrap iron, consisting "of the punchings and clippings of wrought iron boiler plates and wrought sheet iron, left after the process of the manufacture of the boiler plates into boilers was completed, and of the ends of bridge rods and beams of wrought iron, cut off to bring the rods and beams to the required length, and to remove imperfections." When the entry was made at the custom house, the duties were estimated upon the whole at the rate of eight dollars per ton. On the payment of this estimate the iron was delivered to the importers. Afterwards, 263,332 pounds were classified by the customs officers as "new wrought scrap iron," and an additional duty of $1611.92 charged thereon. For the recovery of this amount the suit in favor of the United States was brought.

In November, 1879, the same parties imported from England 200 tons of wrought scrap iron, consisting entirely of punchings and clippings, such as are described above. Upon this entry 280,995 pounds were classified as "old wrought scrap iron," and charged with duty at the rate of eight dollars per ton, and 138,400 pounds as "new wrought scrap iron," and charged at the rate of one cent a pound. The importers paid the duties assessed under protest as to the last item, and then sued to recover back $889.70, the difference between the duties at eight dollars per ton and the amount actually paid.

It was agreed that the punchings, clippings, and ends were all waste iron and incapable of being further used, and that they were only fit for remanufacture. The only actual use to which they had been subjected was in the making of boilers from the plates out of which they had been cut in the process of manufacture, and in the building of bridges of which the rods and beams that had been cut to adapt them to their places formed a part. The importer claimed that all were dutiable as "wrought scrap iron," under Schedule E of § 2504 of the Revised Statutes, p. 466, while the collector claimed that the part classified as "new wrought scrap iron" was subject to a duty of one cent a pound, as "iron less finished than iron in bars and more advanced than pig iron," because it had not been in "actual use."

The court below gave judgment in each of the suits against the importers, to reverse which these writs of error were brought.

The provisions of the tariff act on which the cases depend are the following clauses in Schedule E of § 2504 of the Revised Statutes:

1. p. 464. "But all iron in slabs, blooms, loops, or other forms, less finished than iron in bars, and more advanced than pig iron, except castings, shall be rated as iron in bars, and pay a duty accordingly," *i.e.* one cent per pound.

2. p. 466. "Cast scrap iron of every description: six dollars per ton.

"Wrought scrap iron of every description: eight dollars per ton. But nothing shall be deemed scrap iron except waste or refuse iron that has been in actual use, and is fit only to be remanufactured."

This particular form of provision as to scrap iron, both cast and wrought, appeared for the first time in the act of July 14, 1870, c. 255, § 21, 16 Stat. 264, from which it was carried into the Revised Statutes. The earlier statutes were as follows:

1. An act of July 14, 1832, c. 227, § 2, clause 13, 4 Stat. 588: "That all scrap and old iron shall pay a duty of twelve dollars and fifty cents per ton; that nothing shall be deemed old iron that has not been in actual use and fit only to be remanufactured; and all pieces of iron, except old, of more than six inches in length, or of sufficient length to be made into spikes and bolts, shall be rated as bar, bolt, rod, or hoop iron, as the case may be, and pay duty accordingly."

2. An act of August 30, 1842, c. 270, § 4, clause 3, 5 Stat. 552, which is substantially the same as the act of 1832, excepting only that the duty is reduced to ten dollars per ton.

3. An act of July 30, 1846, c. 74, § 11, schedule 6, 9 Stat. 45, which places among articles subject to a duty of thirty per cent. ad valorem, "iron in bars, blooms, bolts, loops, pigs, rods, slabs, or other form not otherwise provided for; castings of iron; old or scrap iron."

4. An act of March 2, 1861, c. 68, § 7, clause 3, 12 Stat. 181: "On old scrap iron, six dollars per ton: *Provided*, That

nothing shall be deemed old iron that has not been in actual use and fit only to be remanufactured."

5. An act of June 30, 1864, c. 171, § 3, 13 Stat. 205, which is in the exact language of the act of 1861, except that the duty is raised from six to eight dollars per ton.

It thus appears that in 1870 the form of the statutes on this subject was materially changed, and that now the duty is laid upon "scrap iron," without any reference to whether it is new or old, and that all waste or refuse iron is scrap iron, if it has been in actual use, and is only fit for remanufacture.

That the iron now under consideration was waste iron is conceded; and in our opinion it had been "in actual use" within the meaning of that term as employed in the statute. At one time it formed part of boiler plates used in the manufacture of boilers, or of rods or beams used in building bridges. In order to fit the plates, rods, or beams to the places they were to occupy in the structures of which they were to form a part, these pieces were cut off as useless, and thrown away, or, in the language of the trade, "into the scrap heap." They had become, by the use to which they were put, "scrap iron," in the popular sense of that term, and nothing else. It is true the cuttings and clippings had never themselves been used in the boilers or in the bridges, but they had been used in making those structures, and thus had accomplished the purpose for which they were originally manufactured. The plates, rods, and beams of which they were once parts had been used, and these were the waste resulting from that use. They are not old in the sense of having been worn by use, but they are scrap, and no longer capable of any use until remanufactured, because in their use they have been rendered worthless for any purpose except to remanufacture. In the popular sense, as manufactured articles, they have been used up — made worthless by use; and this use has been actual, not colorable only. The plates, rods, and beams were made to be used in a particular way. They have been so used, and these cuttings and clippings are the waste of that use. Consequently they are, in our opinion, "wrought scrap iron," and dutiable as such.

Opinion of the Court.

The judgment in each of the cases is reversed, and the causes remanded, with instructions to enter judgment upon the agreed facts in favor of the importers in the suit against the collector, and against the United States in the suit against the importers.

BANK OF MAYSVILLE *v.* CLAYPOOL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Submitted January 20, 1887. — Decided January 31, 1887.

An application for the removal of a case from a state court, filed not only after the trial had begun, but when it had progressed far enough to get a verdict of the jury subject only to the decision of the court on questions presented by a demurrer to the evidence, is clearly too late.

THE case is stated in the opinion of the court.

Mr. B. H. Smith for plaintiff in error.

Mr. J. Holdsworth Gordon for defendants in error.

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

This is a writ of error for the review of an order of a District Court, having Circuit Court jurisdiction, remanding a cause which had been removed from a state court under § 2 of the act of March 3, 1875, c. 137, 18 Stat. 470, on the ground of citizenship. The record shows a suit begun by the Bank of Maysville in the Circuit Court of Kanawha County, West Virginia, September 24, 1877, against Claypool, as maker, and Thayer, as indorser, of a promissory note. After a demurrer, which was overruled, a plea was filed November 26, on which the parties went to trial the same day before a jury. After the evidence on the part of the plaintiff was all in, the defendant Thayer prayed judgment because on the facts proven no case had been made out against him. The jury, under instruc-

tions from the court, found the amount due on the note, "subject to the judgment of the court on the demurrer to the evidence," and were discharged. Afterwards, on the 10th of January, 1878, the bank moved for leave to amend its declaration so as to show that it was a corporation created by the laws of the State of Kentucky, "and existing in said state of Kentucky." This motion was denied, and the bank then moved for leave "to withdraw its joinder to the defendants' demurrer to the plaintiff's evidence," and that the verdict be set aside and a new trial granted. While these motions were pending undisposed of, the bank filed its petition for the removal of the suit to the District Court of the United States sitting at Charleston, on the ground that the plaintiff was a Kentucky corporation and the defendants were citizens of West Virginia. Objection was made by the defendants, on the 4th of November, 1879, to the entry of the case in the District Court, but this objection was overruled, and the cause docketed by order of the court November 17, 1880. Thereupon the demurrer to the evidence was argued and submitted to the court.

On the 6th of December, 1880, there was filed in this court a petition by the defendant Thayer, sworn to September 13, 1880, for a rule on the district judge to show cause why a mandamus should not issue requiring him to remand the suit. In this petition it did not appear that the court had taken any action in the matter, and it was denied because no application had been made for an order to remand. In the opinion it was said: "We cannot doubt that if such an application is made it will be promptly granted if the facts are as they are stated here. The petition for removal was not filed in the state court until after both trial and verdict, when the law requires it should be filed before or at the term at which the cause could be first tried, and before the trial thereof." Afterwards, May 7, 1883, a motion to remand was made by Thayer and at once granted by the court. To review that order this writ of error was brought.

In the *Removal Cases*, 100 U. S. 457, which were decided December 15, 1879, it was held that a petition for removal

under the act of 1875 to be in time must be "presented to the court before the trial is in good faith entered upon," and we there said, p. 473: "There may be exceptions to this rule; but we think it clear that Congress did not intend, by the expression 'before trial,' to allow a party to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings and take his suit to another tribunal. But, to bar the right of removal, it must appear that the trial had actually begun and was in progress in the orderly course of proceeding when the application was made. No mere attempt of one party to put himself on record as having begun the trial is enough. The case must be actually on trial by the court, all the parties acting in good faith, before the right of removal is gone." This rule was recognized and followed in *Jifkins* v. *Sweetzer*, 102 U. S. 177, 179, and *Alley* v. *Nott*, 111 U. S. 472, and must now be considered as settled. Clearly, therefore, this application for removal came too late. When it was filed, the trial had not only begun, but it had progressed far enough to get a verdict of a jury, subject only to the decision of the court on the questions presented by the demurrer to the evidence.

In this connection it is proper to say that the ruling in the *Removal Cases* was not probably known to the district judge when his order to docket the cause was made, because the volume of our reports in which those cases are found was not published and generally distributed until a very considerable time after our adjournment for the term in May, 1880. The court did not actually proceed in the case after it was docketed, further than to take it on the submission of the demurrer to the evidence made at that time, and the order to remand was granted as soon as a motion to that effect was made by the bank.

The order remanding the case is affirmed.

GRANT v. PHŒNIX LIFE INSURANCE COMPANY.

GRANT and Another v. SAME.

ORIGINAL MOTION IN TWO CAUSES PENDING IN THIS COURT ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted January 17, 1887. — Decided January 31, 1887.

In a suit for foreclosing a mortgage, it appearing that a receiver has been appointed of the mortgaged premises, and that the mortgagor, appellant, is unable to pay the cost of printing the record on appeal, and that there are rents and profits in the receiver's hands collected during the pendency of the suit, the court orders the receiver to pay to the clerk the sum estimated to be necessary to complete the cost of printing the record.

The following motion was filed in these cases:

"The above appellant [Grant] moves the honorable the Justices of the Supreme Court of the United States, that Brainard H. Warner the receiver, appointed by the Supreme Court of the District of Columbia in Equity Cause 4291, be directed to turn over to the Clerk of this Honorable Court out of the rents and profits in his hands the amount of $5500, for costs accruing or to accrue, in the hearing of the cause, and for counsel fees as set forth in the petition, for the following reasons:

"First. Because the rents and profits are not mortgaged to the appellee, and said appellee has no right nor just claims to the fund in the hands of the said Warner.

"Second. Because the Supreme Court of the District of Columbia in General Term, has once finally decided that said rents and profits belong to the appellant, and discharged a receiver for that reason, and turned over the property and funds to the appellant by the decree of said court.

"Third. Because at the time of the appointment of said Warner, the cause stood precisely as it stood on February 12, 1878, when the court discharged the former receiver, and because appellant was refused a hearing by the court below

on said appointment which was made by an interlocutory order and not being continued in the final decree of June 16, 1883, said appointment was superseded thereby.

"Fourth. Because the appellee has delayed the cause for many years by violating the rules and practices of the court, and thereby has caused the destruction of the property and loss of the rents and profits.

"Fifth. Because without receiving the amount prayed for in his petition, appellant will not be able to properly present his case to your Honorable Court, and will thus be prevented from obtaining the right and justice to which he is entitled.

"Sixth. Because of many other manifest reasons appearing of record and set forth in the petition."

Leave was granted to both sides to file briefs.

Mr. H. W. Blair for the motion.

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

We find that the cost of printing the record in No. 165 has been		$1327.00
and that the estimated clerk's fees in the same case are		900.00
In all		$2227.00
Of this the appellant has paid:		
1. To the printer	$552	
2. To the clerk	400	952.00
Leaving a balance of		$1275.00

which the appellant represents himself as unable to pay, and the printer will not allow the requisite number of the printed copies to be delivered for use at the hearing until his claim is satisfied. The money in the hands of the receiver has been collected from the rents of the mortgaged property during the pendency of the suit. We, therefore, direct that there be paid by the receiver to the clerk of this court the sum of $1275, to be by him used in payment of the amount now due for printing the record, and the amount of his own taxable fees in the

case, not already paid by the appellant. A copy of this order may be certified to the court below so that it may be carried into effect by an appropriate order of that court upon the receiver.

The motion papers now on file do not show that the matters involved in the appeal in No. 1201 are of a character to make it proper to direct that the clerk's costs and the expense of printing the record in that case be paid by the receiver. Except as to the payment of clerk's fees and printer's charges in No. 165 as above, the motions are overruled.

Motion granted in part and denied in part as to first suit; and denied as to second.

WINCHESTER *v.* HEISKELL.

ERROR TO THE SUPREME COURT OF TENNESSEE.

Submitted January 25, 1887. — Decided January 31, 1887.

The court restates what was decided in *Winchester* v. *Heiskell*, 119 U. S. 450, and, on petition for rehearing, adheres to it.

THIS was a petition for a rehearing in the case decided in 119 U. S. 450–453.

Mr. B. M. Estes for the petitioner.

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

This petition is denied, but inasmuch as the petitioners think that the points on which they relied for a reversal of the judgment were not clearly understood, we will restate what was decided.

1. We held that, as the suit of *Townsend* v. *Jones* was pending when Townsend filed his petition in bankruptcy, and when he made his assignment to Winchester, the assignee, Winches-

ter, as such assignee, had the right to appear in that suit and have the amount due Heiskell, Scott, & Heiskell determined. It may be that, according to the practice in Tennessee, if he had not appeared, Heiskell, Scott, & Heiskell would have been compelled to bring a new suit to have the amount of their lien ascertained; but as he did appear and did ask to have the matter adjudicated in that suit, he was bound by what was done. As the court had declared the lien, it was within its jurisdiction to ascertain, with the consent of all the parties, the amount that was due under the lien and make the necessary order for its enforcement as against those who were parties to that suit. About this we have no doubt.

2. We said: "The question here is, not whether that decree thus rendered binds these appellants, (plaintiffs in error,) but whether the state court had jurisdiction so as to bind those who were parties to the suit, and those whom the parties in law represented." The assignee having voluntarily made himself a party to the suit, and the court having at his request settled the amount of the lien, he was bound by what was done, and so were all whom he in law represented in the litigation. That certainly includes the general creditors of the bankrupt; but whether it does those claiming under the trust deed from Townsend, before his bankruptcy, to George W. Winchester, trustee, we did not then and do not now decide.

IN RE SNOW.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH.

Argued January 21, 1887. — Decided February 7, 1887.

Where a District Court in the Territory of Utah refuses to issue a writ of *habeas corpus* involving the question of personal freedom, an appeal lies to this court from its order and judgment of refusal.

The offence of cohabiting with more than one woman, created by § 3 of the act of Congress of March 22, 1882, c. 47, 22 Stat. 31, is a continuous offence, and not one consisting of an isolated act.

Opinion of the Court.

S. was convicted separately in a District Court of the Territory of Utah, on three indictments under that section, covering together a continuous period of time, each covering a different part, but the three parts being continuous, the indictments being found at the same time, by the same grand jury, on one oath and one examination, of the same witnesses, covering the whole continuous time. One judgment was entered on the three convictions. It first imposed a term of imprisonment and a fine. It next imposed two further successive terms of imprisonment, each to begin at the expiration of the last preceding sentence and judgment, with two further fines. It set forth the time embraced by each indictment and specified each of the three punishments as being imposed in respect of a specified one of the indictments. On a petition to a District Court of the Territory, by the defendant, for a writ of *habeas corpus*, setting forth that he had been imprisoned under the judgment for more than the term first imposed, and had paid the fine first imposed, and that the other two punishments were in excess of the authority of the trial court, the writ was refused. On appeal to this court; *Held*,

(1) There was but one entire offence for the continuous time.

(2) The trial court had no jurisdiction to inflict a punishment in respect of more than one of the convictions.

(3) As the want of jurisdiction appeared on the face of the proceedings, the defendant could be released from imprisonment on a *habeas corpus*.

(4) The order and judgment of the court below must be reversed, and the case be remanded to that court, with a direction to grant the writ of *habeas corpus* prayed for.

THIS was an appeal from an order of court refusing an application for a writ of *habeas corpus*. The case is stated in the opinion of the court.

Mr. George Ticknor Curtis and *Mr. Franklin S. Richards* for appellant.

Mr. Assistant Attorney General Maury for the United States.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

Section 3 of the act of Congress approved March 22, 1882, c. 47, 22 Stat. 31, provides as follows: "Sec. 3. That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor,

and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court."

The grand jury of the United States for November Term, 1885, in the District Court of the First Judicial District in and for the Territory of Utah, on the 5th of December, 1885, presented and filed in that court, in open court, three several indictments, in the name of the United States, against Lorenzo Snow, each of them found December 2, 1885, designated as No. 741, No. 742, and No. 743. Each of them was founded on the foregoing statute, and they were alike in all respects except that each covered a different period of time. No. 741 alleged that Snow, on the 1st of January, 1883, "at the county of Box Elder, in the said district, territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter, and continuously between said first day of January, A.D. 1883, and the thirty-first day of December, A.D. 1883, did then and there unlawfully live and cohabit with more than one woman, to wit, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phœbe W. Snow, and Minnie Jensen Snow, and during all the period aforesaid, at the county aforesaid, he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as his wives." No. 742 alleged that Snow, on the 1st of January, 1885, "and on divers other days and times thereafter, and continuously between said first day of January, A.D. 1885, and the first day of December, A.D. 1885, did then and there unlawfully live and cohabit with more than one woman, to wit, with" the seven persons above named, "and during all the period aforesaid" "did unlawfully claim, live, and cohabit with all of said women as his wives." No. 743 alleged that Snow, on the 1st of January, 1884, "and on divers other days and times thereafter, and continuously between said first day of January, A.D. 1884, and the thirty-first day of December, A.D. 1884, did then and there unlawfully live and cohabit with more than one woman, to wit, with" the seven persons above named, "and during all the period aforesaid" "did un-

lawfully claim, live, and cohabit with all of said women as his wives."

At the time of filing each indictment it was properly indorsed "a true bill, etc., and with the names of the witnesses." The same sixteen witnesses were examined before the grand jury, "on one oath and one examination, as to the alleged offence during the entire time mentioned in all of said three indictments, and" they were found "upon the testimony of witnesses given on an examination covering the whole time specified in said three indictments." On the 11th of December, 1885, the defendant was arraigned on each of the three indictments, and interposed a demurrer to each, which being overruled, he pleaded not guilty to each.

Indictment No. 742 was first tried, covering the period from and including January 1, 1885, to December 1, 1885. On the 31st of December, 1885, a verdict of guilty was rendered, and the court fixed the 16th of January, 1886, as the time for passing sentence.

Indictment 743 was next tried, covering the period from and including January 1, 1884, to December 31, 1884. The defendant orally put in an additional plea in bar, setting up his prior conviction on indictment No. 742; and that the offence charged in all of the indictments was one continuous offence and the same offence, and not divisible. On an oral demurrer to this plea, the demurrer was sustained. On the trial by the jury, a verdict of guilty was rendered on the 5th of January, 1886, and the court fixed the 16th of January, 1886, as the time for passing sentence.

Indictment No. 741 was next tried, covering the period from and including January 1, 1883, to December 31, 1883. The defendant orally put in an additional plea in bar, setting up his prior convictions on indictments Nos. 742 and 743; and that the offence charged in all of the indictments was one continuous offence, and the same offence, and not divisible. On an oral demurrer to this plea, the demurrer was sustained. On the trial by the jury, a verdict of guilty was rendered on the 5th of January, 1886, and the court fixed the 16th of January, 1886, as the time for passing sentence.

The record of the court states that on the last-named day the following proceedings took place, in open court:

"(Title of court and cause.)

"The defendant and his counsel, F. S. Richards, and C. C. Richards, Esq'rs (of counsel) came into court. The defendant was duly informed of the nature of the indictments found against him on the 5th day of December, 1885, by the grand jury of this court, for the crime of unlawful cohabitation, committed as stated in said indictments, and during the time, as follows, viz.: Indictment No. 741, between the first day of January, A.D. 1883, and the thirty-first day of December, A.D. 1883; indictment No. 742, between the first day of January, A.D. 1885, and the first day of December, A.D. 1885; indictment No. 743, between the first day of January, A.D. 1884, and the thirty-first day of December, A.D. 1884; of his arraignment and plea of not guilty as charged in said three indictments, on the sixteenth day of December, A.D. 1885; of his trial and the verdicts of the juries; indictment No. 742, 'Guilty as charged in the indictment,' on December 31, 1885; indictment No. 743, 'Guilty as charged in the indictment,' on January 5, 1886; indictment No. 741, 'Guilty as charged in the indictment,' on January 5, 1886.

"The said defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none; and no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment, that whereas said Lorenzo Snow having been duly convicted in this court of the crime of unlawful cohabitation:

"It is ordered, adjudged, and decreed, that said Lorenzo Snow be imprisoned in the penitentiary of the Territory of Utah for a period of six months, and that he do forfeit and pay to the United States a fine of three hundred dollars and the costs of this prosecution, and that he do stand committed into the custody of the United States marshal for said territory until such fine and costs be paid in full. (As to indictment No. 741.)

"And it is further ordered, adjudged, and decreed, that at the expiration of the sentence and judgment rendered on said indictment No. 741, said Lorenzo Snow be imprisoned in the penitentiary of Utah Territory for a period of six months, and that he do forfeit and pay to the United States the sum of three hundred dollars and the costs of this prosecution, and that he do stand committed into the custody of the United States marshal for said territory until such fine and costs be paid in full. (As to indictment No. 742.)

"And it is further ordered, adjudged, and decreed, that at the expiration of the sentence and judgment, as last above rendered, on said indictment No. 742, said Lorenzo Snow be imprisoned in the penitentiary of Utah Territory for a period of six months, and that he do forfeit and pay to the United States the sum of three hundred dollars and the costs of this prosecution, and that he do stand committed into the custody of the United States marshal for said territory until such fine and costs be paid in full. (As to indictment No. 743.)

"The said defendant, Lorenzo Snow, is remanded into the custody of the United States marshal for Utah Territory, to be by him delivered into the custody of the warden or other proper officer in charge of said penitentiary; and said warden or other proper officer of said penitentiary is hereby commanded to receive of and from the said United States marshal, him, the said Lorenzo Snow, convicted and sentenced as aforesaid, and him, the said Lorenzo Snow, keep and imprison in said penitentiary for the periods as in this judgment ordered and specified.

"ORLANDO W. POWERS, *Judge*."

On the 22d of October, 1886, the defendant filed in the District Court of the Third Judicial District of the Territory of Utah a petition setting forth that he is a prisoner confined in the penitentiary of the Territory of Utah, "by virtue of the warrant, judgment, and proceedings of record, including three indictments against your petitioner, his arraignment thereon, and pleas thereto, respectively, as well as demurrers to such pleas, decisions thereof, and verdicts of the jury,

being the record of said matters in the District Court of the First Judicial District of the Territory of Utah," copies of all which papers, sixteen in number, were annexed to the petition; that, under said judgment, and in execution thereof, he had been imprisoned in said penitentiary for more than six months, to wit, continuously since the 12th day of March, 1886, and had paid $300 in satisfaction of the fine adjudged against him, and "all the costs awarded and assessed against him on said prosecution;" that his imprisonment is illegal in that "the court had no jurisdiction to pass judgment" against him "upon more than one of the indictments or records referred to in its said judgment, for the reason that the offence therein set out is the same as that contained and set out in each of the other said indictments and records, and the maximum punishment which the court had authority to impose was six months' imprisonment and a fine of three hundred dollars;" and "that by his said imprisonment your petitioner is being punished twice for one and the same offence." The prayer is for a writ of *habeas corpus*, to the end that the petitioner may be discharged from custody.

On a hearing on the petition the following order was made by the court, on the 23d of October, 1886:

"The petition of Lorenzo Snow for a writ of *habeas corpus* having been presented to the court, with the exhibits attached as a part thereof, and the court having fully considered the application and petition and the exhibits attached, finds that the facts alleged and shown by the petition and exhibits are insufficient to authorize the issuance of the writ; and the court being of the opinion, from the allegations and facts stated in the petition and exhibits, that, if the writ be granted and a hearing given, the petitioner could not be discharged from custody, it is ordered and adjudged by the court that the said application for a writ of *habeas corpus* be, and the same is hereby, refused; to which ruling and refusal applicant, by his counsel, excepts."

From this order and judgment the petitioner has appealed to this court.

There can be no doubt that the action of the District Court,

as set forth in its order and judgment refusing to issue the writ, was, so far as an appeal is concerned, equivalent to a refusal to discharge the petitioner on a hearing on the return to a writ; and that, under § 1909 of the Revised Statutes, an appeal lies to this court from that order and judgment.

It is contended for the United States, that, as the court which tried the indictments had jurisdiction over the offences charged in them, it had jurisdiction to determine the questions raised by the demurrers to the oral pleas in bar in the cases secondly and thirdly tried; that it tried those questions; that those questions are the same which are raised in the present proceeding; that they cannot be reviewed on *habeas corpus* by any court; and that they could only be reëxamined here on a writ of error, if one were authorized. For these propositions the case of *Ex parte Bigelow*, 113 U. S. 328, is cited. But, for the reasons hereafter stated, we are of opinion that the decision in that case does not apply to the present one.

The offence of cohabiting with more than one woman, in the sense of the section of the statute on which the indictments were founded, may be committed by a man by living in the same house with two women whom he had theretofore acknowledged as his wives, and eating at their respective tables, and holding them out to the world by his language or conduct, or both, as his wives, though he may not occupy the same bed or sleep in the same room with them, or either of them, or have sexual intercourse with either of them. The offence of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is, inherently, a continuous offence, having duration; and not an offence consisting of an isolated act. That it was intended in that sense in these indictments is shown by the fact that in each the charge laid is that the defendant did on the day named and "thereafter and continuously," for the time specified, "live and cohabit with more than one woman, to wit, with" the seven women named, and "during all the period aforesaid" "did unlawfully claim, live and cohabit with all of said women as his wives." Thus, in each indict-

ment, the offence is laid as a continuing one, and a single one, for all the time covered by the indictment; and, taking the three indictments together, there is charged a continuing offence for the entire time covered by all three of the indictments. There was but a single offence committed prior to the time the indictments were found. This appears on the face of the judgment. It refers to the indictments as found "for the crime of unlawful cohabitation committed" "during the time" stated, divided into three periods, according to each indictment. For so much of the offence as covered each of these periods the defendant is, according to the judgment, to be imprisoned for six months and to pay a fine of $300. The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so on, *ad infinitum*, for smaller periods of time. It is to prevent such an application of penal laws, that the rule has obtained that a continuing offence of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted. Here each indictment charged unlawful cohabitation with the same seven women; all the indictments were found at the same time, by the same grand jury, and on the testimony of the same witnesses, covering a continuous period of thirty-five months; and it was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five, or one hundred and fifty-two, or even more. It was quite in consonance with this action, that the prosecuting officer tried the indictments in the inverse order of the time to which each related, that for 1885 first, that for 1884 next, and that for 1883 last. Hence the defendant could not, on any trial, plead or show that he had before been tried on an indictment in respect to a period of time antedating that laid in the indictment on trial. Then, after the verdicts, there was

not a separate judgment in each case; but only one judgment in form was rendered for all the cases. The judgment says, on its face, that the proper officer of the penitentiary is to imprison the defendant therein "for the periods as in this judgment ordered and specified," that is, for three successive periods of six months each, the first period to apply to the indictment thirdly tried; the second period to apply to the indictment first tried, and to begin when the sentence and judgment on the indictment thirdly tried should expire; and the third period to apply to the indictment secondly tried, and to begin when the sentence and judgment on the indictment first tried should expire.

No case is cited where what has been done in the present case has been held to be lawful. But the uniform current of authority is to the contrary, both in England and in the United States.

A leading case on the subject in England is *Crepps* v. *Durden*, Cowper, 640. In that case the statute, 29 Car. 2, c. 7, provided "that no tradesman or other person shall do or exercise any worldly labor, business, or work of their ordinary calling on the Lord's day, works of necessity and charity only excepted." A penalty of five shillings was affixed to each offence, and it was made cognizable by a justice of the peace. Crepps, a baker, was convicted before Durden, a justice, by four separate convictions, "of selling small hot loaves of bread, the same not being any work of charity, on the same day, being Sunday," in violation of that statute. Durden issued four warrants, one on each conviction, to officers, who, under them, levied four penalties, of five shillings each, on the goods of Crepps. The latter sued Durden and the others, in trespass, in the King's Bench, in 1777, and had a verdict before Lord Mansfield, for three sums of five shillings each, subject to the opinion of the court. The first question raised was whether, in the action of trespass, and before the convictions were quashed, their legality could be objected to; and, next, whether the levy under the last three warrants could be justified. It was contended for the plaintiff that the last three convictions were in excess of the jurisdiction of the justice,

because the offence created by the statute was the exercising of a calling on the Lord's day, and, if the plaintiff had continued baking from morning till night, it would still be but one offence; that the four convictions were for one and the same offence; and that an action would lie against the justice and the officers. On the other side it was urged, that, as the justice had general jurisdiction of the offence in question, the convictions must be quashed, or reversed on appeal, before they could be questioned. At a subsequent day, the unanimous opinion of the court was delivered by Lord Mansfield. He first considered the question whether the legality of the convictions could be objected to before they were quashed. As to this he said: "Here are three convictions of a baker, for exercising his trade on one and the same day, he having been before convicted for exercising his ordinary calling on that identical day. If the act of Parliament gives authority to levy but one penalty, there is an end of the question; for there is no penalty at common law. On the construction of the act of Parliament the offence is 'exercising his ordinary trade upon the Lord's day'; and that without any fractions of a day, hours or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consists of one, or of a number of particular acts. The penalty incurred for this offence is five shillings. There is no idea conveyed by the act itself, that, if a tailor sews on the Lord's day, every stitch he takes is a separate offence; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offences. There can be but one entire offence on one and the same day. And this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day. Killing a single hare is an offence; but the killing ten more on the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here, repeated offences are not the object which the legislature had in view in making the statute; but singly, to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had no jurisdiction whatever in respect of the

three last convictions. How, then, can there be a doubt but that the plaintiff might take this objection at the trial?" As to justifying the levy under the last three warrants, Lord Mansfield said: "But what could the justification have been in this case, if any had been attempted to be set up? It could only have been this: That because the plaintiff had been convicted of one offence on that day, therefore the justice had convicted him in three other offences for the same act. By law that is no justification. It is illegal on the face of it; and, therefore, as was very rightly admitted by the counsel for the defendant, in the argument, if put upon the record by way of plea, would have been bad, and on demurrer must have been so adjudged. Most clearly, then, it was open to the plaintiff, upon the general issue, to take advantage of it at the trial. The question does not turn upon niceties; upon a computation how many hours distant the several bakings happened; or upon the fact of which conviction was prior in point of time; or that for uncertainty in that respect they should all four be held bad. But it goes upon the ground that the offence itself can be committed only once in the same day."

In the case at bar the statute provides, that if any male person shall thereafter cohabit with more than one woman, he shall, on conviction, be punished thus and so. The judgment in the case, taken in connection with the other proceedings in the record and the statute, shows, within the principle of *Crepps* v. *Durden*, that there was but one entire offence, whether longer or shorter in point of duration, between the earliest day laid in any indictment and the latest day laid in any. There can be but one offence between such earliest day and the end of the continuous time embraced by all of the indictments. Not only had the court which tried them no jurisdiction to inflict a punishment in respect of more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on *habeas corpus*, when the sentence on more than one of the convictions is sought to be enforced. If such an objection could be taken in *Crepps* v. *Durden*, in a collateral action for damages, it can be taken on a *habeas corpus* to release the party

from imprisonment under the illegal judgment. These considerations distinguish the case from that of *Ex parte Bigelow*, (*ubi supra*,) and bring it within the principle of such cases as *Ex parte Milligan*, 4 Wall. 2, 131; *Ex parte Lange*, 18 Wall. 163, 178; and *Ex parte Wilson*, 114 U. S. 417.

A distinction is laid down in adjudged cases and in text-writers between an offence continuous in its character, like the one at bar, and a case where the statute is aimed at an offence that can be committed *uno ictu*. The subject is discussed in 1 Wharton's Criminal Law, 9th ed., §§ 27, 931, and the cases on the subject are cited.

The principle which governs the present case has been recognized and approved in many cases in the United States: *Washburn* v. *McInroy* (1810), 7 Johns. 134; *Mayor* v. *Ordrenan* (1815), 12 Johns. 122; *Tiffany* v. *Driggs* (1816), 13 Johns. 253; *State* v. *Commissioners* (1818), 2 Murph. (N. C.), 371; *United States* v. *McCormick* (1830), 4 Cranch C. C. 104; *State* v. *Nutt* (1856), 28 Vt. 598; *State* v. *Lindley* (1860), 14 Ind. 430; *Sturgis* v. *Spofford* (1871), 45 N. Y. 446; *Fisher* v. *New York Central & Hudson River Railroad* (1871), 46 N. Y. 644; *State* v. *Egglesht* (1875), 41 Iowa, 574; *United States* v. *New York Guaranty & Indemnity Co.* (1875), 8 Ben. 269; *United States* v. *Erie Railway Co.* (1877), 9 Ben. 67, 68.

The case of *Commonwealth* v. *Connors*, 116 Mass. 35, gives no support to the view that a grand jury may divide a single continuous offence, running through a past period of time, into such parts as it may please, and call each part a separate offence. On the contrary, in *Commonwealth* v. *Robinson*, 126 Mass. 259, it is said that the offence of keeping a tenement for the illegal sale of intoxicating liquors on a day named, and on divers other days and times between that day and a subsequent day, is but one offence, even though the tenement is kept during every hour of the time between those two days, such offence being continuous in its character.

On the whole case we are unanimously of opinion that

The order and judgment of the District Court for the Third Judicial District of Utah Territory must be reversed and the case be remanded to that court, with a direction to grant

the writ of habeas corpus *prayed for, and to take such proceedings thereon as may be in conformity with law and not inconsistent with the opinion of this court.*

MEMPHIS & LITTLE ROCK RAILROAD *v.* DOW.

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

Argued November 11, 12, 1886. — Decided January 24, 1887.

The provision in the constitution of Arkansas of 1874 that "no private corporation shall issue stock or bonds except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void" does not prevent the carrying out of an agreement between mortgage bondholders of an embarrassed railroad company in that state by which it was agreed that trustees should buy in the mortgaged property on foreclosure, and convey it to a new company to be organized by the bondholders which should issue new mortgage bonds to pay the expenses of the sale, and other new mortgage bonds to be taken by the bondholders in lieu of their old bonds, and full paid up stock subject to the mortgage debt, to be delivered to and held by the bondholders without any payment of money; and the bonds issued under such an agreement are not subject to the provisions of § 5, 488 Rev. Stat. Ark., Mansfield's Digest, page 1057, respecting the legal rate of interest for certain classes of railroad securities.

Trustees under a mortgage from a railroad company with covenants of warranty are entitled to protect the trust property against a forced sale under a prior incumbrance, and upon the payment of that incumbrance to have the benefit of its lien as against the company, and to be reimbursed the amount so paid by them with legal interest: but the rate of interest in such case should be determined by the law in force at the time of the subrogation.

THE appellant, the Memphis and Little Rock Railroad Company, (as reorganized,) an Arkansas corporation, conveyed, by deed of May 2, 1877, to Pierson, Matthews, and Dow, trustees, its road and connections, and all its property, rights, and privileges, including its franchise to be a corporation, to secure the payment of its bonds of the same date, aggregating $2,600,000,

and payable in thirty years, subject to a mortgage for $250,000, executed May 1, 1877. The deed provided for the employment, at the expense of the trust estate, of such attorneys and agents as were reasonably necessary for the execution of the trust, and, also, for the payment of charges, costs, expenses, and compensation, incurred by the trustees, from time to time, "in and about or for the execution of the trust."

On the 4th day of March, 1882, the Supreme Court of Arkansas, in a suit to which that corporation was a party, rendered a decree adjudging that the state had a lien upon its road and rolling stock to secure the payment of $202,133.32, with interest, from December 22, 1879, until paid, at the rate of eight per cent. per annum; that being the aggregate principal and interest then due on a loan of $100,000 made January 10, 1861, by the state to the (old) Memphis and Little Rock Railroad Company, and secured by a mortgage upon its rolling stock and upon the same road now operated by the appellant.

On the 25th of March, 1882, five days before the day fixed for the sale directed to be made in satisfaction of that decree, the appellees, (Moran having succeeded Pierson,) as trustees in the deed of May 2, 1877, paid into the treasury of Arkansas the sum of $239,672.71 in full discharge of the state's claim.

The appellees sought by this suit to be subrogated to the rights of the state, and to charge the mortgaged property and interests with the amount so paid by them, with interest thereon, and, also, with such sums as might be ascertained to be due by reason of liabilities incurred, and costs, time, and labor expended by them in and about the trust.

The company resisted each of the claims asserted by the appellees. Its answer proceeded mainly upon the ground that the bonds secured by the deed of May 2, 1877, were and continued to be void under the constitution and laws of Arkansas, having been issued, it was alleged, to the stockholders of the appellant without consideration in money, labor, or property actually received, of which fact the plaintiffs and every original taker of the bonds were advised, and as to which subsequent takers, if such there were, were put upon inquiry by the

recitals in the mortgage securing their payment. Consequently, it was contended, the appellees were under no duty, and had no legal right as trustees, or in any other capacity, to intervene and satisfy the decree in favor of the state, or to incur liability or costs in reference to the defendant's property. The company also filed a cross-bill, setting forth the same grounds, and praying that upon final hearing the deed of May 2, 1877, and the bonds thereby secured, be declared void.

The court sustained exceptions to the answer and a demurrer to the cross-bill, dismissing the latter for want of equity, and rendering a decree in accordance with the prayer of the bill. By the decree, the appellees were subrogated to all of the rights of the state under the decree of March 4, 1882 ; and for the amount so paid by them, with interest thereon from March 25, 1882, at the rate of eight per cent. per annum, aggregating $261,456.27, together with interest on the latter sum at the same rate, from the date of the decree herein, they were adjudged to have a lien upon the property, rights, and interests embraced by the deed of May 2, 1877, subject — the appellees having consented thereto — to the lien created by that deed as well as by a deed executed May 1, 1877. A decree was also entered against the company for $29,580.87, the amount found due to the plaintiffs for services rendered in and about the trust, and for counsel fees and costs in this suit. To this provision of the decree the appellant also objected upon grounds to which reference will be hereafter made.

The principal question related to the validity of the $2,600,000 issue of bonds secured by the deed of May 2, 1877.

The principal facts, chronologically stated, which bore upon this and other questions in the case were as follows: The Memphis and Little Rock Railroad Company was incorporated in 1853 under the laws of Arkansas, with authority to increase its capital to a sum sufficient to complete and operate a railroad between Memphis and Little Rock, by opening books for new stock or by selling new stock, or by borrowing money secured by mortgage of its charter and stock. Its stockholders, at a meeting held February 20, 1860, adopted a resolution authorizing the board of directors, for the purpose of

building and equipping the road, to increase the capital stock of the company to $1,300,000, by issuing coupon bonds of $1000 each, bearing eight per cent. interest, convertible at any time within ten years thereafter into shares of stock — such bonds to be secured by mortgage upon the company's road, charter, works, and real estate, or either of them. The action of the stockholders having been ratified by the directors, the company by deed of trust executed May 1, 1860, conveyed to Tate and others its franchises, property, privileges, road, road-bed, right of way, rolling stock, and works, in trust to secure its bonds, aggregating $1,300,000, payable thirty years after date, with interest at the rate of eight per cent. per annum. On the 10th of January, 1861, it placed a mortgage upon its road and rolling stock to secure the before-mentioned state loan of $100,000, with interest from that date until paid, at the rate of eight per cent. By deed of March 1, 1871, it conveyed its franchises, property, and net income, to Henry F. Vail, in trust to secure other bonds, amounting to $1,000,000, payable thirty years thereafter, with interest at the rate of eight per cent. per annum. The company having made default in the payment of interest on the latter bonds, Vail, the trustee, on the 17th day of March, 1872, sold and conveyed these properties, rights, privileges, and franchises, for $15,000 in cash, subject to all prior and superior liens, to one Stillman Witt, who purchased in behalf of the holders of bonds, secured by the deed of March 1, 1871. Subsequently, March 29, 1873, Witt executed a deed declaring the respective interests of the parties whom he represented, and conveying to each his proportionate share of the property and interests so purchased. On the 17th of November, 1873, the grantees in the latter deed conveyed the same property, rights, and franchises to the Memphis and Little Rock Rail*way* Company — a corporation then recently organized under the laws of Arkansas, by the parties to whom Witt conveyed, subject, however, to the condition that that company should execute its bonds for $2,600,000, secured by first mortgage to the New York Guaranty and Indemnity Company — that amount, according to the estimate of the parties, being less than the principal and in-

terest due on the $1,300,000 mortgage of May 1, 1860, and other indebtedness theretofore incurred in the construction and equipment of the road. In conformity with that condition the rail*way* company executed, December 1, 1873, a mortgage securing its bonds for $2,600,000. That mortgage provided among other things, that "in case of any sale, judicial or otherwise, of the premises embraced in this mortgage, and the holders of a majority in interest of the then outstanding bonds secured by this mortgage shall, in writing, request the said trustee, or its successor or successors, or his or their survivor or survivors, so to do it, they or he is authorized to purchase the premises embraced herein for the use and benefit of the holders of the then outstanding bonds and coupons secured by this mortgage. And that, having so purchased said premises, the right and title thereto shall vest in said trustee or trustees, and no bondholder shall have any claim to the premises or to the proceeds thereof, except for his *pro rata* share of the proceeds of said premises as represented in a new company or corporation to be formed by a majority in interest of said bondholders for the use and benefit of the holders of the bonds secured hereby. And whenever the holders of a majority of said bonds shall have organized a new company or corporation for the use and benefit of all the holders of the bonds secured by this mortgage, the said trustee, or its successor or successors, or his or their survivor or survivors, shall reconvey the premises so purchased by it, him, or them to said new company or corporation."

The New York Guaranty and Indemnity Company was succeeded in the trust by Pierson, Dow, and Matthews. The rail*way* company having made default in meeting the interest on its bonds, and the principal, under the terms of the deed of trust, becoming thereby due, the trustees instituted a suit for foreclosure. Pending that suit, Tate and others, trustees in the mortgage of May 1, 1860, were made coplaintiffs. The bill was amended and the prayer for relief so enlarged as to include a foreclosure of the latter mortgage. Both mortgages were foreclosed by final decree of November 1, 1876, the amount found to be due on that of May 1, 1860, being $1,088,-

348.80, with interest at the rate of six per cent. per annum, and the amount due on that of December 1, 1873, being $3,016,000. The decree provided, among other things, "that if said trustees shall be so requested, and shall bid for said property, they shall pay into court a sufficient sum to pay the costs of sale and this suit, including counsel fees, allowances to trustees, to the commissioner for sale, and master of this court. And for the residue, their bid to the amount due and ordered to be paid by this decree shall be accepted by said commissioner, and he shall forthwith execute a deed conveying the purchased property to said trustees for and upon the trusts expressed in said second mortgage; that is to say, upon trust that they will convey the same to such new company or corporation as may be organized by the holders of a majority in interest of said bonds upon demand thereof."

At the sale under that decree, Pierson, Dow, and Matthews, as trustees in the deed of December 1, 1873, purchased the property for the holders of bonds secured by that instrument, and a deed was made to them, on April 28, 1877, in trust for such holders, "and upon the further trust that they will convey the same and all thereof to such company or corporation as may be formed by the holders of a majority of such bonds at such time and upon such terms and conditions as a majority of the holders of such bonds may require."

On the day last mentioned the majority, in value, of such bondholders entered into articles of association reorganizing the Memphis and Little Rock Railroad Company and fixing its capital stock at $1,300,000. The parties engaged in the reorganization being holders of the bonds secured by the deed of December 1, 1873, and beneficiaries under the deed of April 28, 1877, took the entire stock to themselves without paying therefor in money. The articles, after declaring that each and every share of the above-named stock was fully paid stock, and acknowledging, on behalf of the company, that one hundred dollars had been paid upon each share by the holder thereof, provided:

"That we hereby require the said trustees, William S. Pierson, Watson Matthews, and R. K. Dow, to convey all and

singular the property, charter, franchises, rights, privileges, and immunities, so conveyed to them by such commissioner, to the Memphis and Little Rock Railroad Company, as reorganized, upon the following terms and conditions, to wit:

"1. That said railroad company, as reorganized, shall issue its two hundred and fifty bonds, payable to bearer at the office of the Central Trust Company of New York, in the city of New York, each for one thousand dollars, maturing in five equal instalments, on the first days of May, in the years 1879, 1880, 1881, 1882, and 1883, bearing interest from date at the rate of ten per centum per annum, payable semiannually at the same place, with coupons for said interest annexed; and shall secure the payment of the principal and interest thereof by a mortgage of all and singular the said property, charter, franchises, rights, privileges, and immunities, of which mortgage said Pierson, Matthews, and Dow shall be trustees, and shall deliver the same to the said Pierson, Matthews, and Dow, to be by them sold, and the proceeds applied to the payment of the liens upon the said property reserved by the decree of the said court directing the sale thereof, and to the payment of moneys borrowed by them to make the cash payment required by said decree.

"2. That said Memphis and Little Rock Railroad Company, as reorganized, shall execute and deliver to said Pierson, Matthews, and Dow, its two thousand five hundred and seventy-five other bonds, each for the sum of one thousand dollars; and its one hundred other bonds, each for two hundred and fifty dollars, payable at the same place thirty years after date, bearing interest from the first day of July, 1878, and until the first day of July, 1882, at the rate of four per centum per annum, and after the last-named date at eight per centum per annum, payable at the same place, with coupons for such interest attached; and shall make provision for a sinking fund for redemption of such bonds, and shall secure payment of said bonds, interest, and sinking fund, by a mortgage of all said property, charter, franchises, rights, privileges, and immunities, of which mortgage said Pierson, Matthews, and Dow shall be trustees; such last-named bonds to be by said Pierson,

Matthews, and Dow *equally distributed among the holders of the bonds secured by the mortgage of the Memphis and Little Rock Railway Company, of date December* 1, 1873."

These terms were formally accepted by the stockholders, and on April 30, 1877, the trustees conveyed to the reorganized company the property, rights, and interests so purchased, subject to the terms, conditions, and trusts prescribed in its said Articles of Association.

Pursuant to the conditions upon which it received title, the appellant, on May 1, 1877, issued its bonds, amounting to $250,000, and, to secure their payment, conveyed the same property, rights, and interests to Pierson, Dow, and Matthews, as trustees. The proceeds of these bonds were applied in payment of the expenses of foreclosure and reorganization. In further compliance with these terms, the appellant issued its bonds for $2,600,000 for distribution among the holders of bonds secured by the mortgage of December 1, 1873, and, to secure their payment, executed the before-mentioned mortgage or deed of trust of May 2, 1877. The recitals in the deed disclosed all the foregoing circumstances connected with the organization of the appellant corporation, and with its acquisition of these properties.

[The provisions of § 8, art. 12, of the Constitution of Arkansas of 1877, and the provisions of § 5488 of the Revised Statutes of Arkansas, Mansfield's Digest, page 1057, which were supposed to apply to this reorganization, are stated below in the opinion of the court.]

Mr. Wager Swayne and *Mr. B. C. Brown* (*Mr. John F. Dillon* and *Mr. J. C. Brown* were with them on the brief), for appellant, cited: *Root* v. *Godard*, 3 McLean, 102; *Hayden* v. *Davies*, 3 McLean, 276; *Root* v. *Wallace*, 4 McLean, 8; *Harris* v. *Runnels*, 12 How. 79; *Armstrong* v. *Toler*, 11 Wheat. 258; *Cincinnati Ins. Co.* v. *Rosenthal*, 55 Ill. 85; *Leavitt* v. *Palmer*, 3 N. Y. 19; *S. C.* 51 Am. Dec. 333; *Southern Loan Co.* v. *Morris*, 2 Penn. St. 175; *S. C.* 44 Am. Dec. 188; *Davidson* v. *Lanier*, 4 Wall. 447; *Bank of the United States* v. *Owens*, 2 Pet. 527; *Brown* v. *Tarkington*, 3 Wall. 377; *Peck*

v. *Burr*, 10 N. Y. 294; *Barton* v. *Port Jackson Co.*, 17 Barb. 397; *Utica Ins. Co.* v. *Scott*, 19 Johns. 1; *Worthen* v. *Badgett*, 32 Ark. 496; *Eagle* v. *Beard*, 33 Ark. 497; *Valett* v. *Parker*, 6 Wend. 615; *Dewing* v. *Perdecaries*, 96 U. S. 193; *German Bank* v. *De Shon*, 41 Ark. 331; *Stanton* v. *Alabama & Chattanooga Railroad*, 2 Woods, 523; *Kerrison* v. *Stewart*, 93 U. S. 155; *Corcoran* v. *Chesapeake & Ohio Canal Co.*, 94 U. S. 741; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Coppell* v. *Hall*, 7 Wall. 542; *In re Comstock*, 3 Sawyer, 218; *Collins* v. *Blantern*, 2 Wilson, 341, and notes in 1 Sm. Lead. Cas.; *Pacific Railroad* v. *Missouri Pacific Railroad*, 111 U. S. 505; *Lloyd* v. *Scott*, 4 Pet. 205; *Jackson* v. *Dominick*, 14 Johns. 435; *De Wolf* v. *Johnson*, 10 Wheat. 367; *Weed Sewing Machine Co.* v. *Emerson*, 115 Mass. 554; *Memphis & Little Rock Railroad* v. *Berry*, 41 Ark. 436; *Shrewsbury, &c., Railway* v. *Northwestern Railway*, 6 H. L. Cas. 113; *Commonwealth* v. *Smith*, 10 Allen, 448; *Head* v. *Providence Ins. Co.*, 2 Cranch, 127; *Chambers* v. *Manchester & Milford Railway*, 5 B. & S. 588; *Rockwell* v. *Elkhorn Bank*, 13 Wis. 653; *Kent Coast Railway* v. *London, Chatham & Dover Railway*, 3 L. R. Ch. 656; *Guckenheimer* v. *Angevine*, 81 N. Y. 394; *Wilkinson* v. *Babbit*, 4 Dillon, 207; *Railroad Co.* v. *Soutter*, 13 Wall. 517.

Mr. U. M. Rose, for appellees, cited: *Memphis & Little Rock Railroad* v. *Dow*, 19 Fed. Rep. 388, and cases therein cited; *Duncan* v. *Jaudon*, 15 Wall. 165; *Railroad Co.* v. *Howard*, 7 Wall. 392; *Mechanics' Bank* v. *New York Railroad*, 13 N. Y. 599; *Weaver* v. *Barden*, 49 N. Y. 286; *Shaw* v. *Spencer*, 100 Mass. 382; *Memphis, &c., Railroad* v. *Berry*, 41 Ark. 436; *Cordova* v. *Hood*, 17 Wall. 1; *Richardson* v. *Hamlett*, 33 Ark. 237; *Craig* v. *Leslie*, 3 Wheat. 563; *Miller* v. *Moore*, 3 Jones N. C. Eq. 431; *Zabriskie* v. *Cleveland, &c., Railroad*, 23 How. 400; *Pine Grove* v. *Talcott*, 19 Wall. 666; *Hough* v. *Cook County Land Co.*, 73 Ill. 23; *Bradley* v. *Ballard*, 55 Ill. 413; *Houston Railroad* v. *Shirley*, 54 Texas, 125; *Bank* v. *Hammond*, 1 Rich. S. C. Eq. 281; *Grant* v. *Henry Clay Coal Co.*, 80 Penn. St. 208; *Natoma Water Co.* v. *Clarkin*, 14 Cal. 544; *Darst* v. *Gale*, 83 Ill. 136; *Union Water Co.* v. *Murphy Co.*,

22 Cal. 620; *Southern Ins. Co.* v. *Lanier*, 5 Fla. 110; *S. C.* 58 Am. Dec. 448; *Third Avenue Bank* v. *Dimock*, 24 N. J. Eq. (9 C. E. Green) 26; *Natchez* v. *Mallery*, 54 Miss. 499; *Chicago Building Society* v. *Crowell*, 65 Ill. 453; *Attleborough National Bank* v. *Rogers*, 125 Mass. 339; *Indiana* v. *Woram*, 6 Hill. 33; *S. C.* 40 Am. Dec. 378; *Steam Nav. Co.* v. *Weed*, 17 Barb. 378; *Underwood* v. *Newport Lyceum*, 5 B. Mon. 129; *S. C.* 41 Am. Dec. 260; *State Board* v. *Citizens' Railway Co.*, 47 Ind. 407; *Doyle* v. *Peerless Petroleum Co.*, 44 Barb. 239; *Sturges* v. *Knapp*, 31 Vt. 1; *Whitman Mining Co.* v. *Baker*, 3 Nevada, 386; *Railway Co.* v. *McCarthy*, 96 U. S. 258; *Hotel Co.* v. *Wade*, 97 U. S. 13; *Hitchcock* v. *Galveston*, 96 U. S. 341; *Ex parte Chippendale*, 4 De G. M. & G. 19; *In re Cork & Yougal Railway Co.*, 4 L. R. Ch. 748; *Troup's Case*, 29 Beav. 353; *Hoare's Case*, 30 Beav. 225; *Peck* v. *Gurney*, 13 Eq. 79; *Peabody* v. *Flint*, 6 Allen, 52; *Royal Bank* v. *Grand Junction Railway Co.*, 125 Mass. 490; *In re Pinto Silver Mining Co.*, 8 Ch. Div. 273; *Thompson* v. *Lambert*, 44 Iowa, 239; *Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159; *Cozart* v. *Georgia Railroad Co.*, 54 Geo. 379; *Commissioners* v. *January*, 94 U. S. 202; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Andrews* v. *Hensler*, 6 Wall. 254; *National Bank* v. *Matthews*, 98 U. S. 621; *Benjamin* v. *Hobbs*, 31 Ark. 151; Sheldon on Subrogation, §§ 19, 30, 31, 33, 34, 38, 40, and cases there cited; *Crosby* v. *Taylor*, 15 Gray, 64; *S. C.* 77 Am. Dec. 352; *Valle* v. *Fleming*, 29 Mo. 152; *S. C.* 77 Am. Dec. 557; *Davis* v. *Roosevelt*, 53 Texas, 305; *Johnson* v. *Robertson*, 34 Maryland, 165; *Payne* v. *Hathaway*, 3 Vt. 212; *Webb* v. *Williams*, Walker (Mich.) 544; *Howard* v. *North*, 5 Texas, 290; *S. C.* 51 Am. Dec. 769; *Selleck* v. *Phelps*, 11 Wis. 380; *Tompkins* v. *Sprout*, 55 Cal. 31; *McLaughlin* v. *Daniel*, 8 Dana, 182; *Porter* v. *Doe*, 10 Ark. 186; *West* v. *Waddill*, 33 Ark. 575; *Summers* v. *Howard*, 33 Ark. 490; *Waggoner* v. *Lyles*, 29 Ark. 47; *Oneida Bank* v. *Ontario Bank*, 21 N. Y. 490; *Shall* v. *Biscoe*, 18 Ark. 142; *Scott* v. *Orbison*, 21 Ark. 202.

Mr. John M. Bowers, for appellees, cited, in addition to some cases cited by *Mr. Rose*, the following cases not cited on his

brief: *Barnes* v. *Mott*, 64 N. Y. 397; *Pierce* v. *Emery*, 32 N. H. 484; *Stanley* v. *Chester & Birkenhead Railway*, 3 Myl. & Cr. 773; *Low* v. *Connecticut, &c., Railroad*, 45 N. H. 370; *Olcott* v. *Tioga Railroad*, 27 N. Y. 546; *Moss* v. *Averill*, 10 N. Y. 449; *Oregon Railway* v. *Oregon Railway & Nav. Co.*, 28 Fed. Rep. 505, and cases cited; *Parish* v. *Wheeler*, 22 N. Y. 494; *Bissell* v. *Mich. Southern & Northern Ind. Railroad*, 22 N. Y. 258; *Williams* v. *Morgan*, 111 U. S. 684; *McCluer* v. *Manchester & Lawrence Railroad*, 13 Gray, 124; *S. C.* 74 Am. Dec. 624.

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

From these facts it appears that at the date of the mortgage of May 2, 1877, appellant's entire assets consisted of the property, rights, and privileges purchased by Pierson, Dow, and Matthews, trustees, at the sale under the decree foreclosing the mortgage of December 1, 1873, and by them conveyed to it, on the express condition that the beneficial owners should receive therefor, besides $1,300,000 in stock, its mortgage bonds for $2,600,000. That amount, in the stock and bonds of the appellant, was the valuation placed by such owners upon their interests, after taking into account, as well the amount previously expended in the construction and maintenance of the road, as the probable value, in the future, of the stock and bonds to be given for a surrender of those interests. The transaction was, in its essence, a purchase of said property, rights, and privileges by the appellant at an agreed price, to be paid in its stock and bonds. A part of the price was paid when the $1,300,000 of stock was issued. But appellant disputes its liability upon the bonds given for the balance, upon the theory that they were prohibited from issuing them by the eighth section of the twelfth article of the constitution of Arkansas, adopted in 1874. That section provides that "no private corporation shall issue stock or bonds, except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void." In support

of this view our attention is called to the fact, admitted by the demurrer, that the full value of the property, rights, and privileges conveyed to appellant did not exceed $1,300,000, the amount at which the capital stock was fixed; and, consequently, it is argued, the $2,600,000 of bonds were issued without any consideration received in money, property, or labor, and represented only a fictitious indebtedness. In other words, appellant's vendors were fully compensated for their interests by taking to themselves its entire stock.

We do not concur in this view of the case. It does not, we think, rest upon a sound interpretation of the state constitution. The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value. In reference to a provision in the constitution of Illinois, adopted in 1870, containing a prohibition, as to railroad corporations, similar to that imposed by the Arkansas constitution upon all private corporations, the Supreme Court of the former state, in *Peoria & Springfield Railroad Co.* v. *Thompson*, 103 Ill. 187, 201, said: "The latter part of the clause of the constitution in question, which declares that 'all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of such corporation shall be void,' we think, clearly points out the chief object which the constitutional convention sought to accomplish in adopting it; and to this we must look, in a large degree, for a solution of the language which precedes it. The object was, doubtless, to prevent reckless and unscrupulous speculators, under the guise or pretence of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy, the stock or bonds in such case being entirely fictitious. . . ."

"Under this provision of the constitution, railroad companies have no right to lend, give away, or sell on credit, their bonds or stock, nor have they the right to dispose of either, except for a present consideration, and for a corporate purpose."

Recurring to the language employed in the Arkansas constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations — at least when acting with the approval of their stockholders — in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper; provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights, and privileges in question, for a given amount of its stock and bonds, falls within the prohibition of the state constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders. And that subsequent holders of stock might not be misled, each certificate of stock states upon its face that the holder takes this stock subject to $2,850,000 of mortgage bonds of the company, which are secured by two mortgages duly recorded. All that was done was, to reorganize the Little Rock & Memphis Railroad Company upon the same basis, substantially, as to capital stock and bonded indebtedness, as existed, in respect to these properties, rights, and privileges, before the adoption of the state constitution, and while they were held and controlled by the companies which preceded the appellant in the ownership. There was, consequently, no fictitious increase by appellant of its stock or indebtedness. Under these circumstances it cannot be fairly said that the bonds secured by the mortgage were

issued without any consideration whatever actually received in property.

Equally untenable is the position that the bonds were void because made to bear interest at a rate in excess of that specified in the act of January 22, 1855, now § 5488 of the Revised Statutes of Arkansas. *Mansfield's Digest*, p. 1057. The 7th section of that act provides that, "Whenever any railroad company heretofore or hereafter incorporated in this state shall, in the opinion of the directors thereof, require an increased amount of the capital stock, they shall, if authorized by the holders of a majority of the stock, be, and they are hereby, authorized to increase their capital stock to any amount not exceeding the estimated cost of their road, and shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at a rate of interest not exceeding seven per cent. per annum, and may execute its bonds therefor, in sums of five hundred dollars or one thousand dollars; and, to secure the payment thereof, may pledge the property, both real and personal, and income of such company, and, to secure the payment thereof, may execute a deed of mortgage or other instrument of writing; and such company are hereby authorized to sell, negotiate, pledge, or mortgage such bonds for the benefit of such company, and at such terms and in such places, either within or without this state, and at such rates and for such prices as, in the opinion of said directors, will best advance the interests of such company; and if such bonds are thus sold *bona fide* at a discount, such sale shall be as valid, in every respect, and such securities as binding for the respective amounts thereof, as if they were sold at their par value."

It is sufficient to say that this statute has no application to the present case; for there was here no increase of the existing capital stock of a corporation; nor were the bonds secured by the mortgage of May 2, 1877, executed for money borrowed, but for property, rights, and privileges conveyed to appellant at an agreed price, to be paid in its stock and bonds.

It results, from what has been said, that the validity of the bonds cannot be disputed upon any of the grounds stated. Neither the constitution nor the statutes of Arkansas inter-

pose any obstacle to the full performance by the appellant of the terms and conditions upon which only it acquired the ownership of the interests in question.

The appellant, in the mortgage to the appellees, covenanted that the interests conveyed were free from encumbrances, and that it would warrant and defend the title against all lawful claims whatsoever. Its duty, therefore, was to protect those interests against prior liens. Appellant having neglected to perform that duty, the appellees, as junior encumbrancers, had the right to protect the mortgaged estate against a forced sale. Upon payment of the amount due the state, they became entitled to the benefit of her lien upon the property. Although the appellees did not purchase the state's claim, or become, technically, the assignee thereof, her lien will be regarded, in equity, as subsisting, so far as is necessary for their protection.

In behalf of the appellant it is contended that the decree below went beyond what was required for the indemnification of the appellees. The debt due the state, by the terms of her contract with the old company, bore interest at the rate of *eight* per cent. per annum until paid. The entire claim, with interest at that rate, was paid by the appellees. But the decree below gave a lien, as against the appellant, for the amount so paid with interest *from the date of such payment, at the same rate as was stipulated in the contract between the state and her debtor.*

The constitution of Arkansas provides that "all contracts for a greater rate of interest than ten per centum per annum shall be void, as to principal and interest, and the general assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be six per centum per annum." Art. 19, § 13. And by statute it is provided that "judgments or decrees upon contracts bearing more than six per cent. interest shall bear the same interest as may be specified in such contracts, and the rate of interest shall be expressed in all such judgments and decrees; and all other judgments and decrees shall bear interest at the rate of six per cent. per annum until satisfaction is made as aforesaid."

The right of subrogation is not founded on contract. It is

a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties. All that the appellees can, in good conscience, demand, is *reimbursement* for their outlay in protecting the mortgaged property against the prior lien of the state. When relief to that extent is accorded, they will have no just ground to complain, especially as the debt held by the state was not the personal debt of the appellant. There was no agreement between them and the appellant in respect to interest upon any sum they might be compelled to pay in order to relieve the property from prior incumbrances. If, therefore, they are adjudged to have a lien upon the mortgaged property for the whole amount actually paid to the state, with interest thereon, from the date of such payment, at the rate established by law in the absence of an agreement as to rate, they will be fully indemnified. It is not for the court or for parties to say that the rate of interest fixed by law in the absence of an agreement, is not adequate compensation for delay in the payment of money. It results that the decree, so far as it allows to appellees interest in excess of six per cent. per annum, on the aggregate amount of principal and interest paid by them to the state, is erroneous.

One other question remains to be determined. The appellant insists that the court below erred in giving judgment against it for $29,580.87, the amount found to be due the appellees for services and counsel fees herein and for costs paid out by the appellees in this suit. We are of opinion that the decree in this respect was right. This allowance, as to its amount, is fully sustained by the evidence in the cause. And it is authorized by that clause and condition in the mortgage of May 2, 1877, which provides that the appellant "will from time to time, as incurred, pay all charges, costs, and expenses" of the appellees, or either of them, "in and about the execution of the trust," and "will indemnify and hold harmless" the appellees "against all costs, charges, damages, and expenses which they or either of them may sustain or be put to in consequence of accepting this trust, or of anything which may be done or omitted to be done under it, saving only such damages

as may be incurred by or arise from the culpable act or neglect" of said appellees.

The decree below is reversed so far as it gives the appellees interest upon the aggregate amount paid by them into the treasury of the State, at the rate of eight per cent. per annum from the time of such payment; and the cause is remanded, with directions to allow interest upon that amount, from the date of payment, at the rate only of six per cent. per annum. In all other respects the decree is affirmed. The appellant will have its costs in this court.

FARLEY *v.* KITTSON.

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

Argued March 29, 30, 1886. — Reargued December 8, 9, 1886. — Decided February 7, 1887.

At the hearing upon a plea in equity and a general replication, no fact is in issue but the truth of the matter pleaded.

Objections to the equity of the plaintiff's claim, as stated in his bill, cannot be taken by plea.

A plea in equity, though under oath, and negativing a material averment in the bill, is no evidence in the defendant's favor.

A bill in equity to enforce a contract between the plaintiff and the defendants to purchase for their joint benefit the bonds, secured by mortgages, of two railroads, of one of which the plaintiff was receiver, and of the other general manager under the trustees in the mortgage, alleged that he performed the agreement on his part; that the defendants purchased the bonds through an agent of the bondholders, and afterwards purchased the railroads under decrees of foreclosure, and entered into possession and made large profits, and refused to account to the plaintiff for his share; and that the plaintiff, pending the negotiations for the purchase of the bonds, informed the agent of the bondholders of his interest, and at all times answered to the best of his knowledge and ability all inquiries of the bondholders or their agent, or of the trustees or any person interested in the property, and always acted honestly and in good faith towards all such persons. The defendants filed a plea, averring that neither the agent nor the bondholders had any notice of the plaintiff's interest until after the sale of the railroads under the decrees of fore-

Statement of Facts.

closure, and that the agreement sued on was a breach of his trusts as receiver and as manager, and did not entitle him to relief in equity. A general replication was filed, and at the hearing the truth of the fact averred in the plea was disproved. *Held*, that the plea must be overruled, and the defendants ordered to answer the bill.

THIS was a bill in equity by Jesse P. Farley against Norman W. Kittson, James J. Hill, and the St. Paul, Minneapolis and Manitoba Railway Company, which, as amended by leave of court, contained the following allegations:

That in 1876 the plaintiff and Kittson and Hill agreed together to acquire by purchase or contract, for their joint and equal benefit, all that could be obtained of the bonds of the St. Paul and Pacific Railroad Company and the First Division of the St. Paul and Pacific Railroad Company, two corporations existing under the laws of Minnesota, and owning railroads in that state, those bonds being then outstanding and for sale at a large discount, and secured by mortgages upon the railroads, then in process of foreclosure; that the object of the agreement was to buy the railroads at the foreclosure sales, using the bonds in payment, and thereby to acquire the railroads; that it was also agreed that, in order to obtain from one Donald A. Smith and other capitalists the funds required for the enterprise, Kittson and Hill might use or give them an interest therein, but that all the interest not so used or given should be retained and held for the joint and equal benefit of the plaintiff and Kittson and Hill.

That it was further agreed between the plaintiff and Kittson and Hill that the details of the negotiations for procuring the necessary funds and for the purchase of the bonds should be principally conducted and managed by Kittson and Hill, and the persons so given an interest in the enterprise, and that the plaintiff "should furnish such facts, information and advice, and render such aid and assistance therein, from time to time, as should be required of him."

That the plaintiff "had knowledge, not possessed by any of the other parties, as to the whereabouts and situation of said bonds, the rated value thereof by holders, the mode whereby and the channel through which the same could be

reached and procured, also in respect to the situation, amount, character and value of the lines of railroad and property mortgaged to secure said bonds, and in respect to the pending suits for the foreclosure of said mortgages, and that the services of the plaintiff in respect to all of said matters, and his coöperation, were indispensable to the success of said enterprise."

That thereupon Kittson procured funds from Smith and one George Stevens, and agreed to give them a share in the enterprise, the amount of which was unknown to the plaintiff, but was believed by him to be one half; and that the rest belonged to the plaintiff Kittson and Hill in equal shares.

That pursuant to the agreement between the plaintiff and Kittson and Hill negotiations were opened in 1877 and carried on until 1879, resulting in the purchase of bonds amounting in the aggregate, at their face value and interest, to more than $25,000,000; and that the purchases of bonds were made by and in the name of Smith, Stevens, Kittson and Hill, but for the purpose of being used in the purchase of the railroads when offered for sale under foreclosure decrees, and under and in pursuance of the agreement between the plaintiff and Kittson and Hill.

That "throughout said negotiations for the purchase of said bonds, and in the purchases thereof, the plaintiff was continuously called upon by the said Kittson and Hill for facts and information, advice and coöperation in respect thereto, and at their request furnished and rendered the same, pursuant to the aforesaid agreements and understandings between them; and that said negotiations were only successful through and by means of the advice and coöperation of the plaintiff, and the facts and information peculiarly within his knowledge as aforesaid, and imparted by him to the said Kittson and Hill, at their request, under said understandings and agreements."

That most of the purchases of bonds were made under an agreement with the holders that they should not be paid for till the railroads were sold under decrees of foreclosure, and that the sellers of the bonds should then have the option of

being paid in cash, or of taking new bonds issued by a company to be organized by the purchasers, and secured by mortgage upon the same property.

That nearly all the bonds were owned in Holland, and that one John S. Kennedy was agent of a large majority of the bondholders, with full authority to take such action in respect to them as he thought best, and was a trustee in all the mortgages, except one for $15,000,000 on the First Division of the St. Paul and Pacific Railroad, and was the agent of the holders of more than $11,000,000 of the bonds secured by that mortgage; and that all the foreclosure suits had been commenced by his order, and were prosecuted under his general control and direction.

That the plaintiff "was appointed receiver of the property of the St. Paul and Pacific Railroad Company, and was made general manager of the lines of road of the First Division of the St. Paul and Pacific Railroad Company, under the trustees in said mortgages in possession thereof, upon the recommendation and at the instance and request of said Kennedy."

That after the agreement between the plaintiff and Kittson and Hill, and before the decrees of foreclosure, and before the purchase of any of the bonds, and while negotiations were pending for the purchase of the bonds represented by Kennedy, "the plaintiff informed the said Kennedy of his said interest and connection with the said Kittson and Hill in the project for the purchase of said bonds; and that the said Kennedy had full notice and knowledge that he was so connected therewith and interested therein, and fully approved and sanctioned the same;" that the negotiations for the purchase of the bonds were mainly had with Kennedy as agent of the bondholders, and the bonds purchased were placed in the hands of Kennedy and his partner, one Barnes, to be held until paid for as agreed, and were so held, and only delivered upon being so paid for; and that Kennedy strongly recommended the bondholders to sell their bonds upon the terms offered by Smith, Stevens, Kittson and Hill, as the best disposition of them that could be made.

That "to all inquiries made by said Kennedy, or any of the

trustees in said mortgages, or by any of the holders of any of the bonds secured thereby, or by any one interested in the property under his charge as manager or receiver, he [the plaintiff] at all times gave full and true answers and information to the best and utmost of his knowledge and ability, and kept the said Kennedy fully informed of all facts, matters and things coming to his knowledge affecting said property, and in all things acted honestly and in good faith towards all persons interested in the property under his control as receiver and manager as aforesaid."

That the defendant railway company was a corporation organized under the laws of Minnesota in May, 1879, by Kittson, Hill, Smith and Stevens, for the purpose of taking, holding and managing the mortgaged railroads, for the use and benefit of the parties interested in the purchase of the bonds; and that those four persons were directors and officers of this company and had control of it.

That in March and April, 1879, foreclosure decrees were entered in the pending suits, directing the sale by auction of the mortgaged railroads, and allowing outstanding bonds to be taken in payment for an amount equal to what they would be entitled to by way of dividends under those decrees; that in May and June, 1879, the railroads were sold accordingly, and, by direction and procurement of Kittson, Hill, Smith and Stevens, purchased by the defendant railway company, for the use and benefit of the parties interested in the purchase of the bonds as aforesaid, including the plaintiff, and all the bonds purchased were then used in payment; that the defendant company paid nothing for the railroads, but took them without consideration, except the consideration furnished and provided by the plaintiff and Kittson, Hill, Smith and Stevens, which consideration, aside from the bonds, was furnished by Smith and Stevens as aforesaid; that property worth in all over $15,000,000 was thereby vested in the company, for the use and benefit of the plaintiff and Kittson, Hill, Smith and Stevens, in proportion to their respective interests, and the company had notice at the time of the purchase that the plaintiff was jointly interested with Kittson and Hill.

Statement of Facts.

That the defendant company in June, 1879, issued and negotiated new bonds to the amount of $8,000,000, secured by mortgage of the railroads, and with these bonds paid for all the bonds purchased as aforesaid, and all other expenses of the enterprise; and had since, under the control and management of Kittson, Hill, Smith and Stevens, held and operated the railroads and made large net profits.

That the capital stock of this company was $15,000,000, which represented the property acquired, and was part of the profits resulting from the enterprise; that other profits amounting to many hundred thousand dollars had also been divided between Kittson, Hill, Smith and Stevens; and that a large amount of stock had been distributed among them, of which Kittson and Hill received 57,646 shares, being part of that to which the plaintiff, Kittson and Hill were entitled under the arrangement with Smith and Stevens, but that the company neglected and refused to deliver any of the stock to the plaintiff.

That Kittson and Hill never questioned, but always admitted, the plaintiff's right to share equally with them, until after the organization of the defendant company in May, 1879, and then at first only suggested to him that his share ought not to be equal to theirs, because they had, as they claimed, been required to advance some money in carrying out the enterprise; but now the defendants, confederating to defraud the plaintiff, refused to account with him, or to deliver to him any stock, or to pay him any of the profits of the enterprise, and ignored and disregarded all his rights in the premises.

The bill prayed for a discovery, for an account, and that the plaintiff be adjudged to be entitled to an equal share with Kittson and Hill in the enterprise and its profits, and they be ordered to pay and turn over to him one third of the moneys, bonds and stocks received by them, and the railway company be ordered to issue to him his proportion of stock, and to recognize his rights in its stock and property as equal to those of Kittson and Hill, and for further relief.

To this bill the St. Paul, Minneapolis and Manitoba Railway Company demurred for want of equity, and Kittson and Hill filed a plea.

Statement of Facts.

The plea, after setting out with particularity the various issues of bonds, secured by mortgages, by the St. Paul and Pacific Railroad Company, and by the First Division of the St. Paul and Pacific Railroad Company, and the appointment of successive trustees under those mortgages; and alleging that, upon a bill filed in 1873 by Kennedy and others, on behalf of all the bondholders under a mortgage of $15,000,000 on the first of those railroads, Farley was appointed by the court, on August 1, 1873, receiver of that railroad, and accepted the trust, and took possession of and managed the road from that date until it was sold and delivered to the defendant railway company under a decree of foreclosure, as stated in the bill; that on October 9, 1876, Kennedy and two others, as trustees, under and pursuant to mortgages on the second of those railroads, took possession of it; and that from that date until it was delivered to the purchaser under a decree of foreclosure, those trustees held and operated it, and Farley was the general manager of it for them, and had full control of the management thereof; continued and concluded as follows:

"That the said plaintiff never at any time informed the said Kennedy, nor any of the holders of any of said mortgage bonds, of his interest in the project for purchasing said bonds, or of his interest in the project of acquiring by means of said bonds the said mortgaged property, which he alleges in his bill of complaint; nor did the said Kennedy, nor any of said bondholders, know, suspect, or have any information or belief, at any time until after the confirmation of all said foreclosure sales, that the plaintiff ever claimed to have any such interest, or any interest in said projects, or either of them.

"And these defendants say, that as receiver of said lines covered by said $15,000,000 mortgage the said plaintiff could not lawfully make the agreement with these defendants mentioned in the bill of complaint, or engage in the enterprise, therein mentioned, of purchasing the bonds of said $15,000,000 issue, or in the enterprise of purchasing the said mortgaged property; and that the making of such an agreement and the embarking in such an enterprise by him was a breach of trust on his part as such receiver, and a fraud on the holders of the

bonds of said $15,000,000 issue, and was a fraud upon this court, whose receiver he was.

"And that as general manager for the trustees in said mortgages of the lines of railroad of said First Division Company the said plaintiff occupied a position of trust and confidence toward his employers, the said trustees, and towards the holders of the bonds secured by said mortgages; and that by making the agreement and engaging and continuing in the enterprise of purchasing the said bonds and said mortgaged property mentioned in his said bill, the said Farley was guilty of a breach of trust towards and a fraud upon the said trustees and the said bondholders.

"And these defendants say that by reason of the said fiduciary positions occupied by the plaintiff, as aforesaid, he is not entitled to the aid of a court of equity to enforce as against these defendants any of the agreements mentioned in said bill, or any rights claimed by him and growing out of said agreements.

"Therefore these defendants do plead all and singular the matters aforesaid in bar to the plaintiff's said bill, and pray the judgment of this honorable court whether they should be compelled to make any further answer to the said bill, and pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained."

Annexed to the plea were a certificate of counsel, that it was in their opinion well founded in point of law; and an affidavit of the defendant Hill, that the plea was true in point of fact, and was not interposed for delay, and that the defendant Kittson was absent from the State and District of Minnesota.

The plaintiff filed a general replication to the plea, and on his motion the demurrer of the railway company and the plea of Kittson and Hill were set down for hearing. The demurrer of the company was overruled, and on its application it was ordered that the plea of Kittson and Hill should stand as the joint and several plea of all the defendants.

The case was then heard upon the bill, plea, replication, and proofs. The only evidence introduced was a stipulation in writing of counsel that the averments of the plea, preceding those

above quoted in full, were true; the bill on which the plaintiff was appointed receiver; an order passed by the court on that bill on May 31, 1878, reciting that Stevens, Smith, Kittson and Hill, under an agreement between them and the bondholders, dated March 13, 1878, were the equitable owners of $11,400,000 of the $15,000,000 issue of bonds, and authorizing Farley as receiver to finish the roads with money to be supplied by them; and the deposition of the plaintiff, the substance of which was, that before the completion of the purchase of the bonds he informed Kennedy by a letter (which could not be found) that Kittson and Hill had offered him an interest in it, in answer to which Kennedy, on February 25, 1878, wrote him a letter (which he produced), acknowledging the receipt of his letter, and saying, "We think it will pay you to take an interest with Kittson and Hill, and we are glad to hear that they have offered it to you;" but that the plaintiff did not disclose to Kennedy that he had already the same interest that Kittson and Hill had, because he had agreed with them that he would not make the fact public, for fear that the stockholders might hear of it and apply to the court to have him removed and another receiver appointed, to the detriment of the enterprise, and of the interests of the bondholders; and that he did not inform the court of his interest when the order of May 31, 1878, was made.

The Circuit Court, assuming it to be proved that the plaintiff informed Kennedy of his interest, yet held that the agreement of the plaintiff with Kittson and Hill was unlawful and void, and on that ground sustained the plea and dismissed the bill. 4 McCrary, 138. The plaintiff appealed to this court.

Mr. George F. Edmunds and *Mr. Henry D. Beam* for appellant. *Mr. Edward D. Cooke* was with them on the brief.

Mr. William M. Evarts and *Mr. George B. Young* for appellees. *Mr. H. R. Bigelow* was with them on the brief.

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

A brief abstract of the pleadings will help to make clear what is presented for decision upon this record.

The suit was brought by Farley to enforce an agreement by which he and the defendants Kittson and Hill agreed to purchase, for their joint and equal benefit, the bonds, secured by mortgages, of two railroads, of one of which he was receiver, by appointment of the court, and of the other of which he was the general manager, by appointment of the trustees named in the mortgages.

The bill alleged the making of the agreement; that its object was, by means of the bonds so purchased, to purchase the railroads at sales under decrees of foreclosure in suits then pending; that it was agreed that Kittson and Hill should conduct the negotiations for procuring the necessary funds and purchasing the bonds, and the plaintiff should furnish such facts, information and advice, and render such assistance, from time to time, as should be required of him; that the plaintiff had knowledge, not possessed by the other parties, as to who held the bonds and at what rate, and how they could be procured, and as to the nature and value of the railroads, and as to the pending suits for foreclosure, and his services and coöperation were indispensable to the success of the enterprise; that he performed the agreement on his part; that Kittson and Hill obtained the requisite funds from other persons, and purchased the bonds from the bondholders through one Kennedy, the authorized agent of the latter, and afterwards purchased the railroads at sales under decrees of foreclosure; that pending the negotiations for the purchase of the bonds, the plaintiff informed Kennedy of his interest, and his connection with Kittson and Hill, in the project to purchase them; that the plaintiff at all times, to the best of his knowledge and ability, gave full and true answers and information to all inquiries made by Kennedy, or by any of the trustees or bondholders, or by any person interested in the property under his charge as receiver and as manager, and kept Kennedy fully informed of all matters coming to his knowledge affecting the property, and in all things acted honestly and in good faith towards all persons interested in it; that Kittson and Hill had

organized a new corporation, which was joined as a defendant; and that the defendants had thereby obtained a great amount of property and of profits, and had refused to account to the plaintiff for his share. The bill prayed for a discovery, an account, and other relief.

The individual defendants filed a plea, which, on the motion of the defendant corporation, was ordered to stand as its plea also, consisting of three parts:

First. A restatement in detail of some of the facts alleged generally in the bill.

Second. Averments that the plaintiff never informed Kennedy or any of the bondholders of his interest in the project for purchasing the bonds and thereby acquiring the mortgaged property, as alleged in the bill; and that neither Kennedy nor the bondholders knew, suspected, or had any information or belief, that the plaintiff had or claimed to have any interest in the project, until after the foreclosure sales.

Third. Averments that the making by the plaintiff of the agreement sued on, and his engaging in the enterprise of purchasing the bonds and thereby acquiring the railroads, were, as to that railroad of which he was receiver, unlawful, a breach of his trust as such receiver, and a fraud upon the bondholders and the court; and, as to the railroad of which he was general manager for the trustees under the mortgages, a breach of trust towards the trustees and the bondholders, and a fraud upon them; and that by reason of the fiduciary positions so occupied by him the plaintiff was not entitled to the aid of a court of equity to enforce the agreement or any rights growing out of it.

To this plea the plaintiff filed a general replication, and the hearing in the Circuit Court was upon the issue thus joined.

The pleader and the court below appear to have proceeded upon the theory that by a plea in equity a defendant may aver certain facts in addition to or contradiction of those alleged in the bill; and also not only, if he proves his averments, avail himself of objections in matter of law to the case stated in the bill, as modified by the facts proved; but even, if he fails to prove those facts, take any objection to the case

stated in the bill, which would have been open to him if he had demurred generally for want of equity.

But the proper office of a plea is not, like an answer, to meet all the allegations of the bill; nor like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. Mitford Pl. (4th ed.) 14, 219, 295; Story Eq. Pl. §§ 649, 652.

The plaintiff may either set down the plea for argument, or file a replication to it. If he sets down the plea for argument, he thereby admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent his recovery. If, on the other hand, he replies to the plea, joining issue upon the facts averred in it, and so puts the defendant to the trouble and expense of proving his plea, he thereby, according to the English chancery practice, admits that if the particular facts stated in the plea are true, they are sufficient in law to bar his recovery; and if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. Mitford Pl. 302, 303; Story Eq. Pl. § 697. That practice in this particular has been twice recognized by this court. *Hughes* v. *Blake*, 6 Wheat. 453, 472; *Rhode Island* v. *Massachusetts*, 14 Pet. 210, 257. But the case of *Rhode Island* v. *Massachusetts* arose within its original jurisdiction in equity, for outlines of the practice in which the court has always looked to the practice of the Court of Chancery in England. Rule 7 of 1791, 1 Cranch, xvii, and 1 How. xxiv; Rule 3 of 1858 and 1884, 21 How. v, and 108 U. S. 574. And the case of *Hughes* v. *Blake*, which began in the Circuit Court, was decided here in 1821, before this court, under the authority conferred upon it by Congress, had established the Rules of Practice in Equity in the Courts of the United States, one of which provides that "if upon an issue the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him." Rule 19 in Equity of 1822,

7 Wheat. xix; Rule 32 in Equity of 1842, 1 How. li. The effect of this rule of court when the issue of fact joined on a plea is determined in the defendant's favor need not, however, be considered in this case, because it is quite clear that at a hearing upon plea, replication and proofs, no fact is in issue between the parties but the truth of the matter pleaded.

In a case so heard, decided by this court in 1808, Chief Justice Marshall said: "In this case the merits of the claim cannot be examined. The only questions before this court are upon the sufficiency of the plea to bar the action, and the sufficiency of the testimony to support the plea as pleaded." *Stead* v. *Course*, 4 Cranch, 403, 413. In a case before the House of Lords a year afterwards, Lord Redesdale "observed, that a plea was a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer which the bill required. If a plea were allowed, nothing remained in issue between the parties, so far as the plea extended, but the truth of the matter pleaded." "Upon a plea allowed, nothing is in issue between the parties but the matter pleaded, and the averments added to support the plea." "Upon argument of a plea, every fact stated in the bill, and not denied by answer in support of the plea, must be taken for true." *Roche* v. *Morgell*, 2 Sch. & Lef. 721, 725–727.

The distinction between a demurrer and a plea dates as far back as the time of Lord Bacon, by the 58th of whose Ordinances for the Administration of Justice in Chancery, "a demurrer is properly upon matter defective contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like." Orders in Chancery (Beames's ed.) 26. Lord Redesdale, in his Treatise on Pleadings, says: "A plea must aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, rest on facts in the bill." Mitford Pl. 297. And Mr. Jeremy, in a note to this passage, com-

menting on the ordinance of Lord Bacon, observes, "The prominent distinction between a plea and a demurrer, here noticed, is strictly true, even of that description of plea which is termed negative, for it is the affirmative of the proposition which is stated in the bill;" in other words, a plea, which avers that a certain fact is not as the bill affirms it to be, sets up matter not contained in the bill. That an objection to the equity of the plaintiff's claim, as stated in the bill, must be taken by demurrer and not by plea is so well established, that it has been constantly assumed and therefore seldom stated in judicial opinions; yet there are instances in which it has been explicitly recognized by other courts of chancery, as well as by this court. *Billing* v. *Flight*, 1 Madd. 230; *Steff* v. *Andrews*, 2 Madd. 6; *Varick* v. *Dodge*, 9 Paige, 149; *Phelps* v. *Garrow*, 3 Edw. Ch. 139; *Rhode Island* v. *Massachusetts*, 14 Pet. 210, 258, 262; *National Bank* v. *Insurance Co.*, 104 U. S. 54, 76.

It only remains to apply these elementary principles of equity pleading to the case before us.

The averments in the first part of the plea, restating in detail some of the facts alleged in the bill, were admitted by stipulation of counsel in writing to be true, and no controversy arose upon them.

The substance of the averments in the second part of the plea was that neither Kennedy, nor the bondholders whose agent and representative he was, had any notice or knowledge that the plaintiff had or claimed to have any interest in the project set forth in the bill, until after the sales of the railroads under decrees of foreclosure. The matter of fact thus averred was put in issue by the replication. The testimony of the plaintiff, (in connection with Kennedy's letter to him,) which was uncontradicted, and was the only evidence upon the matter pleaded, shows that Kennedy, before the completion of the sale and purchase of the bonds, knew that the plaintiff was to have an interest in the project, although he may not have known the extent of that interest, or that it had been already acquired. The want of any notice to Kennedy and the bondholders, averred in the plea, was thus disproved.

Opinion of the Court.

The plea, indeed, is supported by the affidavit of one of the defendants that it is true in point of fact. But the oath of the party to its truth in point of fact is added only for the same purpose as the certificate of counsel that in their opinion it is well founded in matter of law, in order to comply with the 31st Rule in Equity, the object of which is to prevent a defendant from delaying or evading the discovery sought, without showing that the plea is worthy of the consideration of the court. *Ewing* v. *Bright*, 3 Wall. Jr. 134; *Wall* v. *Stubbs*, 2 Ves. & B. 354. An answer under oath is evidence in favor of the defendant, because made in obedience to the demand of the bill for a discovery, and therefore only so far as it is responsive to the bill. *Seitz* v. *Mitchell*, 94 U. S. 580. But a plea, which avoids the discovery prayed for, is no evidence in the defendant's favor, even when it is under oath and negatives a material averment in the bill. *Heartt* v. *Corning*, 3 Paige, 566.

The allegations of the bill, that the plaintiff at all times, to the best of his knowledge and ability, gave full and true answers to all inquiries made by Kennedy or any of the trustees or bondholders, or any person interested in the property under his charge as receiver and as manager, and in all things acted honestly and in good faith towards all persons interested in it, were not denied by the plea, and therefore, for the purposes of the hearing thereon, were conclusively admitted to be true. So much of the plaintiff's testimony, as tended to show that he intentionally concealed his interest from the stockholders and from the court, was outside of the averments of the plea, and therefore irrelevant to the issue to be tried.

The plaintiff having neither moved to set aside the plea as irregular for want of an answer supporting it, nor set down the case for hearing upon the bill and plea only, but having replied to the plea, and the only issue of fact thus joined having been determined by the evidence in his favor, it is unnecessary to consider whether the averments of fact in the second part of the plea ought to have been supported by an answer, or whether, if proved, they would have made out a defence to the bill.

The averments in the third part of the plea, that, by reason

of the plaintiff's position as receiver and general manager of the railroads, his entering into the agreement sued on, and engaging in the enterprise of purchasing the bonds and thereby acquiring the railroads, were unlawful, and did not entitle him to the aid of a court of equity to enforce the agreement or any rights growing out of it, were averments of pure matter of law, arising upon the plaintiff's case as stated in the bill, and affecting the equity of the bill, and therefore a proper subject of demurrer, and not to be availed of by plea.

The result is, that the principal question considered by the court below and argued at the bar is not presented in a form to be decided upon the record before us; and that, for the reasons above stated, and as suggested in behalf of the plaintiff at the reargument, the plea was erroneously sustained, and must be overruled, and the defendants ordered, in accordance with the 34th Rule in Equity, to answer the bill.

Decree reversed, and case remanded, with directions to overrule the plea, and to order the defendants to answer the bill.

PENSACOLA ICE COMPANY *v.* PERRY.

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

Submitted December 20, 1886. — Decided February 7, 1887.

It appearing by the record in this court that the verdict at the trial of an action of ejectment in the Circuit Court of the United States sitting in Florida did not state the quantity of the estate or describe the land, the judgment was reversed and the cause remanded for a new trial.

THE case is stated in the opinion of the court.

Mr. William A. Blount for plaintiff in error.

Mr. Wayne Mc Veagh for defendant in error.

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

Syllabus.

A statute of Florida, approved February 22, 1881, contains the following provisions:

"Sec. 4. The verdict in actions of ejectment shall, when for the plaintiff, state the quantity of the estate of the plaintiff, and describe the land by its metes and bounds, by the number of the lot or other certain description.

"Sec. 5. The judgment awarding possession shall, in like manner, state the quantity of the estate, and give description of the land recovered."

This was an action of ejectment, and the verdict, which was for the plaintiff, did not state the quantity of the estate or describe the land. This is assigned for error, among others, and Perry, the defendant in error, in the brief which has been filed in his behalf, confesses that the judgment in his favor is thereby vitiated. Without considering any of the other errors assigned, therefore, we reverse the judgment on this ground alone and remand the cause for a new trial.

Reversed.

SHERMAN *v.* JEROME.

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

Argued December 17, 1886. — Decided February 7, 1887.

A clause in a will gave to C the interest of $4000 for life, "the said sum" of $4000 to be equally divided, at C's death, between M, S, and J, or so many of them as should then be living. The will appointed P executor for New York, and G and D executors for Michigan. G and D, before the death of C, executed a paper and recorded it in Michigan, by which they, as executors, "set apart for the benefit of" C and "to be held" by them "in trust for the purpose of paying" said interest, and, upon the death of C, "for distribution" among M, S, and J, a bond and mortgage for $4000, on land in Michigan, given to the testator in his lifetime, which was overdue seventeen months when the paper was executed. None of the legatees assented to this proceeding or ratified it or waived their rights, nor was it authorized by any order of any court. C having died without the full interest on the $4000 having been paid to him, his administrator and M, S, and J filed a bill in equity in Michigan against G and D,

as executors, praying for an accounting and for the payment of the legacies. The executors set up as a defence that the bond and mortgage were the sole fund for the payment of the legacy, and that the general estate was not liable for it; *Held*, that the paper was revocable at any time, and did not amount to the decisive and irrevocable act which must exist to have the effect to transmute the property.

Bill in equity. The case is stated in the opinion of the court.

Mr. George W. Miller for appellants. *Mr. James C. Smith, Jr.*, was with him on the brief.

Mr. J. H. McGowan for appellees. *Mr. Benton Hanchett* filed a brief for same, submitting on his brief.

Mr. Justice Blatchford delivered the opinion of the court.

In 1872, Sarah E. Little, then a resident of Perry, Wyoming County, New York, died at that place, leaving a last will and testament executed August 30, 1872, and a codicil thereto, executed September 9, 1872. The will, after giving sundry money legacies, proceeded as follows: "Fourth. I give and bequeath to Charlotte Sherman the interest of four thousand dollars during the term of her natural life, and at her decease the said sum of four thousand dollars shall be equally divided between Maria Cameron, Sarah E. Morse, and James Sherman, children of C. A. W. Sherman, or so many of them as shall then be living." By subsequent articles other money legacies were given, and then followed these articles: "Twenty-second. All bequests herein contained to persons residing in New York, and that to Maria Cameron, I desire paid first, and the remainder as fast as the money is available." "Twenty-sixth. I hereby appoint Henry N. Page my executor for carrying out the provisions of this my last will and testament, so far as they relate to parties and property in this state (in New York), and Charles W. Grant, of East Saginaw, and D. H. Jerome, of Saginaw City, Michigan, my executors for everything, so far as they relate to parties and property in the State of Michigan and elsewhere, and my executors are hereby authorized and

empowered to sell and convey any real estate of which I may be possessed as they shall deem for the best interest of the legatees."

On the 24th of December, 1881, the present suit in equity was brought, in the Circuit Court of the United States for the Eastern District of Michigan, by Charles A. W. Sherman, as administrator of Charlotte Sherman, deceased; Maria Cameron; James Sherman; and Sarah E. Morse; against David H. Jerome and Charles W. Grant. The bill sets out the foregoing provisions of Little's will and states these facts: Charles A. W. Sherman is the C. A. W. Sherman named in the will. Charlotte Sherman was his wife, and died in May, 1880, and he was appointed her administrator in December, 1881. In January, 1873, the will of Little was proved before the surrogate of Wyoming County, New York, and letters testamentary were issued to Page, named in it as executor. In March, 1873, letters testamentary on the will of Little were issued by the Probate Court for Saginaw County, Michigan, to Grant and Jerome. Page, in New York, and Grant and Jerome, in Michigan, entered upon their duties as executors. In New York, Little left property not exceeding a few hundred dollars in amount, which went into the hands of Page, and was used in defraying funeral expenses, leaving nothing in his hands with which to pay the legacies. Little left a large real and personal estate in Saginaw County, Michigan, which came into the hands of Grant and Jerome, as executors, and they have now in their hands a greater amount of the estate than is sufficient to pay to the plaintiffs their legacies and to pay all the other legacies. Grant and Jerome paid to Charlotte Sherman the interest on the $4000 down to April 1, 1876, but nothing more has been paid on the legacies to the plaintiffs. Maria Cameron, Sarah E. Morse, and James Sherman were living at the time of the death of Charlotte Sherman, and are still living. The bill prays for an accounting by the defendants, as executors, and for the payment to the plaintiffs of the amounts due to them for the legacies.

The answer admits that a part of the estate left by Little in Michigan came into the hands of Grant and a part into the

hands of Jerome. It avers that, aside from the Coats bond and mortgage hereafter mentioned, Grant has none of the estate now in his hands, and Jerome has $9621.75, including any fees, commissions or compensation for his services. Accounts of receipts and disbursements by each defendant, as executor, are annexed to the answer. It then sets forth, that the defendants believed it to be their duty to set apart and invest, out of the estate, $4000, the interest of which, as they should be able to collect it, should be paid to Charlotte Sherman during her lifetime, and the principal be retained by them in such investment, and, after her decease, be paid over to Maria Cameron, Sarah E. Morse, and James Sherman; that, for that purpose, they took out of the estate and set apart a bond executed by one Coats to Little, in the penalty of $10,000, dated May 1, 1869, conditioned to pay $1000 May 1, 1871, $1000 May 1, 1872, and $3000 May 1, 1873, with interest annually on all sums unpaid at 10 per cent., and a mortgage given to secure the bond, bearing the same date, executed by Coats to Little, mortgaging a parcel of land in East Saginaw, Saginaw County, Michigan, and recorded in the office of the register of deeds for Saginaw County; that, to set apart the bond and mortgage, they, on the 20th of October, 1874, executed and acknowledged the following instrument in writing, which was recorded in the office of said register of deeds on the same day:

"Whereas, by the last will and testament of Sarah E. Little, the interest of [the] sum of four thousand dollars is bequeathed to Charlotte Sherman for her life, and upon her decease the said sum of four thousand dollars is to be divided between parties therein named;

"And whereas, among the assets of the estate of said Sarah E. Little is a bond and mortgage made by Alice L. Coats to said Sarah E. Little, dated May 1, 1869, for the sum of five thousand dollars, on which there is now due four thousand dollars, and which mortgage is recorded in the office of the register of deeds of Saginaw County, Michigan, in liber O of mortgages, on pages 324 and 325:

"Now, therefore, we, the undersigned, executors of the said

will, do hereby set apart for the benefit of said Charlotte Sherman, and to be held by us in trust for the purpose of paying the said interest, and upon her decease for distribution among the persons named in said will, the said bond and mortgage.

"In witness whereof, we have hereunto set our hands and seals, this twentieth day of October, A.D. 1874.

"DAVID H. JEROME. [L.S.]
"CHARLES W. GRANT. [L.S.]

"Signed, sealed, and delivered in presence of —
"BENTON HANCHETT,
"D. R. RICHARDSON.

"State of Michigan, } *ss.*
County of Saginaw, }

"On this 20th day of October, A.D. 1874, before me, a notary public in and for said county, personally came the above-named David H. Jerome and Charles W. Grant, to me known to be the executors of the last will of Sarah E. Little, deceased, and acknowledged the foregoing instrument by them subscribed to be their free act and deed.

"BENTON HANCHETT,
Notary Public;"

by means whereof they set apart the bond and mortgage, as an investment in their hands, to be held by them as executors under the will, in trust, from which to collect the interest on the sum of $4000, represented by the bond and mortgage, as principal, and pay the same to Charlotte Sherman, and to collect and receive the principal, and pay the same, in pursuance of the direction of the will, to Maria Cameron, Sarah E. Morse, and James Sherman; that they made the investment properly, and in accordance with their duty; that their action was, in effect, the same, in all respects, as if they had taken the sum of $4000 in money and purchased a security for that amount, or had loaned that sum on security for the purpose of obtaining interest and retaining the principal to meet the payment of the legacy; that the investment was made according to the

best of their judgment, and in good faith; that they then believed the security was ample, and that the bond and mortgage were a desirable security for providing for the legacy; that Coats was then believed by the defendants to be worth, in her own right, the sum of at least $75,000 over and above the real estate covered by the mortgage; that they then believed also that the real estate was a good and sufficient security by itself to secure the payment of the $4000 and interest thereon; that the money secured by the bond and mortgage was not collected from Coats, because they believed the security, as it stood, was an entirely satisfactory and altogether desirable one, and an investment as good as they could make; that on such setting apart of the security, Charlotte Sherman was informed thereof, and thereafter Grant collected from Coats, on the bond and mortgage, four sums of $200 each, which he paid to her, he having, in January, 1874, paid to her $200, all on account of her legacy; that no other sums have since been collected by the defendants on the bond and mortgage, and there is due thereon $4000 of principal, and interest from May 1, 1876; that when the interest ceased to be paid the defendants notified Charlotte Sherman thereof, and asked her advice and direction as to foreclosing the mortgage, and since her death they have requested the advice and direction of the plaintiffs in regard to collecting the bond and mortgage, and have advised them of the setting apart of the security; that the defendants have offered, and now offer, to transfer the bond and mortgage to the plaintiffs; that they have paid $132.43 for taxes on the mortgaged land, which were a lien on it, and which should be reimbursed to them; that since the investment, Charlotte Sherman and the plaintiffs have had no right to claim payment of any part of the legacy out of the estate of Little; and that the investment has remained the sole fund out of which the legacy should be paid. The answer then admits that the amount which came into the hands of the defendants from the estate of Little was sufficient, after paying all the debts of Little, to pay the legacy to the plaintiffs, and all the other legacies payable before that legacy, according to the directions of the will, but such amount and the es-

tate was not sufficient to pay all the legacies, not including the residuary legacy. It then avers that, according to the provisions of the will, it was not their duty to pay over the $4000 to Charlotte Sherman; and that the other legatees under the will always objected, after such investment had been made, to any other provision or payment being made out of the estate on account of that legacy.

It was stipulated by the parties that Charles A. W. Sherman was administrator of Charlotte Sherman, and that Page had not, at the time of the filing of the bill, or at any time, any funds in his hands belonging to the estate of Little, except as alleged in the bill.

The case was heard on bill and answer. A decree was made providing, that the defendants, as executors, have in their hands, and hold, said bond and mortgage, in trust for the payment to the plaintiffs of the legacy specified in the fourth clause of the bill; that the plaintiffs are entitled to the payment of the proceeds of the bond and mortgage, after deducting therefrom the expenses of the collection thereof, and the amounts paid, and to be paid, by the defendants for taxes on the property covered by the mortgage, to preserve the lien thereof, and the costs of this suit; and that the defendants foreclose and collect the bond and mortgage, by proper legal proceedings, and, out of the proceeds, retain the necessary and reasonable costs and expenses of such foreclosure and collection, and the amounts so paid, and to be paid, by them for taxes, and their costs of this suit, and pay the balance of the proceeds to the plaintiffs in payment and discharge of the legacy. From this decree the plaintiffs have appealed.

The only question necessary or proper to be disposed of on this appeal, in view of the pleadings and of the terms of the decree below, is whether the special matter alleged in regard to the setting apart of the bond and mortgage, is a defence to the suit.

At the time of the execution of the paper of October 20, 1874, the unpaid $4000 secured by the bond and mortgage had been overdue more than seventeen months. There is no suggestion that any of the legatees named in the fourth article of

the will consented to the setting apart of the bond and mortgage, or that there was any order of any court on the subject. The fourth article gives directly to Charlotte Sherman the interest of $4000 for life, and at her decease gives directly to such of the other three persons named as shall then be living, "the said sum of four thousand dollars," to be equally divided among them. Under these circumstances, the execution of the paper of October 20, 1874, by the defendants, setting apart the bond and mortgage, to be held by them in trust, even though the paper was put on record, amounted to no more than if they had retained the bond and mortgage, without executing any such paper, and had merely made a mental resolution to consider the bond and mortgage as set apart for this legacy. There was no second party to the paper, no transfer in it, no contract, and the beneficiaries never assented to it, or ratified it, or waived their rights; and, in the absence of any such action by the beneficiaries, it was revocable at any time. Without deciding what course, if any, might lawfully have been taken by the defendants at the time in question, to effect the object they sought, we are of opinion that what they did was of no more avail to that end than the mere mental determination of the executor in *Miller* v. *Congdon*, 14 Gray, 114. Even though the mental determination took the shape of a written declared purpose, it did not amount to the decisive and irrevocable act which must exist to have the effect to transmute the property.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to take such further proceedings therein as shall not be inconsistent with this opinion.

UNITED STATES *v.* NORTHWAY.

CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Argued January 4, 5, 1887. — Decided February 7, 1887.

The question whether either of the counts in an indictment charges an offence under the laws of the United States, is too vague and general to be certified in a Certificate of Division of Opinion.

An indictment charging that the defendant, "as president and agent" of a national bank, did the acts forbidden by Rev. Stat. § 5209, does not vitiate the counts in which he is so described.

In an indictment, under Rev. Stat. § 5209, for wilfully misapplying the funds of a national bank, it is not necessary to charge that the moneys and funds alleged to have been misapplied had been previously intrusted to the defendant; since a wilful and criminal misapplication of the funds of the association may be made by its officer or agent without having previously received them into his manual possession.

In charging, in an indictment, the president of a bank with aiding and abetting its cashier in the misapplication of the funds of the bank, it is not necessary to aver that he then and there knew that the person so aided and abetted was the cashier.

An indictment which charges in substance that the defendant was president and agent of a certain national bank theretofore duly organized and established, and then existing and doing business, under the laws of the United States, and that, being such president and agent, he did then and there "wilfully and unlawfully and with intent to injure the said national banking association, and without the knowledge and consent thereof, abstract and convert to his own use certain moneys and funds of the property of the said association of the amount and value," etc., sufficiently describes and identifies the crime of abstracting the funds of the bank created by Rev. Stat. § 5209.

An indictment which charges that the defendant "was then and there president and agent of a certain national banking association, to wit: [naming the association] theretofore duly organized and established, and then existing and doing business at [naming the place] under the laws of the United States," sufficiently states that that bank was organized under the national banking act, or to carry on the business of banking under a law of the United States.

THIS was a certificate of division of opinion as to the sufficiency of the counts in an indictment for abstracting and misapplying the funds of a national bank. The case is stated in the opinion of the court.

Mr. Solicitor General for the United States.

Mr. J. B. Burrows and *Mr. A. J. Marvin* for the defendant.

Mr. Justice Matthews delivered the opinion of the court.

On the 23d of April, 1885, the grand jury for the Eastern Division of the Northern District of Ohio returned an indictment, apparently founded upon § 5209 of the Revised Statutes, against Stephen A. Northway, as president and agent of the Second National Bank of Jefferson, a national banking association. On July 13, 1885, the record was, on motion of the district attorney, remitted to the Circuit Court. There are fifty-nine counts in the indictment; all of these were quashed except counts 2, 12, 15, 16, 28, 30, and 46, to each of which the defendant interposed a general demurrer. This demurrer came on for hearing before the Circuit Court, composed of the circuit judge and the district judge for that district, who certify to us that on the hearing they were divided and opposed in opinion on the following questions:

"1st. Whether either of said counts charges defendant with an offence under the laws of the United States.

"2d. Whether the charging of the defendant with committing the acts therein charged against him as 'president and agent' did not vitiate said counts of said indictment.

"3d. Whether under § 5209 of the Revised Statutes of the United States it was necessary in the indictment to charge that the moneys and funds alleged to have been embezzled and misapplied, or either, had been previously intrusted to the defendant.

"4th. Whether it is necessary in charging said defendant with aiding and abetting Sylvester T. Fuller, cashier of said bank, as in counts sixteen, twenty-eight, and forty-six, with the misapplication of the funds of said bank, to charge that the defendant then and there knew that said Fuller was such cashier.

"5th. Whether said second count sufficiently describes and identifies the crime of abstracting the funds of the bank created by the act of Congress.

"6th. Whether the indictment sufficiently states that the Second National Bank of Jefferson was organized under the national banking act, or to carry on the business of banking under a law of the United States."

Section 5209 of the Revised Statutes, under which this indictment appears to have been drawn, is as follows:

"SEC. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

We proceed to dispose of the several questions certified to us in their order.

1st. The question whether either of said counts charges said defendant with an offence under the laws of the United States, which is the first one certified, we decline to answer, for the reason that it is too vague and general, within the act of Congress authorizing certificates of this character and the repeated decisions of this court.

2d. We are of opinion that charging the defendant with committing the acts therein charged against him as "president and agent" did not vitiate the counts of the indictment in which that description is contained. The only grounds on which the contrary conclusion could be predicated are that the allegation is either too uncertain or is contradictory.

The allegation is not uncertain, as it might have been if it had been "president or agent." In that case, it might have been urged, that, as the offence was charged to have been committed by the defendant either as president or agent, it was uncertain in which of these capacities he was charged. For, although it might be said that a president is *ex officio* agent of the association, there may be many agents who are not president. Here the description is that he was "president and agent," and committed the offence charged in some capacity described by both terms. Neither is the description contradictory, because he may be both president and agent. There is no repugnance in the two characters. Even on the supposition that the statute means to make a distinction between the two offices of president and agent, there is nothing in the nature of either to prevent them both being held at the same time by one person, and the acts charged may in contemplation of law have been committed by him in both capacities.

A fortiori may this be the case, if every president of such an association is to be held by virtue of his office to be also, within the meaning of the act, an agent of the association. In that case, the use of the words "and agent" would be mere surplusage in the indictment. Being already included within the meaning of the word "president," it does not add anything to the description to introduce the words "and agent." This question is, therefore, answered in the negative.

3d. The twelfth count of the indictment charges that the defendant, with proper allegations of time and place, "was then and there president and agent of a certain national banking association, to wit, 'The Second National Bank of Jefferson,' theretofore duly organized and established, and then existing and doing business, in the village of Jefferson and county of Ashtabula, in the division and district aforesaid, under the laws of the United States; and the said Stephen A. Northway, as such president and agent, then and there had and received in and into his possession certain of the moneys and funds of said banking association of the amount and value of twelve thousand dollars, to wit, . . . then and there

being the property of said banking association, . . . and then and there being in the possession of said Stephen A. Northway, as such president and agent aforesaid, he, the said Stephen A. Northway, then and there . . . wrongly, unlawfully, and with intent to injure and defraud said banking association, did embezzle and convert to his, said Stephen A. Northway's, own use," &c.

The fifteenth count is for wrongfully, unlawfully, and wilfully misapplying certain described funds of the bank, with intent to injure the association, and without the knowledge and consent thereof, by paying and causing to be paid to certain persons, out of the moneys, funds, and credits then and there belonging to the property of the association, a large sum of money in the purchase by him, the said Northway, for the use, benefit, and advantage of himself, of a large number of shares of the capital stock of certain stock companies. It is not alleged in this count that the moneys and funds so alleged to have been misapplied had previously come into the possession of the defendant by virtue of his office and character of president and agent.

In respect to the counts for embezzlement, it is quite clear that the allegation is sufficient, as it distinctly alleges that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent. This necessarily means that they had come into his possession in his official character, so that he held them in trust for the use and benefit of the association. In respect to those funds, the charge against him is that he embezzled them by converting them to his own use. This we think fully and exactly describes the offence of embezzlement under the act by an officer and agent of the association.

With respect to the fifteenth count, and other similar counts charging a wilful misapplication of the funds of the bank, this allegation is omitted; that is, it is not alleged that the moneys and funds charged to have been misapplied had previously come into the possession of the defendant. Neither do we think this to be necessary to a description of the offence. A wilful and criminal misapplication of the funds of the associa-

tion may be made by an officer or agent of the bank without having previously received them into his manual possession. In the case of the *United States* v. *Britton*, 107 U. S. 655, 669, the offence of wilfully misapplying the funds of a banking association, as defined by the statute, was considered with reference to the facts in that case. It was there held that a wilful and criminal misapplication of the funds, as defined by § 5209, did not include every case of an unlawful application of funds, inasmuch as in the very statute itself there were other instances of unlawful misapplication, evidently not embraced within the intention of § 5209. For that reason it was held, in that case, that it was necessary to specify the particulars of the application, so as to distinguish that charged in the indictment as wilful and criminal from those others contemplated by the statute which were unlawful but not criminal; and it was held to be of the essence of the criminality of the misapplication that there should be a conversion of the funds to the use of the defendant, or of some person other than the association, with intent to injure and defraud the association, or some other body corporate or natural person. Now, if in addition it be necessary to the commission of the offence of wilfully misapplying the funds of the bank that they should have come previously into the possession of the defendant in his official capacity, so that he could be said to have been intrusted with their possession, all distinction between the offences of wilfully misapplying the funds and of embezzlement would disappear. But it is evidently the intention of the statute not to use the words "embezzle" and "wilfully misapply" as synonymous. In order to misapply the funds of the bank it is not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully, and afterwards criminally misapply them, or by virtue of his official relation to the bank he may have such control, direction, and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offence of wilful misapplication. And when it is charged, as in the counts of this indict-

ment, that he did wilfully misapply certain funds belonging to the association, by causing them to be paid out to his own use and benefit in unauthorized and unlawful purchases, without the knowledge and consent of the association, and with the intent to injure it, it necessarily implies that the acts charged were done by him in his official capacity, and by virtue of power, control, and management which he was enabled to exert by virtue of his official relation. This, we think, completes the offence intended by the statute of a wilful misapplication of the moneys and funds of a national banking association. We, therefore, answer the third question in the negative.

4th. The fourth question is whether it is necessary, in charging the defendant with aiding and abetting Sylvester T. Fuller, the cashier of the bank, with the misapplication of its funds, to charge that the defendant then and there knew that said Fuller was such cashier. We answer this question in the negative. The counts in question charge Fuller with having made the misapplication of the funds of the bank as cashier. They further allege that the defendant, being president and agent of the association, wilfully, knowingly, and unlawfully, and with intent to injure said banking association, before the misdemeanor was committed, "did aid, abet, incite, counsel, and procure the said Sylvester T. Fuller, he, the said Fuller, then and there being cashier and agent as aforesaid, so as aforesaid to wrongfully, unlawfully, and wilfully misapply," &c. We do not think it is necessary, in an indictment for this offence, to charge any *scienter* more distinctly. The acts charged against Fuller could only be committed by him by virtue of his official relation to the bank; the acts charged against the defendant likewise could only be committed by him in his official capacity. Both are alleged to be officers of the same corporation. The knowledge that each had of the official relation of the other is necessarily implied in the coexistence of this official relation on the part of both towards the same corporation. It is as cashier that Fuller was aided and abetted by the defendant in the commission of his offence. This allegation necessarily imputes knowledge of his official character.

5th. The second count of the indictment is for the offence of abstracting the moneys and funds of the association. In substance, it charges that the defendant was president and agent of the Second National Bank of Jefferson, theretofore duly organized and established, and then existing and doing business, under the laws of the United States; and that the defendant, being president and agent as aforesaid, did then and there "wilfully and unlawfully, and with intent to injure the said national banking association, and without the knowledge and consent thereof, abstract and convert to his, the said Stephen A. Northway's, own use certain moneys and funds of the property of said association, of the amount and value," &c. We see no reason to doubt the sufficiency of this description of the offence. It is true that the word "abstract," as used in this statute, is not a word of settled technical meaning like the word "embezzle" as used in statutes defining the offence of embezzlement, and the words "steal, take, and carry away," as used to define the offence of larceny at common law. It is a word, however, of simple, popular meaning, without ambiguity. It means to take or withdraw from, so that to abstract the funds of the bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted. This, of course, does not embrace every element of that which under this section of the statute is made the offence of criminally abstracting the funds of the bank. To constitute that offence, within the meaning of the act, it is necessary that the moneys and funds should be abstracted from the bank without its knowledge and consent, with the intent to injure or defraud it or some other company or person, or to deceive some officer of the association, or an agent appointed to examine its affairs. All these elements are contained in the description of the offence in the count in question; the count is, therefore, sufficient within the decisions of this court upon similar statutes. *United States* v. *Mills*, 7 Pet. 138; *United States* v. *Simmons*, 96 U. S. 360; *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Britton*, 107 U. S. 655.

Unlike the word "misapply," as used in the same section,

the word "abstract" is not ambiguous, because it does not appear from other parts of the statute that there are two or more kinds of abstracting, both unlawful, but only one described as a criminal offence. The word "abstract," as used in the statute, therefore, has but one meaning, being that which is attached to it in its ordinary and popular use. It is to be accepted with that meaning in framing an indictment under the section, which is not required, in order to be sufficient, to contain more than those allegations which are necessary, when added to the allegation of abstracting, to complete the description of the offence intended by the statute. This the count in question sufficiently does.

It is contended, however, on behalf of the defendant, that the offence of "abstracting" the moneys and funds of the bank under this section of the statute is exactly equivalent to the offence of larceny, and that it can only be technically and appropriately described by the words used to describe the offence of larceny. So that the charge should have been "did abstract, take, and carry away." The answer to this point, it seems to us, is twofold. If, as is contended, an analysis of the section of the statute demonstrates that the legislative intent was simply to describe the offence of larceny by an officer or agent of the bank of its funds, then there is no ambiguity or uncertainty in using the word "abstract" in the indictment, as used in the statute, fully to describe the offence charged; for, according to the argument, it can mean nothing else, and the legislature, by substituting the word "abstract" for the words which are required technically to describe the offence of larceny, have justified the use of the same word in the indictment. But, in the next place, we do not admit the proposition that the offence of "abstracting" the funds of the bank under this section is necessarily equivalent to the offence of larceny. The offence of larceny is not complete without the *animus furandi*, the intent to deprive the owner of his property, but under § 5209 an officer of the bank may be guilty of "abstracting" the funds and money and credits of the bank without that particular intent. The statute may be satisfied with an intent to injure or defraud some other

company, body politic or corporate, or individual person, than the banking association whose property is abstracted, or merely to deceive some other officer of the association, or an agent appointed to examine its affairs. This intent may exist in a case of abstracting without that intent which is necessary to constitute the offence of stealing. We answer the fifth question, therefore, in the affirmative.

6th. The sixth question is whether the indictment sufficiently states that the Second National Bank of Jefferson was organized under the national banking act, or to carry on the business of banking under the laws of the United States. The language of the indictment is that the defendant "was then and there president and agent of a certain national banking association, to wit: 'The Second National Bank of Jefferson,' theretofore duly organized and established and then existing and doing business at the village of Jefferson and county of Ashtabula, in the division and district aforesaid, under the laws of the United States."

We do not understand the necessity of this question; the allegation seems to be perfectly explicit. The defendant is charged by virtue of his office as president and agent of a national banking association, to wit: The Second National Bank of Jefferson, which, it is further alleged, had been theretofore duly organized and established and was then existing and doing business under the laws of the United States. This can mean only that it was organized and established as a banking association under the act of Congress authorizing the organization and establishment of national banks, and that it was in existence and doing business at the time of the alleged offence as such national banking association, because it could not be organized and established and existing and doing business under the laws of the United States in any other capacity. This question is accordingly answered in the affirmative.

These answers will be accordingly certified to the Circuit Court.

THE L. P. DAYTON.

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

Argued January 21, 24, 1887. — Decided February 7, 1887.

If a vessel in tow by one steam-tug collides on navigable waters with a vessel in tow by another steam-tug and is injured, and the two tugs are libelled in one proceeding in admiralty to recover damages for the injuries sustained, the burden of proof is on the libellant to establish negligence against each tug separately; and admissions in the answer on the part of one tug cannot be used against the other tug to relieve the injured vessel of this burden.

The rule which presumes fault in case of a collision against a vessel in motion in favor of one at anchor does not apply to the case of a vessel moved by a steam-tug colliding with another vessel moved by another steam-tug.

If a vessel towed by a steam-tug, colliding with a vessel towed by another steam-tug, libels the other steam-tug, its rights in the suit and its standing in court will be the same which its own steam-tug would have had, in case the collision had been directly with her; but if it libels its own steam-tug, the latter is responsible, under its contract of towage, only for the results happening from the want of ordinary care on its part.

The relative position of the steam-tug of the other tow to the appellant and its tug, before and up to the instant before the accident, and its action during that time, were not such as to constitute a violation of Rev. Stat. § 4233, rule 19, that "if two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

THE appellant, Thomas McNally, filed his libel in a cause of collision, civil and maritime, against the steam-tug L. P. Dayton, the steam-tug James Bowen, and the float or scow called Number Four, in the District Court of the United States for the Southern District of New York. The second article of the libel set out the cause of action as follows:

"2d. Heretofore, to wit, on the fourteenth day of February, 1879, the boat or barge Centennial, of the burden of about 300 tons, of which boat your libellant was master, was taken in tow by the steam-tug L. P. Dayton at the pier foot of Fifty-ninth Street, New York harbor, to be towed by the said

tug to the Erie basin, near Atlantic docks, New York harbor. She was taken at or about five and one-half o'clock in the afternoon of that day. She was loaded with a valuable cargo, to wit, six thousand four hundred and fifty bushels, or thereabouts, of red wheat. She was then stanch and seaworthy. When the L. P. Dayton left Fifty-ninth Street pier she had in tow four boats or barges, of which the boat Centennial was one; these were placed two on the port side of the said tug and two on her starboard side. The Centennial was the inside starboard boat — that is, the one lashed to the starboard side of the tug Dayton. The Centennial was a boat one hundred and three feet in length, and when fastened to the tug, as aforesaid, her bow projected some twenty feet beyond the bow of the said steam-tug. The evening was quite clear and starlit. The tug and tow being made up as aforesaid proceeded down the river, the tide being ebb, until about opposite Eagle pier, Hoboken, when the tug put into shore and there left one of the boats that had been fastened to her port side.

"After the port boat had been left at the Eagle pier as aforesaid, the tug, with the remaining three boats, resumed her course, proceeding down the river. When about opposite Pier 1, North River, and when about three hundred yards from the New York shore, the said boat Centennial was run into by the float or scow called Number Four, which was then in tow of the steam-tug James Bowen, and received such injuries that she very soon thereafter sunk with her cargo. At the time of the collision darkness had set in, and your libellant is unable to speak of his own knowledge with entire accuracy of the movements of the vessels aforesaid. But he is informed and believes the truth to be as follows, that is to say:

"Before the collision aforesaid the steam-tug James Bowen, having the float or scow Number Four lashed to her port side, was proceeding from some point on the East River to the Long Dock, Jersey City. She had rounded the Battery, and at the time of the collision was on a course opposite or nearly opposite the course then being taken by the tug L. P. Dayton

and her tow. Through the carelessness of both of the persons in charge of the L. P. Dayton and of the James Bowen and the scow, the said tows were not kept clear of each other, though there was ample space of water in which to have done so, but were so negligently handled that the float or scow aforesaid bore right down on and struck full on her stem the boat Centennial, staving in her whole bow and causing her to sink in about ten minutes.

"Your libellant and his son were on board the Centennial at the time of the collision, but it was not possible for them to do anything to prevent the same. The Centennial was entirely under the control and subject to the direction of the tug-boat L. P. Dayton, having neither propelling nor steering power of her own.

"Your libellant alleges that both the steam-tugs aforesaid were in fault in the following respects:

"First. Neither tug-boat observed the signals of the other, the observation of which might have and would have prevented danger.

"Second. Neither tug-boat made use of the proper signals for avoiding a collision in time to avoid the same.

"Third. The tug-boat Bowen did not reverse her movement, or did not do so in time to prevent a collision.

"Fourth. Neither tug-boat was provided with a suitable and competent watch at and before the time of the collision.

"Fifth. The tug-boat James Bowen improperly changed her course before the collision, having put her wheel to port and made an effort, apparently, to pass under the bows of the Dayton and her tow.

"But your libellant alleges, in general, negligence against both the said tugs, and requires them to make definite answer of the facts pertinent to the collision, which will clearly show either that both were equally to blame, or to blame in unequal degree, though neither entirely free from blame; but, for the reasons above mentioned, your libellant's boat, the Centennial, was in nowise to blame or responsible for the collision aforesaid."

And also alleged negligence against the steam-tugs in addition, as follows:

"That on the night and at the time of the collision the tide was a strong ebb, that the tug Bowen and her tow were proceeding against the tide, and that it was negligence in her not to have kept more to the westward than she did, and thereby have avoided the tug Dayton and her tow, as might easily have been done had the proper care been used in observing the Dayton's lights and signals.

"And, further, that the said tug Bowen and her tow kept too near the New York shore in rounding the Battery and making up the North River.

"That the tug Bowen was also negligent in respect of not having a proper light set on her port side, or in permitting the same to be covered and obscured by certain cars or carriages at that time on the deck of the float, which was on her port side.

"That the tug Bowen was also negligent in not answering the signals of the tug Dayton when they were approaching each other.

"That the tug Dayton was at fault in proceeding at too great a speed, the tide being a strong ebb and the wind northwest.

"That the tug Dayton was likewise negligent in not having a proper light set on the extreme starboard and forward end of her tow.

"That the person in charge of the wheel of the Dayton at the time of and before the collision was unfit for such duty, being a man of near and imperfect sight, and generally incompetent.

"That the tug Dayton, after twice blowing her whistle, did not keep on her course, but ported her wheel and went to starboard, showing her red light to the Bowen and the float before reversing and attempting to go back.

"That neither the Dayton nor the Bowen had a watchman or lookout on her forward deck."

Hugh J. Jewett, Receiver of the Erie Railway Company, claimant of the float or scow called Number Four filed his answer on her behalf, in response to the charges of the libel. It was admitted, however, that no cause of action appeared

against the scow Number Four both in the courts below and upon the argument in this court. It is, therefore, not necessary to consider the answer filed on its behalf.

Daniel Shea intervened as owner of the tug James Bowen, and answered the charges of the libel as follows:

"Third. That this respondent has no knowledge of the matters contained in the second article of said libel preceding the allegation in the said article contained, to the effect that the boat Centennial was run into by the float or scow Number Four, and he therefore neither admits nor denies the same, but leaves the libellant to make such proof thereof as he may be advised; that, so far as the allegations of the said article relate to the collision between the said boat Centennial and the float or scow called Number Four, which occurred on the 14th day of February, 1879, and the causes thereof, this respondent, upon information and belief, denies the said allegations of said article, and each and every one of them, except so far as the same are hereinafter expressly admitted.

"And this respondent, upon information and belief, says that the facts in respect to said collision and the causes thereof are as hereinafter stated, and not otherwise, that is to say:

"On the evening of the 14th day of February, 1879, at about half-past six o'clock, the said steam-tug James Bowen, at Williamsburg, in the waters of the East River, took in tow the said float or scow Number Four, the said float or scow being lashed to the port side of said tug James Bowen, and the said tug James Bowen, with the said float or scow in tow as aforesaid, proceeded down the East River, bound for Long Dock, Jersey City; that the tide was ebb, the wind moderate from northwest; that the said tug James Bowen and the said float or scow were both stanch, properly manned and equipped; that the said tug was provided with a bright headlight on the forward end of her house, and with red and green lights on her port and starboard sides respectively, and with two white lights on the flagstaff aft, and that the said float was provided with a white headlight near the bow, all of said lights being properly placed and burning brightly; that the said tug James Bowen was provided with a compe-

tent pilot and lookout, properly placed on the tug, and that a lookout was also stationed forward on the roof of the float or scow; that the said tug James Bowen, with the said float or scow in tow as aforesaid, proceeded down the East River to the Battery, and on rounding the Battery into the North River encountered considerable ice, and in consequence was running very slow; that after getting clear of the ice the said tug, with the said scow in tow as aforesaid, was headed for the Jersey City abattoir. At this time there was outside of the said float, and about one hundred feet distant from the port side thereof, the steam-tug W. H. Vanderbilt, with two barges in tow astern on a hawser; that said tug W. H. Vanderbilt, with her said tow, was proceeding in the same direction and at a little faster rate of speed than the James Bowen; that after the said James Bowen, with the said scow or float in tow, had gotten into clear water and was heading as last aforesaid, a boat was discovered by her pilot coming down the river with a tow, which subsequently turned out to be the L. P. Dayton; that at the time the said approaching tug and tow were discovered the green light of the tug L. P. Dayton was visible, and she appeared to those in charge of and navigating the tug James Bowen, including the lookout on the float, to be going to the eastward, between the said James Bowen and the New York shore, which was then about three hundred yards distant. At a proper distance the pilot in charge of the James Bowen blew two blasts of his steam whistle, to which the approaching tug, L. P. Dayton responded with two blasts of her whistle, and the pilot in charge of the said James Bowen thereupon put his wheel to starboard, heading as close to the westward as could safely be done without danger of colliding with the tug W. H. Vanderbilt or the barges in tow thereof, which were, as before stated, on the port side of the said float, heading in the same direction; that notwithstanding the signal which had been given by the James Bowen, and which had been answered by the L. P. Dayton, the pilot of the said L. P. Dayton, instead of keeping his course or putting his wheel to starboard so as to pass the said James Bowen on her starboard side, so

changed his course as to shut out his green light and bring his red light in view of those navigating the James Bowen; that thereupon, it being evident that the said tug L. P. Dayton could not cross the bow of the James Bowen and of the said float in tow thereof without imminent danger of collision, the pilot in charge of the James Bowen immediately rang his bells to slow, stop, and back; that said signals were promptly answered by the engineer of the James Bowen, and that at the time of the collision the heading of the James Bowen and of the float in tow thereof was about stopped, and that those in charge of the said L. P. Dayton and the canal-boats or barges in tow thereof so navigated the same that the bow of the canal-boat or barge on the starboard side of the L. P. Dayton was brought into collision with the bow of the said float or scow Number Four with such force as to break the tow-line from the said scow or float Number Four to the James Bowen, and to crush in the bow of the said barge or canal-boat on the starboard side of the L. P. Dayton, and that, as this respondent is informed and believes, the said barge or canal-boat was the barge or canal-boat called the Centennial in the libel in this cause mentioned, and that in consequence of said collision the said barge or canal-boat Centennial subsequently sank; that the place where the said collision occurred was about opposite Pier 1, North River, and from three hundred to three hundred and fifty yards from the head of said pier.

"And this respondent, upon information and belief, says that the said collision was in no way occasioned by any fault on the part of the said float or scow Number Four, or of the said tug James Bowen, or of those in charge thereof, but was occasioned by and due wholly to the fault of those navigating and in charge of the said tug L. P. Dayton and the said barges or canal-boats in tow thereof in the following respects:

"1. That the pilot in charge of the tug L. P. Dayton and of the said canal-boats in tow thereof, including the said Centennial, was not a competent person for the purpose, being a man of near and imperfect sight and generally incompetent.

"2. That the L. P. Dayton, at the time of the said collision, while navigating the waters of the Hudson River and engaged in towing canal-boats or barges, failed and omitted to have white lights placed in the extreme outside of the tow on either hand.

"3. That the pilot in charge of the said tug L. P. Dayton and the canal-boats or barges in tow thereof, after having received and answered the signal of two blasts from the steam whistle of the James Bowen, instead of keeping to the eastward and passing the said James Bowen on her starboard side, improperly changed his course so as to cross the bows of the said James Bowen, thereby bringing the bow of the said canal-boat Centennial into collision with the said float or scow Number Four.

"4. That the said tug L. P. Dayton, when danger of collision became imminent, did not in season reverse her engine, so as to prevent a collision.

"5. That the said tug-boat L. P. Dayton was not provided with a suitable or competent lookout properly stationed at and before the time of the collision.

"6. That the said tug L. P. Dayton was also negligent in proceeding at too great a rate of speed, the tide being ebb and the wind from the northwest.

"7. That the said tug L. P. Dayton, after twice blowing her whistle as aforesaid, did not keep on her course, but ported her wheel and went to starboard, showing her red light to the James Bowen and the said float before reversing and attempting to go back.

"And this respondent, upon information and belief, says that the said collision was in no way due to any fault on the part of the said scow or float Number Four or of the said tug James Bowen, and upon information and belief he denies each and every allegation in the said libel and in the supplement filed thereto contained charging or imputing any fault or negligence whatever to the said float, or those in charge thereof, or the said tug James Bowen, or those in charge thereof, and each and every allegation in the said libel contained respecting the said collision, except as hereinbefore expressly admitted."

Statement of Facts.

Arthur B. Twombly, as surviving partner of Whitney & Twombly, intervened as owner of the steam-tug L. P. Dayton, and answered the libel as follows:

"Second. This respondent admits that on the 14th day of February, 1879, the boat Centennial, of the burden of about 300 tons, and of which the libellant was master, was taken in tow by the steam-tug L. P. Dayton, at the pier foot of Fifty-ninth Street, New York, to be towed to the Erie basin, at about half-past five o'clock P.M., and that she was loaded with a cargo of wheat, of the quantity of which he is not informed, nor is he informed whether the said boat was then staunch and seaworthy, but leaves the libellant to make such proof in reference thereto as he shall be advised.

"He admits that when the Dayton left Fifty-ninth Street pier she had in tow four boats, two on each side, and that the Centennial was the inside starboard boat; that she was one hundred and three feet in length, and that her bow projected some twenty feet beyond the bow of the steam-tug L. P. Dayton; that the evening was clear and starlit and the tide ebb, and that the tug landed one of the boats that had been on her port side at the Eagle pier, Hoboken, and that she thereafter pursued her course with the remaining three boats, and that when about opposite or a short distance above Pier No. 1, North River, and about three hundred yards from the piers on the New York shore, the Centennial was run into by the scow Number Four, which was then in tow of the steam-tug James Bowen, and received such injuries that she sank with her cargo.

"And he admits that the said scow was lashed on the port side of the James Bowen and that the said tug and scow were proceeding from a point in the East River to the Long Dock, Jersey City, and that at the time of the collision she was on a course opposite or nearly opposite the course then being taken by the L. P. Dayton and her tow.

"He denies that it was through any carelessness of the persons in charge of the L. P. Dayton that said tows were not kept clear of each other.

"He admits that the Centennial was under the control

and subject to the direction of the L. P. Dayton, having neither propelling nor steering power of her own.

"And as to the various allegations of fault on the part of the L. P. Dayton, he denies the same and each one of them.

"And as to the allegations in said libel in respect to the damages sustained by the libellant, he has no knowledge and leaves the libellant to his proof thereof.

"And he further avers that said tug L. P. Dayton was wholly without fault which caused or contributed to said collision, and the same was wholly caused by fault of those on board and in charge of the said tug James Bowen and said scow Number Four, as alleged in said libel.

"And he alleges that the tug L. P. Dayton was well and properly manned and had the requisite lights set and burning brightly according to law, and that the tow was in all respects properly made up; that the two tugs were approaching in such a way that the proper course was for each to pass on the starboard side of each other, and that the proper measures were taken by said tug L. P. Dayton to pass in that manner and the proper signals were blown, but that said tug James Bowen failed to give heed to said signals and to take proper measures to pass on the starboard hand of said tug L. P. Dayton and the boats in her tow, but so negligently navigated as to bring the said scow against the said boat Centennial and also the boat on the port side of the L. P. Dayton."

The case was heard in the District Court on the pleadings without testimony, and a decree was passed dismissing the libel. 10 Ben. 430. On appeal to the Circuit Court, the case was again submitted on the pleadings alone, when the same decree was rendered. 18 Blatchford, 411. The present appeal was from that decree, and presents the single question of law whether upon the pleadings, without testimony, there is error in that decree.

Mr. Edward D. McCarthy, for appellant, cited: *The Scioto*, 2 Ware, 359; *The Nautilus*, 1 Ware, 529; *The Alabama and The Gamecock*, 92 U. S. 695; *The Johnson*, 9 Wall. 146; *Sproul* v. *Hemmingway*, 14 Pick. 1; *S. C.* 25 Am. Dec. 350;

Sturgis v. *Boyer*, 24 How. 110; *The Atlas*, 93 U. S. 302; *Clark* v. *Barnwell*, 12 How. 272; *Canfield* v. *Balt. & Ohio Railroad*, 93 N. Y. 532; *Stokes* v. *Saltonstall*, 13 Pet. 181; *Platt* v. *Hibbard*, 7 Cowen, 497; *Clark* v. *Spence*, 10 Watts, 335; *Beardslee* v. *Richardson*, 11 Wend. 25; *S. C.* 25 Am. Dec. 596; *Doorman* v. *Jenkins*, 2 Ad. & El. 256; *Ware* v. *Gay*, 11 Pick. 106; *Christie* v. *Griggs*, 2 Campb. 79; *Transportation Co.* v. *Downer*, 11 Wall. 129; *The Marpesia*, L. R. 4 P. C. 212; *The Benmore*, L. R. 4 A. & E. 132; *The Abraham*, 2 Aspin. 34; *The Bolina*, 3 N. of Cas. 208; *Scott* v. *London, &c., Dock Co.*, 3 H. & C. 596; *The Quickstep*, 9 Wall. 665; *Dutton* v. *The Express*, 3 Cliff. 462; *The Express*, Olcott Adm. 258; *S. C.* 1 Blatchford, 365; *The Rhode Island*, Olcott Adm. 505; *Treadwell* v. *Joseph*, 1 Sumner, 390; *The John Adams*, 1 Cliff. 404; *The Lochlibo*, 3 W. Rob. 310; *The Gautier*, 5 Ben. 469; *The Sea Nymph*, Lush. 23; *The Webb*, 14 Wall. 406; *The Brazos*, 14 Blatchford, 446; *Ins. Co.* v. *Newton*, 22 Wall. 32; *Carver* v. *Tracy*, 3 Johns. 427; *Wailing* v. *Toll*, 9 Johns. 141; *Fenner* v. *Lewis*, 10 Johns. 38; *Credit* v. *Brown*, 10 Johns. 365; *Burmon* v. *Woodbridge*, 2 Doug. 781; *Rex* v. *Clews*, 4 C. & P. 221; *Delamater* v. *Pierce*, 3 Denio, 315; *Bearss* v. *Copley*, 10 N. Y. 93; *Barnes* v. *Allen*, 30 Barb. 663; *Trimleston* v. *Kemmis*, 9 Cl. & Fin. 749, 780–784; *Morrison* v. *Clark*, 7 Cush. 213; *Cent. Bridge Co.* v. *Butler*, 2 Gray, 130; *de Nemours* v. *Vance*, 19 How. 162; *Pope* v. *Nickerson*, 3 Story, 465; *The Clement*, 2 Curtis, 363.

Mr. Joseph F. Mosher, for the L. P. Dayton (*Mr. James E. Carpenter* was with him on the brief), cited: *Transportation Line* v. *Hope*, 95 U. S. 297; *The Margaret*, 94 U. S. 494; *The Webb*, 14 Wall. 406; *The Brazos*, 14 Blatchford, 446; *The Brooklyn*, 2 Ben. 547; *The Frank G. Fowler*, 21 Blatchford, 410; *The M. Vandercook*, 24 Fed. Rep. 472; *The Quickstep*, 9 Wall. 665; *The Deer*, 4 Ben. 352; *The W. E. Gladwish*, 17 Blatchford, 77; *The B. B. Saunders*, 23 Blatchford, 378; *The New Champion*, Abbott Adm. 202; *The William Young*, Olcott Adm. 38; *The Neptune*, Olcott Adm. 483, 493; *The Breeze*, 6 Ben. 14; *The Columbus*, Abbott Adm. 384; *The Summit*, 2 Curtis, 150; *The Eri*, 3 Cliff. 456, 460; *The*

Kallisto, 2 Hughes, 128; *The Ligo*, 2 Hagg. Adm. 356, 360; *The Bolina*, 3 N. of Cas. 209; *The Adolph*, 4 Fed. Rep. 730; *The Marpesia*, L. R. 4 P. C. 212; *The Abraham*, 2 Asp. N. S. 34; *The Benmore*, L. R. 4 A. & E. 132.

Mr. William D. Shipman for the Bowen.

Mr. Charles M. Da Costa, for appellant, cited the following cases not cited by *Mr. McCarthy*: *The George*, 9 Jur. Pt. I, 670; *The Victoria*, 3 W. Rob. 49; *The Telegraph*, 1 Spinks, 427; *S. C.* 8 Moore P. C. 167; *The Hibernia*, 4 Jur. N. S. Pt. I, 1244; *The Bothnia*, 2 Law Times N. S. 160; *The Despatch*, 3 Law Times N. S. 219; *The Annapolis*, 5 Law Times N. S. 326; *The Kepler*, 2 P. D. 40; *The Glengarry*, 2 P. D. 235; *The Andalusian*, 3 P. D. 182; *The La Cahapool*, 7 P. D. 217; *The George Roper*, 8 P. D. 119; *The Louisiana*, 3 Wall. 164; *The Granite State*, 3 Wall. 310; *The Syracuse*, 12 Wall. 167; *The Clarita and Clara*, 23 Wall. 1; *The Belknap*, 2 Lowell, 281; *Sterling* v. *The Jennie Cushman*, 3 Cliff. 636; *The Julia M. Hallock*, Sprague, 539; *The Bridgeport*, 7 Blatchford, 361; *The Delaware*, 20 Fed. Rep. 797; *The Brady*, 24 Fed. Rep. 300; *The Charlotte Raab*, Brown Adm. 453; *Hall* v. *Little*, 2 Flipp. 153; *The Fremont*, 3 Sawyer, 571; *Rose* v. *Transportation Co.*, 20 Blatchford, 411; *Mullen* v. *St. John*, 57 N. Y. 567; *Seybolt* v. *N. Y., Lake Erie & Western Railroad*, 95 N. Y. 562; *Feital* v. *Middlesex Railroad*, 109 Mass. 398; *Philadelphia & Reading Railroad* v. *Anderson*, 94 Penn. St. 351; *Iron Railroad* v. *Mowery*, 36 Ohio St. 418; *Pittsburg, Cincinnati & St. Louis Railroad* v. *Williams*, 74 Ind. 462; *Eagle Packet Co.* v. *De Fries*, 94 Ill. 598; *Byrne* v. *Boadle*, 2 H. & C. 721; *Bridges* v. *North London Railway*, L. R. 6 Q. B. 377.

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

The ground on which the Circuit Court proceeded is, that as the libel alleges negligence and fault in various particulars as against the tug L. P. Dayton and the tug James Bowen,

which are denied in the several answers of the respective claimants, in opposition to which the libellant has proven no negligence or fault on the part of either, the libel must be dismissed, as the burden of proof lies upon the libellant to establish a case of negligence against one or the other, or both of the respondents, and that this burden of proof is not changed or shifted by reason of any allegations of fault contained in the answer of either respondent as against the other. On the other hand, it is contended on the part of the libellant, that while it is true that each of the defendants denies the negligence charged against it, yet both the answers show that the loss must have been occasioned by the fault of one of the defendants, and that being so, the law casts upon each defendant the burden of making good its allegations of fault against the other, in order to exonerate itself.

The proposition is stated by one of the counsel for the appellant, in his printed argument, as follows: "A vessel, without propelling or steering power, lashed to the side of a tug, is sunk, as the result of a collision between such tug and another one. In a libel filed by the tow against both tugs, to which answers are interposed, in neither of which is negligence causing or contributing to the collision attributed to the tow and by which each tug seeks to exculpate itself and inculpate the other, a *prima facie* case of negligence arises without the necessity of proving the specific acts of negligence by either or both tugs, and that the decree to be entered in favor of the libellant, either against one tug alone or against both, is dependent entirely upon the nature of the evidence which it is incumbent upon the tugs to produce, in order to determine as between themselves the issues so made by them by their respective answers."

The propriety and soundness of this rule is supposed in argument to rest upon two general grounds: 1st. It is contended that the tow which was injured by the collision is in the same category, as respects both tugs, as that of a vessel at anchor injured by a collision with a moving vessel, where the burden of proof is upon the latter to show that it was without fault, or that the disaster was the result of fault on the part of the com-

plaining party. 2d. That where it appears, as in the present case, that the tow, being helpless as to its own navigation, was without fault on its part, and it is manifest, from the circumstances appearing on the pleadings, that the collision was caused either by the fault of one or the other of the tugs, or was the result of inevitable accident, the burden of proof rests upon each to establish such facts as excuse it. The argument is, that such a disaster could only occur from fault of navigation, or from that *vis major* which is styled inevitable accident; that by the supposition the appellant is free from fault; that consequently it must be that either there was fault on the other side or inevitable accident, in either of which cases it is incumbent upon the respondent affirmatively to establish its excuse.

It is also contended for the appellant, that if the truth of the general rule must be admitted, that he who seeks judicially to establish a claim based upon an alleged default of his adversary must affirmatively establish by proof the facts which justify his complaint; and that the burden of proof, as a principle of general jurisprudence, is assumed by the plaintiff, unless the cause of action is confessed or admitted judicially by the defendant; yet, it is also true, that if the defendant accompanies a general denial of the alleged cause of action with the admission of such facts as in law constitute his liability, the plaintiff's case is in fact admitted without other proof. And that, in this aspect, the libellant was entitled to a decree below on the basis of certain admissions of fact in each of the answers inconsistent with the general denials of fault.

In our opinion, the burden of proof was upon the appellant to establish a case of negligence against each of the tugs separately and independently. The rule which presumes fault in a case of collision, against a vessel in motion in favor of one at anchor, does not apply. In the present case, the tow, which was injured, was not at rest as respects either of the tugs. As against the Bowen, the movement and navigation of the tow was under the control and management of the Dayton; and in a suit against the Bowen, the tow can have no other or greater rights, and no other of better standing in court, than would the Dayton have had in case the collision had been

directly with her, because the tow in such a suit is identified with its own tug, so far, at least, that she cannot escape the consequences if the collision was caused wholly or in part by the fault of that tug. *The Civilta and The Restless*, 103 U. S. 699; *Sturgis* v. *Boyer*, 24 How. 110; *The J. H. Gautier*, 5 Ben. 469; *The Cleadon*, Lush. 158.

It follows, therefore, that, as respects the Bowen, the same burden of establishing the fault charged against it rests upon the libellant in this case, as the law would impose upon the Dayton if she were the libellant prosecuting for damages on its own behalf, as to which there could be no question.

As between the tow and its tug, the Dayton, the contract of towage involves a responsibility for loss upon the tug only by reason of the want of ordinary care; for a tug is not a common carrier, and does not insure the safety of its tow. In some cases the facts of the collision, as admitted in the pleadings, might constitute a *prima facie* case of negligence, which would impose upon the tug the duty of explanation and exoneration; but no such presumption of fault arises in the present case. Here there was a collision between the tow of one tug and the tow of another, which may have been caused by a fault of navigation upon the part of one or both of the tugs. Each charges fault against the other. As the matter stands, it is indeterminate, being a mere matter of controversy to be adjudged between them upon proof of all the circumstances. In favor of the injured tow, the libellant in this case, there is no presumption of fault as against either, nor against both jointly. There is no presumption against the Bowen, for the reason we have already stated; there is none against the Dayton, because on her behalf all the alleged negligence is denied, and the contrary allegations of the libel cannot be legally maintained merely by corresponding allegations in the answer of the Bowen. To hold otherwise would require that in every case, as between the tow and its tug, the latter should be required affirmatively to establish its defence against the presumption of its negligence. There is no ground, in reason or authority, for making such an exception to the general rule, which requires the plaintiff, in the first instance, to establish

by proof the allegations of its complaint. It does not tend to establish such an exception that it appears by the record that one or the other of the respondents must have been so in fault as to be liable for the consequences. It still remains that there is a controversy as to which of the two is guilty, and no decree can pass without affirming the liability of one or both. That affirmation must stand upon proof, unless it appears on the record which one of the two is at fault, or that both are.

Neither is it material that the facts of the case and the causes of the collision are peculiarly within the knowledge of the respondents. It is alleged in the present case, as one of the inconveniences of the libellant's situation, that it would be compelled, in order to establish the allegations of the libel, to resort to the testimony of those navigating the respective tugs, and thus call witnesses interested to exonerate the vessel to which they were attached. We are not aware, however, of any ground on which such an inconvenience can affect the rule of law which governs the rights of the parties. And perhaps it is counterbalanced by the corresponding interest on the part of each set of witnesses to fix the fault upon the opposing vessel.

It is further argued on the part of the appellant, that it was entitled to a decree below, as against the Bowen, on the ground of admissions, in the answer filed on its behalf, affirmatively showing negligence and a violation of the rules of navigation tending to produce a collision. This aspect of the case was disposed of by the Circuit Court in the opinion of Mr. Justice Blatchford, which we adopt, as follows:

"It is urged for the libellants that the answer of the Bowen shows that she had the Dayton on her starboard side, with the courses of the two vessels crossing so as to involve risk of collision, and that, therefore, under rule 19 of § 4233 of the Revised Statutes, it was the duty of the Bowen to keep out of the way of the Dayton, and, as she did not, a *prima facie* case of negligence is thus made out against her by her answer. This is an error. The facts stated in the answer of the Bowen do not show that the courses of the two tugs were crossing when the Bowen discovered the Dayton. On the contrary,

the green light of the Dayton was then visible to the Bowen, and not her red light, and the Dayton appeared to be going between the Bowen and the New York shore, to the eastward, and in a direction which would cause her green light to still be visible to the Bowen, and her red light to be still invisible. This would ensure safety and no collision; and, to ensure it still more, the Bowen blew two whistles and the Dayton answered with two whistles. After that the Bowen starboarded. Even if — before so starboarding, and while so starboarding — the Bowen is to be considered as having the Dayton on her starboard side, with the courses of the two vessels crossing, (which is by no means clear on the averments in the answer of the Bowen,) her answer shows that she took proper measures to keep out of the way of the Dayton; that such measures were assented to at the time by the Dayton as proper, and that then the Dayton changed her course and went across the bow of the Bowen. Under these circumstances the Bowen slowed, stopped, and backed.

"The answer of the Bowen states substantially that there was imminent danger of collision if she kept on. There is nothing in all this to show negligence in the Bowen. When the Dayton so came suddenly across the bow of the Bowen, a case was not made within rule 19, although in that position the Bowen had the Dayton on her starboard side, and their courses were crossing; and even if it were, the answer shows that the Bowen did all she could to keep out of the way of the Dayton.

"The libel, so far from alleging that it was a fault in the Bowen to slow, stop, and back, alleges, as a fault in her, that she did not reverse, or did not do so soon enough. The isolated fact of her slowing, stopping, and backing cannot be taken away from the connection in which it is found in the answer and separated from the circumstances under which the answer states it occurred, particularly as the libel states distinctly that it was a fault in her not to reverse." 18 Blatchford, 411, 418.

Decree affirmed.

MERIWETHER *v.* MUHLENBURG COUNTY COURT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Argued January 5, 1887. — Decided January 31, 1887.

Following the decisions of the Supreme Court of Kentucky, this court holds that the justices of the peace of Muhlenburg County, in that state, do not form a necessary part of the county court when levying a tax to satisfy a judgment against the county, under § 9 of the Act of the Legislature of Kentucky, of February 24, 1868, amending the charter of the Elizabethtown and Paducah Railroad Company.

MERIWETHER, the plaintiff in error, obtained a judgment in the court below against the county of Muhlenburg, in the State of Kentucky, for the amount of certain unpaid coupons of bonds, issued by it in payment of a subscription to the capital stock of the Elizabethtown and Paducah Railroad Company. Execution having been returned "no property found to satisfy the same or any part thereof," and the county court of the county having refused to levy a tax sufficient to pay the judgment, Meriwether filed the petition in this case against the judge of that court, praying for a mandamus compelling the levy and collection of such tax. The plaintiff based his right to relief upon the ninth section of an act of the General Assembly of Kentucky, approved February 24, 1868, amending the charter of the Elizabethtown and Paducah Railroad Company. That section provided:

"That in case any county, city, town, or election district shall subscribe to the capital stock of said Elizabethtown and Paducah Railroad Company, under the provisions of this act, and issue bonds for the payment of such subscription, it shall be the duty of the county court of such county, the city council of such city, and the trustees of such town, to cause to be levied and collected a tax sufficient to pay the semiannual interest on the bonds issued and the cost of collecting such tax, and paying the interest, on all the real estate and personal

property in said county, city, or town, subject to taxation under the revenue laws of the state, including the amounts owned by residents of such county, city, or town, or election districts, which ought to be given in under the equalization laws." *Sess. Acts* 1867–8, p. 622.

This proceeding having been instituted against the judge of the county court alone, a demurrer to the petition, on the ground of defect of parties, raised the objection that, within the meaning of the foregoing statute, the justices of the peace of the county must be a part of the court when making a levy for the purpose asked by the plaintiff. The court below, being of opinion that the point was well taken, sustained the demurrer. An amended petition was filed, stating among other facts, that there were no justices of the peace of the county; that the justices elected from time to time, and who had qualified, resigned their positions in order that there might be no officers in existence who could, under the theory of the defendant, levy the required tax. A demurrer to the amended petition having been sustained, and the plaintiff having elected not to amend further, the action was dismissed.

Mr. Alexander P. Humphrey for plaintiff in error. *Mr. W. O. Dodd*, *Mr. J. L. Dodd*, *Mr. John Mason Brown*, and *Mr. George M. Davie* were with him on the brief.

Mr. T. W. Brown for defendant in error.

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

The only question necessary to be considered is, whether the justices of the peace of Muhlenburg County constitute a necessary part of the county court when levying a tax to pay plaintiff's judgment.

The constitution of Kentucky, adopted in 1850, provided for the organization of a county court in each county, to consist of a presiding judge and two associate judges, any two of the three to constitute a quorum; with power in the General Assembly to abolish the office of associate judges whenever it

was deemed expedient, "in which event they may associate with said court any or all of the justices of the peace" elected in the several districts into which the county is divided. Constitution, Art. IV. It is also declared in the same instrument that "the General Assembly may provide, by law, that the justices of the peace in each county shall sit at the court of claims and assist in laying the county levy and making appropriations." Ib. § 37. The words "court of claims" are here employed to designate the county court when it sits for the purpose, among others, of ascertaining the claims against, and the expenses incurred by, the county, and of providing for their payment by appropriations out of the county levy — such levy being the annual tax imposed for county purposes, not upon property, but upon persons residing in the county, without reference to the value of their property. 1 Rev. Stat. Ky. 296, c. 26. The county court is also described as "the county court of levy and disbursements," when reference is made to its duty "to erect and keep a sufficient county jail." Ib. 329, c. 27, Art. 21, § 7.

The Revised Statutes provide that the county courts shall have jurisdiction to lay and superintend the collection and disbursement of the county levy; to erect, superintend, and repair all needful county buildings and structures; and "to superintend and control the fiscal affairs and property of the county, and to make provision for the maintenance of the poor." Ib. 327, c. 27, Art. XIX. They also provide that "the office of associate judge of the county court is abolished," and that "a county court shall be held in each county at the seat of justice thereof by a presiding judge of the court, on the days prescribed by law," except that "at the court of claims . . . the justices of the peace of the county shall sit with the presiding judge and constitute the court"; and "justices of the peace shall only compose a part of the court when it is engaged in laying the county levy, and in appropriating money and in transacting other financial business of the county." Ib 328, Art. XXI, § 2.

The same provisions substantially are to be found in the General Statutes of the state which went into effect in 1873. Gen. Stat. Ky. 269, c. 27; Ib. 304, c. 28, Art. 15, 16, and 17.

Opinion of the Court.

It is clear that the levying and collection of a tax to meet a county subscription to the stock of a railroad company, is not a business connected with the laying of the county levy, or with appropriations of money out of such levy. But it is insisted that it is a matter relating to the "fiscal affairs" of the county, and is "financial business of the county," the control or management of which belongs, under the law, to the county court, composed of the presiding judge and the justices of the peace. On the other hand, the plaintiff in error contends, this case is taken out of the operation of the general statute, by the fact that the special statute under which the county made the subscription and issued the bonds in question imposes upon the county court, held by the presiding judge, the absolute duty of levying the necessary tax.

Upon this point there seems to be a settled course of decision in the highest court of Kentucky; and upon such a subject as the organization or composition of a tribunal established by the fundamental law of the state, those decisions are, at least, entitled to great weight. *Burgess* v. *Seligman*, 107 U. S. 20, 34; *Claiborne County* v. *Brooks*, 111 U. S. 400, 410; *Norton* v. *Shelby County*, 118 U. S. 425.

The first case in the Court of Appeals of Kentucky upon this question is *Bowling Green and Madisonville Railroad Company* v. *Warren County*, 10 Bush, 711, decided in 1875. That was a proceeding to compel the county court to execute and deliver bonds in payment of a subscription to the stock of the railroad company,—a subscription sustained by a majority of the legal voters at an election held under the order of the county court, composed of the presiding judge alone. The defence was that the county court, held by that officer, the justices being absent, was without authority to call the election there in question. The court, speaking by Pryor, J., after observing that, as a general rule, when reference is made to a county court, or the action of a county court, it is understood as a court presided over by the county judge alone, said:

"A county court, held by the county judge or by the judge in conjunction with the justices, has no power to impose such taxation as this on the people of the county or to submit the

question of taxation to the popular vote, without some special legislative enactment; and in the absence of any such original jurisdiction belonging to either mode of organization, it remains to be determined whether the legislative intent, to be gathered from the provisions of appellant's charter, and particularly the sixteenth section, was to empower the county judge alone to exercise this right, or to require that the justices of the county should be associated with him. If the direction of the legislature had been imperative on the county court to enter the order submitting the question of subscription to the people, there would be little difficulty in determining this question; for, if the county court had been deprived of all discretion and compelled to obey a mandatory act, it would be immaterial whether the county court, composed of the justices or the county judge, made the order, as either or both must obey.

"In this case the legislature seems to have departed from the usual course of legislation with reference to such charters, and instead of exercising its own judgment as to the interests of the people in this particular locality, or of permitting them primarily to do so, required that the county court, preliminary to a vote on the question by the people, should first, in its discretion, determine the propriety of such legislative action. This action on the part of the county court was certainly not judicial. The appellant had no right or claim on the people to make the subscription or upon the county court to order the vote. The company was empowered by this act to make a request only of the county court that it might in its discretion accede to or refuse. . . . It was a matter of vital importance to the people of the county of Warren, as well as the other counties to whom such a proposition might have been made by appellant, that they should fully understand the nature of the burden they were about assuming, and the legislature in its wisdom saw proper to give them the benefit of the judgment of those who represented the various localities and interests in each county, in order that they might determine whether the benefits to be derived from the construction of this railway would be an equivalent for the large expenditure to be made."

Opinion of the Court.

So the mandamus was refused upon the ground that the special statute intended that the question of submitting a subscription to the vote of the electors should be determined, in the first instance, by the county court, composed of the judge and justices.

The same point again arose in the Court of Appeals of Kentucky in *Logan County* v. *Caldwell*, 1880, and in *Cook* v. *Lyon County*, 1884. Neither of these cases is reported in the printed volume of decisions, but a copy of the opinion in each has been submitted to us. The case of *Logan County* v. *Caldwell* involved the validity of a subscription to the capital stock of the Owensville and Russellville Railroad Co., and of the bonds issued in payment thereof — the subscription having been voted at a popular election called by the county court held by the judge alone. The court, speaking by Chief Justice Cofer, reaffirmed the rule announced in *Bowling Green and Madisonville Railroad Co.* v. *Warren County*, observing that it proceeded upon the idea that, as the justices of the peace are by law part of the county court in laying the levy, in making appropriations of money, and generally when the financial interests of the county are involved, it ought to be presumed, when a discretion is given by law to the county court in respect to a matter relating to the financial affairs of the county, that the legislature intended by the phrase "county court," that tribunal to which it had committed the management of the general financial interests of the county. Adhering to this rule, the court sustained the subscription and bonds of Logan County upon the ground that an act, amendatory of the charter of the company, and which was in force when the election was held, imperatively required the county court to make the subscription and issue the bonds, in accordance with the vote of the majority; and hence, as held in the former case, it was "immaterial whether a court composed of the justices or held by the presiding judge alone made the order, as either must obey."

In *Cook* v. *Lyon County* the question was as to the validity of certain bonds and coupons issued in conformity with a popular vote at an election called by the county court, held

by the presiding judge alone, upon the question of a subscription to the stock of the Elizabethtown and Paducah Railroad Company, *under the very act now before us.* The court said:

"It is urged that the bonds and coupons are not valid, because the county judge, in ordering the election to take the vote as to whether the county should subscribe stock to said road, and in making the subscription and issuing the bonds therefor, acted alone and without associating the justices of the county with him. The act in question provides that all this shall be done by the 'county court,' and contains no language from which it can be even inferred that the legislature intended that it should be done by the county levy or fiscal court of the county; and although there is some reason in the claim that when the term 'county court' is used as to fiscal matters, it refers to the fiscal court, yet, as a general rule, when reference is made to a county court, or the action of a county court, it means a court presided over by the county judge alone, and should be held to so mean when used in connection with fiscal matters if it relates to mere ministerial duties. Moreover, in this instance, the direction of the legislature to the county court to do these ministerial acts was imperative, and it is, therefore, immaterial whether it was done by the county judge alone, or by him and the justices, even admitting (as we do not) that a *bona fide* holder of the bonds can be affected by such matters."

Taking these decisions as the basis upon which to rest our judgment in this case, it only remains to inquire whether the provisions of the act of February 24, 1868, are mandatory in their character, or only invested the county court with a discretion in respect to the material matters involved in the subscription by Muhlenburg County. When the railroad company requests the county court of any county, through or adjacent to which it is proposed to construct the road, to subscribe, either absolutely or conditionally, a specified amount to its stock, the act provides that "the county court shall forthwith order an election to be held," &c. The sections authorizing subscriptions by precincts, cities, or towns are equally imperative. Secs. 5 and 6. When a county . . . subscribes

under the provisions of the act, "it shall be the duty of the county court . . . to issue the bonds of such county," &c., to be signed by the "county judge and countersigned by the clerk." Sec. 7. In case of a subscription by an election district in any county, "it shall be the duty of the county court of such county to issue the bonds of such district or districts in payment thereof," &c. Sec. 8. We have already referred to the ninth section, which provides that, upon a subscription by any county, "it shall be the duty of the county court of such county . . . to cause to be levied and collected a tax sufficient to pay the semiannual interest on the bonds issued and the cost of collecting such tax and paying the interest, on all real estate and personal property in said county," &c. On levying a tax as provided in the act, to pay the interest on bonds issued by a county, "it shall be the duty of the county court . . . to appoint three resident tax-payers . . . who shall be styled the Board of Commissioners of the Sinking Fund of such county." Sec. 10. If dividends upon the stock subscribed prove to be insufficient to enable the county to pay its bonds at maturity, new bonds may be issued; but if the county deems that course inexpedient, "it shall be the duty of the county court . . . to cause a tax to be levied and collected on all property in such county . . . subject to taxation," &c. And so of all the remaining sections of the company's charter.

It would be difficult, we think, to frame an act more mandatory in its character than that of February 24, 1868. None of its provisions leave room for the exercise of discretion by the county court in respect to any matter upon which it is required to act. The learned court below announced that, except for the fourth section of this act, it would decide — following the decisions in *Bowling Green* v. *Madisonville Railroad Company*, and *Logan County* v. *Caldwell* — that the "county court" in the company's charter meant a court held by the presiding judge alone. That section provides: "4. That the person acting as sheriff at the several precincts shall return to the clerk of the county court within (three) days after the day of such election the poll-books of their respective pre-

cincts, and on the next day thereafter the county judge and county clerk shall count the vote; and if it shall appear that the majority of those voting voted in favor of the subscription of stock as proposed, the county judge shall order the vote to be entered on the record, and the subscriptions to be made by the clerk on behalf of the county on the terms specified in the order submitting the question to a vote."

We are unable to concur in the suggestion that the use of the words "county judge," in the fourth section of the act, in connection with the direction that the vote be entered on the record, that is, upon the records of the county court, is inconsistent with the idea that "county court," as used in the company's charter, meant merely the county court, held by the judge thereof. As the counting must have been by individuals, not by a court, the requirement that the county clerk and county judge should perform that duty, and that the latter should cause the result to be entered on the records of the court, does not, we think, show an intention to invest the county court with any discretion whatever in ordering the election, or in issuing the bonds, or in levying taxes to pay the bonds and the interest thereon. In the absence of that discretion, it is the duty of the county court, held by the presiding judge alone, to levy the required tax. Such was the decision in *Cook* v. *Lyon County*, to which the attention of the court below does not appear to have been called.

The counsel for the defendant in error refer to § 2, Art. XVII, c. 28 of the General Statutes of Kentucky, page 306, (ed. Bullitt and Feland, 1881,) which provides that, "if under the provisions of any law hereafter enacted, it is required of the county court to submit to the qualified voters of the county, or to the qualified voters of any local community therein, the proposition to take stock in any company or to levy any tax other than for common school purposes; or, if, under any law hereafter enacted, it is required that the county court shall decide upon the issue of any bonds of the county, or of any district or local community therein, to any railroad or other company, it shall be the duty of the county judge to cause all the justices of the peace of such county to be summoned to at-

tend at the term of the court at which any such action is proposed to be taken, who shall be associated with the county judge and constitute the county court for the occasion."

It is sufficient to say that, as that provision, by its terms, only applies to laws "hereafter enacted," that is, enacted after the general statutes went into operation, it cannot affect the present case, which depends upon the construction to be given to an act passed in 1868.

As the court below erred in sustaining the demurrer to the original petition,

The judgment is reversed, with directions to overrule that demurrer, and for such other proceedings as may be consistent with this opinion.

HARMON *v.* ADAMS.

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

Submitted January 10, 1887. — Decided February 7, 1887.

An agreement by the payee of a promissory note to release the maker from the payment of the principal on the payment, in advance each year, until payee's death, of interest at a rate above the legal rate, is no defence in a suit by the payee's executor, without proof of such payment until his death.

ASSUMPSIT on a promissory note. Judgment for plaintiffs. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Charles H. Wood and *Mr. Robert Doyle* for plaintiff in error.

Mr. John P. Wilson for defendants in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This was an action of assumpsit, brought in the Circuit Court of the United States for the Northern District of Illinois, on September 25, 1885, the plaintiffs being executors of Jacob

Harmon, deceased, citizens of Indiana, and the defendants citizens of Illinois. The action was founded on a promissory note signed by the defendants, dated March 1, 1875, payable one year after date to the order of Jacob Harmon, for $15,000, with interest at ten per cent. per annum, from date until paid, with a proviso that if the note was collected by suit the judgment should include a reasonable fee for the plaintiffs' attorney. A copy of the note, with the indorsements thereon, was set out with the declaration, showing that the interest thereon had been paid to March 1, 1885. The plea was the general issue. The case was tried by a jury, who returned a verdict in favor of the plaintiffs below, the judgment on which is brought into review by this writ of error.

From the bill of exceptions it appears that the following took place on the trial:

"Upon the said trial the defendants introduced proof tending to show that there was a verbal agreement between themselves and Jacob Harmon, the payee of the note, that if they would pay the interest regularly, at the rate of ten per cent. per annum, as called for by the note, until his death, they should be acquitted of the payment of the principal — in other words, that the money represented by the note was given to them upon condition that they should pay the interest thereon, during the life of Jacob Harmon, at the rate of ten per cent. per annum.

"The defendants also offered to prove that in the forepart of the year 1880, after the said note in suit had become due, they offered to pay Jacob Harmon the amount then due on said note, with interest, and proposed to do so, unless he would reduce the interest; whereupon the said Jacob Harmon verbally agreed that if they would continue to pay him the interest upon the sum of money represented by said note during his life, and pay in November of each year the interest in advance for four months, or, if they failed to pay the interest in advance for four months, should pay interest upon the interest so unpaid, then the said defendants should be acquitted of and released from the payment of the principal sum of said note at the death of said Jacob Harmon, which the court refused

to be permitted to be proved, and the defendants then and there excepted.

"And the court being of opinion that the facts so offered in evidence by the defendants, and the said facts which the defendants offered to prove, would not make a sufficient defence at law, if proven in the said case, directed the jury to return a verdict for the plaintiff therein, and the verdict was taken accordingly; to all of which the defendants then and there duly excepted."

These rulings of the court are now assigned for error. In support of the assignments of error, the plaintiffs in error maintain this proposition, viz.: That an agreement by the payor, after the note becomes due, to keep the money and pay interest thereon at the rate of ten per cent. per annum till the death of the payee, constitutes a sufficient consideration for an agreement on the part of the payee that he will then consider the note cancelled and paid, where the payor from the time of such agreement continues to pay such interest on the note until the death of the payee. This proposition should be considered in connection with the fact that in the year 1879, and therefore after the note in suit had become due, the interest laws of Illinois were so changed as to make eight per cent. per annum the maximum rate of interest that could be thereafter contracted for. Hurd's General Statutes, 1885, chap. 74, p. 736.

The agreement proved, and that to prove which evidence was offered, were both unilateral. The promise alleged was by the payee of the note, not in consideration of a promise on the part of the payor, but on condition that he perform what was to be done; viz.: payment of the interest at the rate and in the mode agreed until the death of the payee. It became essential, therefore, to the defence, to establish the fact that this undertaking had been fully performed, by proof of the payment of the interest as agreed until the death of Jacob Harmon. This fact is assumed in the brief of the counsel for the plaintiffs in error, but it nowhere appears in the record. The bill of exceptions does not state when Jacob Harmon died; it does not appear elsewhere in the record. All we can

Statement of Facts.

know from that is that he must have died before the institution of the suit, which was begun by his executors on September 25, 1885, but whether before or after March 1, 1885, we cannot infer, that being the date up to which interest was paid. If he died after that date, then the condition on which his promise could be enforced against his executors had not been fulfilled. On this point, therefore, the defence failed.

Judgment affirmed.

Harmon v. *Adams.* Error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Matthews: The record in this case involves no other questions than those just decided in the foregoing case. The judgment is therefore

Affirmed.

DURAND *v.* MARTIN.

ERROR TO THE SUPREME COURT OF CALIFORNIA.

Submitted January 13, 1887. — Decided February 7, 1887.

Lands listed to California as indemnity school lands, and patented by the State, are not open to preëmption settlement while in possession of the patentee.

The act of March 1, 1877, 19 Stat. 267, "relating to indemnity school lands in the State of California," was a full and complete ratification by Congress, according to its terms, of the lists of indemnity school selections which had been before that time certified to the State of California, by the United States as indemnity school selections, no matter how defective or insufficient such certificates might originally have been, if the lands included in the lists were not any of those mentioned in § 4, and if they had not been taken up in good faith by a homestead or preëmption settler prior to the date of the certificate.

This was an action to recover the possession of land in California, brought, and prosecuted to final judgment, in the courts of that state. The facts which make the Federal case for this court are stated in the opinion of the court.

Mr. Michael Mullany for plaintiffs in error.

Mr. E. D. Wheeler for defendant in error.

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

This was a suit brought by Samuel B. Martin, the defendant in error, on the 20th of March, 1878, in the District Court of Contra Costa County, California, against Martin Durand and Anthony Thompson, the plaintiffs in error, to recover the possession of the E. ½ sec. 13, T. 2 S., R. 1 E., Mount Diablo meridian. The facts found at the trial were in brief these:

The land in dispute was agricultural land, and it was located by the locating agent of California on the 20th of October, 1862, at the request and in the name of Martin, in lieu of the E. ½ sec. 16, T. 22 S., R. 6 E., of the same meridian. In making this selection, which was for idemnity school lands, the agent acted under color of the authority of § 7 of the act of March 3, 1853, c. 145, 10 Stat. 244, 247. This township twenty-two has never been surveyed by the United States, and the east half of section 16 is within the boundaries of a Mexican grant known as San Miguelito, confirmed to one Gonzales, the final survey of which was approved in 1859, and the lands afterwards patented to Gonzales or his assigns.

On the 2d of March, 1863, the State of California issued a certificate of purchase to Martin for the land in dispute. On the 8th of September, 1870, it was listed to the state by the United States government, and, on the 3d of February, 1871, it was patented by the state to Martin under his certificate of purchase. The plat of the United States survey of township two, embracing the land, was filed in the United States land office in San Francisco on the 10th of June, 1865.

On the 10th of April, 1839, the Mexican government granted to José Noriega and Robert Livermore, a tract of land known as Las Pocitas. The claim under this grant was confirmed on the 14th of February, 1854, by the land commissioners appointed under the act of March 3, 1851, c. 41, 9 Stat. 631,

and afterwards, on appeal, by this court, at December Term, 1860. After the decision of the land commissioners, a deputy surveyor, under instructions from the surveyor general of the United States for California, made a survey which purported to show the boundaries of the claim confirmed, and this survey was approved by the surveyor general May 7, 1854, but nothing further appears to have been done under it. In March, 1869, after the decree of confirmation by this court, the surveyor general caused the claim so confirmed to be again surveyed and designated, and this survey was approved by him May 11, 1870, by the Commissioner of the United States General Land Office, March 1, 1871, and by the Secretary of the Interior, June 6, 1871. On the 20th of August, 1872, the United States issued a patent to Noriega and Livermore, their heirs and assigns, for the land so surveyed and designated in March, 1869. The land now in dispute was embraced within the exterior boundaries of the grant adjudged to be valid by the decree of the board of land commissioners affirmed by this court, but was not embraced within the surveys of 1854 or 1869, or in the patent issued to Noriega and Livermore.

On the 16th of May, 1876, Thompson entered into the possession of the south half and Durand into the possession of the north half of the half-section in dispute. When these entries were made Martin was in possession of the land, though it was not then, nor had it ever been, fully enclosed or fenced. Within a few days afterwards Martin notified Thompson that he claimed to own the land under a patent from the State of California, which he exhibited; but, notwithstanding this, both Thompson and Durand maintained actual and exclusive possession, and kept Martin out until this suit was brought. Each of the parties entered for the purpose of availing himself of the preëmption laws of the United States, having the necessary personal qualifications therefor. They each made application at the proper land office to perfect their respective claims, but the officers refused to permit them to do so. Upon this state of facts the Supreme Court of California affirmed a judgment of the District Court in favor of Martin, and to reverse that decision this writ of error was brought.

Upon the facts as found we have no hesitation in deciding that the title of Martin, under his patent from the State of California, was perfect when his suit was brought, and that the judgment in his favor was right. The land in dispute had not only been selected by the state as indemnity school lands, and certified or listed as such by the proper officer of the United States, when Durand and Thompson made their respective entries as preëmption settlers, but it had been patented to Martin and he was in actual possession under color of that title. These are facts specially found by the court below, and the evidence on which this finding was made cannot be considered here. Such being the case, the land was not open to preëmption settlement as against Martin when Durand and Thompson entered on his possession. *Atherton* v. *Fowler*, 96 U. S. 513; *Trenouth* v. *San Francisco*, 100 U. S. 251, 256; *Mower* v. *Fletcher*, 116 U. S. 381.

If the title of Martin was ever at all defective, it was because at the time of the selection the land was within the boundaries of a claim under a Mexican grant, and therefore not then, in a strict legal sense, public land; but the United States have never objected to the title of the state because of this. On the contrary, after a survey had been made and approved by the surveyor general of the United States for California, which excluded the land from the grant, the proper officer of the United States listed it to the state under the act of August 3, 1854, c. 201, 10 Stat. 346, now § 2449 of the Revised Statutes, as indemnity school lands which had been properly selected, and from that day to this, so far as the record shows, the United States have never disputed the title of the state or its grantee. This survey was made in 1869, the claim having been finally confirmed in 1860. As the survey was not made until more than ten months after the act of July 23, 1866, c. 219, 14 Stat. 218, "to quiet land titles in California" had become operative, its approval by the surveyor general had the effect, under the ruling of this court in *Frasher* v. *O'Connor*, 115 U. S. 102, of opening all lands within the exterior boundaries of the grant, but outside of those fixed by the survey, to selection or preëmption entry as public lands, subject only to a

defeat of title, if in the end the survey as made should be set aside and the boundaries of the grant finally extended so as to include the selection or the entry. In the present case, however, the survey was accepted by the owners of the grant and a patent taken for the land within its boundaries, in full satisfaction of their original claim as confirmed by the commissioners and by this court. This was in 1872, and from that time certainly there has been no one, according to this record, who could dispute the title of the state or its grantee, except the United States. The owners of the Mexican grant abandoned their claim to the excluded land when they accepted their patent, and no one could enter upon the land by the laws of the United States as a preëmption settler, because Martin was in the actual possession under his claim of title. It is not contended that this title of Martin is even technically defective, unless it be for the reason that the selection was actually made when the land was not in law public land. But when the Commissioner of the General Land Office in 1870 certified this with other land to the state as land which had been selected as indemnity lands, it was an existing selection at that date, and there were no intervening rights to prevent its operation as such. By accepting the certificate, the state treated the selection as a valid selection existing at the time of the certificate, and the list thus certified operated under the act of 1854 as a transfer of the title from the United States to the state which immediately inured to the benefit of Martin under his patent. It is true that the certificate of the Commissioner to a list of lands which were not open to selection at the time they were selected, nor at the time they were certified, would not pass title out of the United States because he had no authority in law to make such a certificate. But the case is quite different when the state presents for certification as an existing selection one that was bad when made but good when presented. Under such circumstances, if the rights of no third parties have intervened, there is nothing to prevent the Commissioner from treating the selection as if made on the date of its presentation, and certifying accordingly. His certificate is of selections claimed by the state at the time of its

date, and if the state had a right to the title under the circumstances existing then, it was within his official authority to make the transfer. It is a matter of no moment that the selection was bad at the time it was made, if at the time of its presentation for title it was good, and there were no intervening rights to be injured by reason of its acceptance and ratification by the United States.

This would be sufficient to sustain the title of Martin if there were nothing more. But there is more. All must agree that, even if the title was defective because of the invalidity of the original selection, it was within the power of the United States to cure such a defect by a release to the state or its grantee of all their interest in the land remaining after the lists were certified by the Commissioner of the Land Office, provided no other person had in the meantime acquired rights superior to those of Martin. This, we think, was done by the act of March 1, 1877, c. 81, 19 Stat. 267, "relating to indemnity school selections in the State of California." That act is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the title to the lands certified to the State of California, known as indemnity school selections, which lands were selected in lieu of sixteenth and thirty-sixth sections, lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by said state, is hereby confirmed to said state in lieu of the sixteenth and thirty-sixth sections, for which the selections were made.

"SEC. 2. That where indemnity school selections have been made and certified to said state, and said selection shall fail, by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: *Provided*, That if there be no such sixteenth or thirty-sixth section and the land certified therefor shall be

held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person: *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States.

"SEC. 3. That the foregoing confirmation shall not extend to the lands settled upon by any actual settler claiming the right to enter, not exceeding the prescribed legal quantity under the homestead or preëmption laws: *Provided*, That such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of said lands to the State of California by the Department of the Interior: *And provided further*, That the claim of such settler shall be presented to the register and receiver of the district land office, together with the proper proof of his settlement and residence, within twelve months after the passage of this act, under such rules and regulations as may be established by the Commissioner of the General Land Office.

"SEC. 4. That this act shall not apply to any mineral lands, nor to any lands in the city and county of San Francisco, nor to any incorporated city or town, nor to any tide, swamp or overflowed lands."

This statute was, in our opinion, a full and complete ratification by Congress, according to its terms, of the lists of indemnity school selections which had been before that time certified to the State of California by the United States as indemnity school selections, no matter how defective or insufficient such certificates might originally have been, if the lands included in the lists were not of the character of any of those mentioned in § 4, and if they had not been taken up in good faith by a homestead or preëmption settler prior to the date of the certificate. The history of the times, which is exemplified by the facts of this case, shows that such must have been the in-

tention of Congress. Almost from the beginning many of the titles under these indemnity selections had been in doubt because of the delay which attended the settlement of Mexican claims, and the records of this court contain a large number of cases in which claimants under the preëmption and homestead laws of the United States have sought to establish their titles, as against purchasers from the state under indemnity selections who had been many years in possession, because of some real or supposed defect in the title of the state. This statute was passed twenty-three years after the original grant to the state of the right to select indemnity lands for lost school sections, and more than fourteen years after the lands now in dispute had been selected by the state under this grant and sold to Martin. Eight years before the statute the proper officer of the United States had made a certificate which, if authorized by law, transferred an absolute estate in fee simple to the state that enured at once to the benefit of Martin. This certificate had never been disputed by the United States, and no attempt had ever been made by any one in authority to set it aside. This, as we know from our own records, is but one of many cases of a similar character, and, read in the light of these facts the statute has to us no uncertain meaning.

In its first section all such certificates are expressly confirmed where the only objection to their validity is that a selection was made before the Mexican grant within which the original school section was actually situated had been surveyed, and the survey finally approved. In this class of cases the state was entitled to its indemnity lands, and the United States in effect formally waived any and all irregularities in making the selections.

In the second section cases were provided for in which the selection failed: 1, because the school section in lieu of which indemnity was claimed and taken was not actually within the limits of a Mexican grant; and, 2, because it was "otherwise defective or invalid." This language is certainly broad enough to include every defective certificate; and, in order that the United States might be protected from loss, it was provided that, if the sixteenth or thirty-sixth section, in lieu

of which the selection was made, should be found outside the Mexican grant, the United States would accept that in lieu of the selected land, and confirm the selection. If, however, there was no such sixteenth or thirty-sixth section, and the land certified was held by an innocent purchaser from the state for a valuable consideration, such purchaser would be allowed to purchase the same from the United States at the rate of one dollar and twenty-five cents per acre, not exceeding three hundred and twenty acres for any one person.

The statute relates only to such selections as had been certified to the state, and, taken as a whole, it meets the requirements of all the cases of defective selection which could be so certified. These are: 1. Cases where the state was entitled to indemnity, but the selection was defective in form; 2. Cases where the original school sections were actually in place, and the state was not entitled to indemnity on their account; and 3. Cases where the state was not entitled to indemnity, because there never had been such a section sixteen or section thirty-six as was represented when the selection was made and the official certificate given. As to the first of these classes, the certificate was simply confirmed because the state was entitled to its indemnity, and nothing was needed to perfect the title but a waiver by the United States of all irregularities in the time and manner of the selections. As to the second, the selection was confirmed, and the United States took in lieu of the selected land that which the state would have been entitled to but for the indemnity it had claimed and got. In its effect this was an exchange of lands between the United States and the state. And as to the third, in lieu of confirmation, *bona fide* purchasers from the state were given the privilege of perfecting their titles by paying the United States for the land at a specified price. Under these circumstances, it was a matter of no moment to the United States whether the original selection was invalid for one cause or another. If the state was actually entitled to indemnity, it was got, and the United States only gave what it had agreed to give. If the state claimed and got indemnity when it ought to have taken the

original school sections, the United States took the school sections and relinquished their rights to the lands which had been selected in lieu. And if the state had claimed and sold land to which it had no right, and for which it could not give school land in return, an equitable provision was made for the protection of the purchaser by which he could keep the land, and the United States would get its value in money. In this way all defective titles, under the government certificates, would be made good without loss to the United States.

It may be, as was claimed in argument, that when the bill was originally prepared the framer had it in mind only to provide for selections made in lieu of school sections within Mexican grants before the final survey of the grants, and for selections made in lieu of sections not finally included within the survey of a grant; but to our minds it is clear that before the bill finally became a law, Congress saw that, as ample provision had been made for the protection of the United States in all cases, it was best to include all certificates which were defective, no matter for what cause, and so the words "or are otherwise defective or invalid" were added in what seemed to be the most appropriate place to carry that purpose into effect. No selection was made good unless it had been certified, and not then unless the United States got an equivalent either in land or in money, or in carrying out their original school-land grant. In this way the titles of all bona fide purchasers from the state were or could be perfected without loss to the United States, and that, we have no doubt, was the intention of Congress when the statute was enacted.

It is true that Durand and Thompson had entered on the land, and had excluded Martin from the possession, before the statute was passed, but that gave them no rights either under this statute or any other. As we have already shown, their entry was of no avail under the general preëmption laws, and this statute saves the rights of no homestead or preëmption settlers, except such as had entered on the lands in good faith prior to the date of their certification to the state.

The judgment is affirmed.

MARTIN *v.* THOMPSON.

ERROR TO THE SUPREME COURT OF CALIFORNIA.

Submitted January 24, 1887. — Decided February 7, 1887.

An action at law in a state court of California by A against B, to recover the value of a crop raised on land occupied by B who claims as preëmptor, adversely to A, claiming under the State, by B's labor and at B's expense, does not involve the title to the land, and the issue presents no Federal question.

THIS was a motion to dismiss, united with a motion to affirm. The case is stated in the opinion of the court.

Mr. Mich. Mullany for the motion.

No appearance against it.

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

This suit was brought by Martin, the defendant in error in *Durand & Thompson* v. *Martin*, just decided, to recover of Thompson, one of the plaintiffs in error, a crop of wheat raised by him during the year 1878 on the land described in that case, which he took from the possession of Martin in 1876, and occupied adversely thereafter. The court has found as a fact that Martin never had possession of the crop before the commencement of this suit, and that it was raised by Thompson with his own labor and at his own expense while he held exclusive possession of the land adversely to Martin and claiming title.

From this it is clear that the question of the title to the land was not necessarily involved in this case, and on looking into the opinion, which in California forms part of the record, we find that the decision was put entirely on the ground that the owner of land out of possession cannot recover from one in possession, holding adversely under claim of title, the crops raised by him in cultivating the soil. The remedy in such a

Statement of Facts.

case is by an appropriate action for the recovery of the possession of the land and damages for the detention. This does not present a Federal question, and

The motion to dismiss is granted.

SPEIDEL *v.* HENRICI.

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

Argued December 14, 1886. — Decided March 7, 1887.

The general rule that express trusts are not within the statute of limitations does not apply to a trust openly disavowed by the trustee with the knowledge of the cestui que trust.

Implied trusts are barred by lapse of time.

A court of equity will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them.

If a bill in equity shows upon its face that the plaintiff, by reason of lapse of time and of his own laches, is not entitled to relief, the objection may be taken by demurrer.

A bill in equity against persons holding a fund avowedly in trust for the common benefit of the members of a voluntary association, living together as a community and subject to its regulations, cannot, whether the trust is lawful or unlawful, be maintained by one who has left the community, and for fifty years afterwards taken no step to claim any interest in the fund.

This was a bill in equity, filed June 7, 1882, by Elias Speidel, a citizen of Ohio, against Jacob Henrici and Jonathan Lenz, trustees of the Harmony Society of Beaver County in the State of Pennsylvania, and citizens of Pennsylvania, and containing the following allegations:

That the plaintiff's parents lived in the kingdom of Wurtemburg in Germany up to the year 1804, "engaged in farming and well to do, and without any education or knowledge of the world or of business, but devout Christians, members of the Established Protestant Church of that country, and earnest seekers after spiritual light and their salvation."

That at the same time there lived in the same neighbor-

hood one George Rapp, "a farmer and vintner, of an education superior to that of the plaintiff's parents and of the simple farming people of that country, and who was a person of great intellectual power, clear-sighted, sharp-witted, eager for superiority, and a born leader of men."

That about 1800 Rapp, without license or ordination, and in violation of law, began to preach clandestinely to his countrymen, including the plaintiff's parents, and "preached to them the doctrine that the Lord had chosen him as their spiritual leader, that the second advent of Christ and the beginning of the millennium, as taught by the Revelation of St. John, was near at hand, and that, in order to be saved from eternal damnation, it would be necessary for them to separate from the established church of their country, to form a settlement by themselves under his guidance and control, and thus fit themselves for the second coming of Christ and accomplish their salvation."

That Rapp, "by means of such clandestine teachings, and by the exercise of strong will power over the weaker minds of his said disciples, obtained such overpowering influence over about three hundred families of them," including the plaintiff's parents, that he caused them to separate from their established church, to believe in and accept Rapp as their only spiritual leader and as a necessary medium of their salvation, and to believe that it was necessary for their salvation that they should sell all their land and possessions for cash in hand, leave their country and friends, and, "as the chosen of the Lord, form a colony by themselves, either in the Holy Land or in the United States of America, in which places Christ would first reappear on earth;" that during the year 1804 and 1805, "in pretended furtherance of the said pretended plan of their salvation," Rapp made about one hundred and twenty-five families of them, the plaintiff's parents included, sell all their land and possessions, emigrate to the United States, and settle near Zelienople, in Butler County, in the State of Pennsylvania, upon a wild, uncultivated tract of land, selected by said Rapp and by him called Harmony, "where the plaintiff was born, in the year 1807, and where he was raised;" and

there "they formed a colony or voluntary association, called and known as the Harmony Society, and were made by said Rapp and became wholly subject to his absolute power and control in both spiritual and temporal affairs."

That, up to their arrival at Harmony, the heads of said families had severally paid their own expenses, and had kept, and had intended to keep, their several means as their own, and to live each family by itself; "but when said Rapp had succeeded in bringing them to said Butler County, and in separating them from their home and friends, he fraudulently and corruptly conceived the scheme to take advantage of their ignorance and helplessness, and of their blind reliance upon him as the prophet of the Lord, and the Lord's chosen mouthpiece in guiding them to salvation, for the purpose of gratifying his fierce ambition and lust of power, by acquiring unrestricted dominion over the money and means and mode of living of his followers, and by reducing them to abject dependence upon his irresponsible will;" and "in furtherance of this scheme, falsely and fraudulently pretended to his said followers, the plaintiff's parents included, that they could not and would not be saved from eternal damnation, except that they would renounce their plan of establishing a separate and exclusive home for each family in said settlement, and that they would yield up all their possessions, the same as it had been done by the early Christians, according to the fourth chapter of the Acts of the Apostles, and that they would lay their said possessions at the feet of said Rapp as their apostle, to be placed into a common fund of said Harmony Society, in the keeping of said Rapp as their trustee, and that they would live thenceforth as a community or a common household with all the rest of the followers of said Rapp, and submit themselves and their families to the control of said Rapp to do for said community such work as he should direct, the avails thereof to form part of said common fund, relinquishing to him and to his successors in the leadership of said community the management of all of said trust funds and the disposition of their own persons and those of their wives and children, and they receiving only the necessaries of life in return; but

that said Rapp knew better, and did not honestly believe any of the foregoing things to be necessary to their salvation."

That "all of said families, the parents of the plaintiff included, induced by and relying upon the said false and fraudulent representations, and believing that they would be eternally damned unless they should obey the said teachings of said Rapp, immediately, in the year 1805, yielded up all their possessions to the said common fund of said Harmony Society, the parents of the plaintiff contributing thereto the sum of about one thousand dollars, and placed said fund into the keeping of said Rapp as their trustee, and lived thenceforth as a community or a common household with all the rest of the followers of said Rapp, and submitted themselves and their families to the control of said Rapp to do for said community such work as he directed, and allowed the avails thereof to form part of said common fund, and relinquished to him and his successors in the leadership of said community the management of all of said trust funds and the disposition of their own persons and those of their wives and children, and they received only the necessaries of life in return, for none of which they, or any of them, ever received or were promised any other consideration than the pretence that, by complying with the said teachings of said Rapp, they would not be damned, and that, as the chosen of the Lord, they would be led by him as their prophet, priest and king to eternal salvation."

That "said Rapp received and accepted said trust fund and the contributions of the parents of the plaintiff thereto, and all the profits and interest, and all the accretions of said fund by the work of the plaintiff and of the other inhabitants of said community and otherwise, not as his own, but in trust for the members of said families and the contributors of said fund and for their common benefit, and always, up to his death, recognized and acknowledged said trust, and disclaimed any greater interest in said funds than that of any other contributor thereto, and any other right to the management and control of said funds than by virtue of his pretended apostolic leadership of said community."

That in 1807 Rapp, "for the purpose of breaking up among

them the last tie which could have caused them to have interests of their own separate from those of the said community at large and conflicting with his absolute dominion over their fortune and mode of life, and over their bodies and those of their wives and children, and as a part of his said fraudulent and corrupt scheme," "falsely and fraudulently pretended to his said followers, the plaintiff's parents included, that there had been no difference of the sexes nor any seed of death in man until both were brought about by original sin;" "that all intercourse of the sexes, even in wedlock, was polluting, and that they could not and would not be saved from eternal damnation except by abjuration of matrimony and of all sexual indulgence on the part of those of his followers who were still single, and by a cessation of all conjugal intercourse on the part of those of his followers who were already married; but that said Rapp knew better, and did not honestly believe in said statements; that all of the married persons of said community, the parents of the plaintiff included, induced by and relying upon the said false and fraudulent representations, and believing that they would otherwise be eternally damned, immediately ceased to have any further conjugal intercourse, and thenceforth lived as if single, and those who were single abjured matrimony and all sexual indulgence."

That the plaintiff "was raised in and as a part of said community, and, in common with the younger members of the families forming the same, was taught from his earliest infancy by Rapp to believe, and by reason of said teachings did believe" in the doctrines proprounded by Rapp as aforesaid, and "continuously, faithfully and diligently worked in and for said community, under the control and direction of said Rapp, from the age of twelve years until the age of twenty-four years, in all for the full term of twelve years, and allowed the avails of his said work to form, and they did become and now are, part of said common fund; and the plaintiff contributed to said fund his time, attention and skill, and increased the wealth and promoted the interests of said community, and received nothing more in return than the bare necessaries of life for the said term of twelve years, and no longer, which

were of far less value than the avails of his said work, for none of which he received any other consideration than the pretence that by complying with the said teachings of said Rapp he would not be damned, and that, as one of the chosen of the Lord, the plaintiff would be led by said Rapp as his prophet, priest and king to eternal salvation;" and that his contributions to the said fund, after deducting therefrom the value of the necessaries of life so received by him, were largely in excess of the sum and value of three hundred dollars, and by the interest and profit on their investment in said fund now largely exceeded the sum and value of over thirty thousand dollars.

That in 1815 the community, including the plaintiff, and his parents, removed to Posey County, in the State of Indiana, where, in 1816, both the plaintiff's parents died; and that in 1825 the community, including the plaintiff, removed thence to Beaver County, in the State of Pennsylvania, where it has ever since remained.

That Rapp ruled over the community continuously from 1805 until his death in 1847 with absolute dominion, making the only laws or rules that were allowed to govern it, teaching and making them all believe that "whoever broke any of said laws or rules committed the unpardonable sin, the sin against the Holy Ghost, which would neither be forgiven here nor in the other world;" forbidding the use of tobacco; determining "the character and amount of victuals to be supplied from the common store to the inmates of the community, and the material and cut of the dress of all males and females therein, and the hours of labor, rest, and eating;" sitting as sole judge and jury to try all charges against them, fixing the punishment at will, by putting on a diet of bread and water, excluding from church for a time, or reprimanding or expelling, without action of the community, or hearing or appeal; making them confess their sins to him, "invariably, and as a necessary condition of receiving the forgiveness of the Lord;" not permitting them to acquire any knowledge of the English language, or to have access to English books or papers; forbidding them, on pain of damnation, to associate with or to visit any but

inmates of the community; not allowing them to have any money or to buy or sell on their own account, threatening them for any disobedience with the punishment of Ananias and Sapphira; permitting them to become citizens of the United States, but compelling them to vote at elections for the candidate whom he selected; repeatedly and corruptly making some of them forge the names of dead persons to legal instruments, and sign and swear to false statements, he knowing them to be false; that during all this time his management of said trust funds was selfish and rapacious; that in 1818 he destroyed the records of the original contributions made by the heads of families in 1805, for the avowed purpose of preventing the young people from finding out about them; that he studiously and fraudulently concealed from the contributors to said trust funds all his money transactions, and habitually destroyed the records thereof, and in 1845 gathered up out of the said trust fund and secreted the sum of five hundred and ten thousand dollars in coin.

That "the whole of the said system of said Rapp was repugnant to public policy and the laws of the land, and more especially in this: that no inmate of said community was permitted by said Rapp to marry therein, and that whoever was about to enter into the married state was compelled by said Rapp to leave said community; and that the plaintiff, in the year 1831, being about to enter into the married state, had to leave and did leave said community, although said Rapp did permit, as an exception, a few of his favorites to marry in said community and to remain therein; and until after the plaintiff so left said community he was kept under such duress and restraint by the iron rule of said Rapp that he did not know, and had no means of ascertaining, the iniquity and degradation thereof and the impious and blasphemous character of the teachings of said Rapp."

That the said trust fund so received and accepted by Rapp, by profits, interest and accretions, had become of the value exceeding eight million dollars, and the net profits thereof for many years and now exceeded the sum of two hundred thousand dollars annually; that at the death of Rapp one Rome-

lius L. Baker and the defendant Henrici succeeded him as trustees of said trust, and at the death of Baker, in 1868, the defendants succeeded Baker and Henrici as trustees of said trust and managers of all the estate of the Harmony Society; and that Baker and Henrici, while such trustees, and the defendants ever since, "received and accepted the said trust fund, and all the profits and interest thereof, and all accretions of said fund received by them, not as their own, but in the same trust in which said Rapp had held said fund, and always recognized and acknowledged said trust, and always disclaimed any greater interest in said fund than any other contributor thereto; that the plaintiff did not know and had no means of ascertaining the names and places of abode of the other parties interested in said fund, but they were very numerous and their interest is common with his; and that neither Rapp nor either of the defendants ever rendered to the plaintiff, or to any of the beneficiaries of said fund, any account of their trust, although the plaintiff demanded an account of them and a settlement of his share therein before the bringing of this suit in May, 1882."

The prayer of the bill was "that said trust be rescinded and held for naught, as resting upon fraud and iniquity and being contrary to public policy and the laws of the land; that the persons interested in its assets be remitted to their original rights, the plaintiff included; that the defendants discover the names and places of abode of the other parties interested in the funds and property under the control of the defendants, for the purpose that they may be brought before the court; that an account be taken of the said trust and assets and of the share of the plaintiff therein; that he have compensation for his contributions to said trust and to its assets; that a distribution of said assets be had, and that the plaintiff receive his share therein;" and for further relief.

The defendants demurred to the bill, and assigned the following causes of demurrer:

"1st. That it appears in and by said bill that more than fifty years have elapsed since the said alleged cause of complaint occurred to the plaintiff, whereby said cause of com-

plaint hath become barred by the statute of limitations in such cases made and provided.

"2d. That it appears in and by said bill of complaint that the causes of complaint are stale, and that so long a time has passed since the matters and things complained of took place that it would be contrary to equity and good conscience for a court to take cognizance thereof, or to enforce any further or other answer thereto.

"3d. That no case is stated in said bill authorizing the court to grant the relief sought, or any other relief."

The Circuit Court, without considering the first and third causes of demurrer, sustained the demurrer for the second cause assigned, and dismissed the bill. 15 Fed. Rep. 753. The plaintiff appealed to this court, and having since died, the appeal was prosecuted by his executors.

Mr. William Reinecke and *Mr. George Hoadly* for appellants. *Mr. Herman Marckworth* was with them on the brief.

Mr. George Shiras, Jr., for appellees. *Mr. C. S. Fetterman* was with him on the brief.

Mr. Justice Gray delivered the opinion of the court.

This bill was filed against the trustees of the Harmony Society, an unincorporated association of persons living together as a community, by a former member of the society, claiming a share in property in the hands of the trustees.

The bill is sought to be maintained on the ground that the trust was not a charity, in the legal sense, and the members of the society were equitable tenants in common of the property held in trust. The learned counsel for the appellants differ in their views of the trust; the one insisting that it was unlawful because founded in fraud and against public policy, and should therefore be dissolved; and the other contending that it was a lawful and continuing trust. We have not found it necessary to consider which of these is the sound view, because we are of opinion that the plaintiff did not show himself to be entitled to invoke the interposition of a court of equity.

As a general rule, doubtless, length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of his cestui que trust. *Prevost* v. *Gratz*, 6 Wheat. 481, 497; *Lewis* v. *Hawkins*, 23 Wall. 119, 126; *Railroad Co.* v. *Durant*, 95 U. S. 576.

But this rule is, in accordance with the reason on which it is founded, and as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to this qualification, that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the cestui que trust; as when, for instance, such transactions take place between the trustee and the cestui que trust as would in case of tenants in common amount to an ouster of one of them by the other. *Kane* v. *Bloodgood*, 7 Johns. Ch. 90, 124 [*S. C.* 11 Am. Dec. 417]; *Robinson* v. *Hook*, 4 Mason, 139, 152; *Baker* v. *Whiting*, 3 Sumner, 475, 486; *Oliver* v. *Piatt*, 3 How. 333, 411. This qualification has been often recognized in the opinions of this court, and distinctly affirmed by its latest judgment upon the subject. *Willison* v. *Watkins*, 3 Pet. 43, 52; *Boone* v. *Chiles*, 10 Pet. 177, 223; *Seymour* v. *Freer*. 8 Wall. 202, 218; *Bacon* v. *Rives*, 106 U. S. 99, 107; *Philippi* v. *Philippe*, 115 U. S. 151.

In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law. *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607, 634; *Beckford* v. *Wade*, 17 Ves. 87. In such a case, Chief Justice Marshall repeated and approved the statement of Sir Thomas Plumer, M. R., in a most important case in which his decision was affirmed by the House of Lords, that "both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate, for a period of twenty years, (supposing it the case of one who must within that period have made his claim in a court of law, had it been a legal estate,) under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations, if,

during all that period, the possession has been under a claim unequivocally adverse, and without anything having been done or said, directly or indirectly, to recognize the title of such rightful owner by the adverse possessor." *Elmendorf* v. *Taylor*, 10 Wheat. 152, 174; *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 1, 175, and 4 Bligh, 1.

Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. "A court of equity," said Lord Camden, "has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." *Smith* v. *Clay*, 3 Bro. Ch. 640, note. This doctrine has been repeatedly recognized and acted on here. *Piatt* v. *Vattier*, 9 Pet. 405; *McKnight* v. *Taylor*, 1 How. 161; *Bowman* v. *Wathen*, 1 How. 189; *Wagner* v. *Baird*, 7 How. 234; *Badger* v. *Badger*, 2 Wall. 87; *Hume* v. *Beale*, 17 Wall. 336; *Marsh* v. *Whitmore*, 21 Wall. 178; *Sullivan* v. *Portland & Kennebec Railroad*, 94 U. S. 906; *Godden* v. *Kimmel*, 99 U. S. 201. In *Hume* v. *Beale*, the court, in dismissing, because of unexplained delay in suing, a bill by cestuis que trust against a trustee under a deed, observed that it was not important to determine whether he was the trustee of a mere dry legal estate or whether his duties and responsibilities extended further. 17 Wall. 348. See also *Bright* v. *Legerton*, 29 Beavan, 60, and 2 D., F. & J. 606.

When the bill shows upon its face that the plaintiff, by reason of lapse of time and of his own laches, is not entitled to relief, the objection may be taken by demurrer. *Maxwell* v. *Kennedy*, 8 How. 210; *National Bank* v. *Carpenter*, 101 U. S. 567; *Lansdale* v. *Smith*, 106 U. S. 391.

The allegations of this bill, so far as they are material to the defence of laches, are in substance as follows:

The Harmony Society is a voluntary association, formed in 1805 by the plaintiff's parents and other heads of families, who had emigrated from Germany under the leadership of one Rapp, and become subject to his control in both spiritual and temporal affairs. In that year Rapp, for the purpose of acquiring absolute dominion over their means and mode of living, falsely and fraudulently represented to them that they could not be saved from eternal damnation, except by renouncing the plan of a separate home for each family, yielding up all their possessions, as had been done by the early Christians, and laying them at the feet of Rapp as their apostle, to be put into a common fund of the society, and thenceforth living as a community under his control, receiving in return only the necessaries of life; and they, induced by and relying on his false and fraudulent representations, immediately yielded up all their possessions to the common fund of the society, and placed the fund in his keeping as their trustee, and thenceforth lived as a community or common household, submitted themselves and their families to do for the community such work as he directed, allowed the avails thereof to form part of the common fund, and relinquished to him and his successors in the leadership of the community the management of the trust fund and the control of their own persons and those of their wives and children, and received only the necessaries of life in return. Rapp received and accepted the trust fund, and all the accretions to it by the work of the inhabitants of the community or otherwise, not as his own, but in trust for the members of those families and the contributors to the fund, and for their common benefit; and always, up to his death in 1847, recognized and acknowledged said trust, and disclaimed any greater interest in the fund than that of any other contributor, and any other right to its management and control than by virtue of his leadership of the community. In 1807 Rapp obliged his followers to abjure matrimony, and thenceforth did not permit them to marry in the community, and compelled any one about to marry to leave it. The plaintiff was born in the community in 1807, and was reared in and as a part of it, under Rapp's teachings and control, and faith-

fully worked for it from the age of twelve to the age of twenty-four years, and allowed the avails of his work to become part of the common fund, and received in return nothing but the necessaries of life, which were of far less value than the avails of his work; and in 1831, being about to marry, had to leave and did leave the community. The trust fund so received and accepted by Rapp, with its profits, interest and accretions, now amounts to eight millions of dollars, and yields an annual income of two hundred thousand dollars, and is held by the defendants on the same trust on which Rapp held it in his lifetime; and neither Rapp nor the defendants ever rendered any account to the plaintiff or to the beneficiaries of the fund, although the plaintiff, before bringing this suit in May, 1882, demanded of the defendants an account and a settlement of his share.

The trust on which Rapp, and the defendants as his successors, held the common fund of the Harmony Society, is described in one place in the bill as "for the members of said families and the contributors of said fund and for their common benefit," that is to say, as is clearly explained by what goes before, in trust for their common benefit as a community, living together in the community, working for the community, subject to the regulations of the community, and supported by the community. This was the "said trust," which, as the bill afterwards alleges, Rapp, up to his death, and his successors, until the bringing of this suit, "always recognized and acknowledged." The constant avowal of the trustees that they held the trust fund upon such a trust is wholly inconsistent with and adverse to the claim of the plaintiff that they held the fund in trust for the benefit of the same persons as individuals, though withdrawn from the community, living by themselves, and taking no part in its work.

The plaintiff, upon his own showing, withdrew from the community in 1831, and never returned to it, and, for more than fifty years, took no step to demand an account of the trustees, or to follow up the rights which he claimed in this bill.

If he ever had any rights, he could not assert them after

such a delay; not on the ground of an express and lawful trust, because the express trust stated in the bill, and constantly avowed by the trustees during this long period, was wholly inconsistent with any trust which would sustain his claim; not on the ground that the express trust stated in the bill was unlawful and void, and therefore the trustees held the trust fund for the benefit of all the contributors in proportion to the amounts of their contributions, because that would be an implied or resulting trust, and barred by lapse of time. In any aspect of the case, therefore, if it was not strictly within the statute of limitations, yet the plaintiff showed so little vigilance and so great laches, that the Circuit Court rightly held that he was not entitled to relief in equity.

It is proper to add that this decision does not rest in any degree upon the judgments of the Supreme Court of Pennsylvania and of this court, in the cases cited at the bar, in favor of the trustees of the Harmony Society in suits brought against them by other members, because each of those cases differed in its facts, and especially in showing that the society had written articles of association, which are not disclosed by this bill. *Schriber* v. *Rapp*, 5 Watts, 351 [*S. C.* 30 Am. Dec. 327]; *Baker* v. *Nachtrieb*, 19 How. 126.

Decree affirmed.

ROLSTON *v.* MISSOURI FUND COMMISSIONERS.

MISSOURI FUND COMMISSIONERS *v.* ROLSTON.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Argued December 1, 2, 1886. — Decided March 7, 1887.

The State of Missouri having loaned its credit to the Hannibal and St. Joseph Railroad Company for $3,000,000, upon a first lien of the road and property of the company, the legislature on the 20th February, 1865, authorized that company to mortgage its road and property to trustees to secure an issue of bonds to that amount, and further enacted that whenever those trustees should "pay into the treasury of the state a sum

Statement of Facts.

of money equal in amount to all indebtedness due or owing by said company to the state, and all liabilities incurred by the state by reason of having issued her bonds and loaned the same to said company as a loan of the credit of the state, together with all interest that has and may at the time when such payment shall be made have accrued and remain unpaid by said company, and such fact shall have been certified to the governor of the state by the treasurer," the governor should "make over, assign, and convey to the trustees aforesaid all the first liens and mortgages now held by the state." The act further required the state treasurer to receive of the trustees in payment of the $3,000,000 any outstanding bonds of the state, bearing not less than six per cent. interest, or any of the unpaid coupons thereof at their par value. *Held*, that this meant that if payment was made in money, and not in state bonds or coupons, it must be of an amount equal to the face value of the bonds issued to the company and the accrued interest thereon to the time of payment, together with such further sum, if any, as would be necessary to enable the state to cancel then, or within a reasonable time thereafter, $3,000,000 of its outstanding liabilities, bearing interest at the rate of six per cent. per annum.

The act of the General Assembly of Missouri of March 26, 1881, to provide for the transfer to the sinking fund of surplus money in the treasury, recognized the act of February 20, 1865, providing for the reduction of the state indebtedness, and constituted an agreement, on the part of the state, that all moneys paid into the treasury by the railroad company should be put into the state debt sinking fund, and that all option bonds should be called in and paid as soon as it could lawfully be done; and the use of the money so paid in taking up six per cent. bonds of the state operated to discharge the company from liability for the payment of either the principal or interest of an equal amount of the bonds which had been issued for its benefit.

The provisions of the Constitution of the State of Missouri which went into effect November 30, 1865, relating to the lien held by the state upon any railroad, or to the release of the indebtedness of any corporation to the state, do not prevent the state authorities from complying with the requirements of the acts of February 20, 1865, and March 25, 1881, respecting the lien upon the Hannibal and St. Joseph Railroad and the debt of that company to the state, when the company has performed the acts required by the statutes to be done upon its part.

This suit is brought to compel state officers to do what a statute of the state requires them to do, and is not a suit against the state, but against the officers. *Louisiana* v. *Jumel*, 107 U. S. 711, distinguished.

THIS was a bill in equity to restrain the fund commissioners of the State of Missouri from selling the Hannibal and St. Joseph Railroad. Both parties appealed. The case is stated in the opinion of the court.

Opinion of the Court.

Mr. John F. Dillon and *Mr. Elihu Root* for Rolston and others. *Mr. Sidney Bartlett* also filed a brief for same.

Mr. D. A. De Armond and *Mr. John B. Henderson* (*Mr. George H. Shields* was on their brief), for the Missouri Fund Commissioners. *Mr. B. G. Boone*, Attorney General of Missouri filed a brief for same.

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

This was a suit in equity brought by Rosewell G. Rolston, Heman Dowd, and Oren Root, Jr., trustees in a mortgage made by the Hannibal and St. Joseph Railroad Company, a Missouri corporation, to restrain the executive officers of Missouri from selling the mortgaged property under prior statutory mortgages in favor of the state, on the ground that the liability for which the earlier liens were created had been satisfied, and that they, as trustees, were entitled to an assignment of those liens. The material facts are these:

The Hannibal and St. Joseph Railroad Company was incorporated by the State of Missouri under a statute for that purpose, approved February 16, 1847, to build and operate a railroad from Hannibal, on the Mississippi River, to St. Joseph, on the Missouri. Stats. Missouri, 1847, 156. To expedite the construction of the road the state passed an act, which was approved February 22, 1851, Stats. Missouri, 1851, 265, to issue to the company its own bonds as a loan of credit, redeemable at the pleasure of the legislature at any time after the expiration of twenty years from the date of their issue, with interest, payable semiannually, at the rate of six per cent. per annum, in the city of New York, on the first days of January and July in each and every year. The acceptance of these bonds by the company was to operate as a mortgage on its road "for securing the payment of the principal and interest of the sums of money for which such bonds shall . . . be issued and accepted. . . ." The company also became bound to "make provision for punctual redemption of the said bonds so issued . . . to them, . . . and for the punctual payment of the interest which shall accrue thereon in such manner as to

exonerate the treasury of" the "state from any advances of money for that purpose." If default should be made by the company in the payment of either the principal or the interest, the governor was authorized to sell the road at auction, first giving a required notice.

Under the authority of this statute bonds were issued by the state to the company at different times between December 28, 1853, and September 24, 1856, to the amount of $1,500,000, for which the company and its railroad became bound in the manner specified.

On the 10th of December, 1855, the company not having then completed its road, another act was passed by the General Assembly, Stats. Missouri, 1855, No. 2, 472, authorizing a further loan of the credit of the state, in bonds, to the amount of $1,500,000. These were to be thirty years bonds. Section 2 of this act was as follows:

"§ 2. The loan of the state's credit under this act shall be, and it is hereby declared to be, upon the condition of a first lien or mortgage, as contained and reserved in the act of February 22, 1851, hereinbefore recited, and the same shall in all respects be held to be an extension of the loan of state credit, under the said mortgage provisions, securing the state in this as in the former loan, upon the same equal and unrestricted basis, as to each and every bond of the state so issued, under said acts or either of them."

Under this authority other state bonds were issued to the company to the prescribed amount, maturing as follows:

November 10, 1886 . . . . . $ 500,000
February 28, 1887 1,000,000

On the 20th of February, 1865, the following act of the General Assembly of Missouri was approved. Stats. Missouri, 1865, 84.

"An Act to Provide for Reducing the Indebtedness of the State.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. The Hannibal and St. Joseph Railroad Company is hereby authorized to issue its bonds, signed by the

president and countersigned by the secretary of the company, in sums of one thousand dollars each, with coupons attached, bearing interest, payable semiannually, at the rate of six per cent. per annum, and having not less than ten years to run, and to the amount of three millions of dollars, the payment of the same, with the accruing interest, to be secured by a mortgage or deed of trust conveying to three trustees, to be named therein, by and with appropriate forms of expression, and for the purpose of securing the payment of said bonds and interest, and for no other purpose, on the road of said company, with all its franchises, rolling-stock, and appurtenances, subject, however, to all the liens and liabilities existing in favor of the state by virtue of any law of the state at the time said bonds may be issued and delivered.

"SECTION 2. Whenever the trustees provided for in the first section of this act shall pay into the treasury of the state a sum of money equal in amount to all indebtedness due or owing by said company to the state, and all liabilities incurred by the state by reason of having issued her bonds and loaned the same to said company as a loan of the credit of the state, together with all interest that has and may at the time when such payment shall be made have accrued and remain unpaid by said company, and such fact shall have been certified to the Governor of the state by the treasurer, who is hereby directed to make such certificate, then the Governor of the state is hereby authorized and required to make over, assign, and convey to the trustees aforesaid all the first liens and mortgages now held by the state under the provisions of an act of the legislature of the state approved February 22, 1851, to secure the payment of a loan of the credit of the state to said railroad company in the sum of one million five hundred thousand dollars; and also of an act of the legislature approved December 10, 1855, to secure the payment of a like loan of the credit of the state in the sum of one million five hundred thousand dollars; and such conveyance shall, by appropriate expressions, convey to said trustees all and singular the rights, titles, and interests held by the state under the several acts of the legislature, as aforesaid, in and to said railroad, its rolling-

stock, franchises, and appurtenances, to hold the same as security for the payment of the bonds of the road authorized by the first section of this act, and the interest thereon, with full power to sell and dispose of the same, in case of the failure of said company to meet and pay, at maturity, the interest or principal of said bonds, or any of them, and to have and exercise all the rights and powers which belong to the people of the State of Missouri, and which, by the provisions of the acts of the legislature, as aforesaid, they might have exercised by and through the Governor of the state: *Provided*, That nothing in this act shall be construed so as to render the State of Missouri liable in any case for the payment of the bonds or interest thereon, authorized to be issued by the first section of this act.

"SECTION 3. The treasurer of the state is hereby authorized and directed to receive of the trustees aforesaid, in payment of three millions of dollars, and interest, as provided in the second section of this act, any of the outstanding bonds of the state bearing no less than six per cent. interest, or of the unpaid coupons thereof, at their par value.

"SECTION 4. The true intent and meaning of this act is to place the persons and parties who may hold the bonds of the road authorized to be issued by the first section of this act, through the trustees herein provided, in the same legal position which the people of the State of Missouri now hold, with full powers to act in the premises as the said state, by its Governor, might have done; and it shall be the duty of such trustees to proceed to advertise and sell the road with its appurtenances, as aforesaid, and in the manner provided for the sale of the same by the Governor of the state in the acts of the legislature aforesaid, whenever they shall receive a request so to do in writing, signed by persons and parties representing not less than one third of the bonds authorized to be issued by the first section of this act, and which may be still outstanding, but only in case the said railroad company shall have made default in the payment of the principal or interest on said bonds when the same has become due, and all needed authority to do the same shall be maintained, and all needed decrees shall be

issued by and in any court of competent jurisdiction in this state, either in law or equity, and such sale, so made as herein provided, shall be deemed and held in all respects good and valid in law.

"SECTION 5. The provisions of this act shall not be construed to modify, release, exonerate, discharge, or relieve said railroad company from any duty, liability, obligation, penalty, or forfeiture to which, under former laws, said company may be liable to the people of the State of Missouri, on any account whatever, except from the payment of the several sums of money as is in this act provided.

"SECTION 6. This act to take effect from and after its passage."

When this act was passed, it is said in the brief of the Attorney General, "the bonds of the state were worth in the market from 65 to 69 cents on the dollar, and there were outstanding on January 1, 1865, state aid bonds loaned to different railroad companies to the amount of many millions of dollars, beside $833,000 of other state bonds, and over $5,000,000 of past due coupons on state aid bonds loaned to the railroads." The testimony shows conclusively that no interest had been paid on any of the aid bonds except those of this company since January 1, 1861.

On the 21st of March, 1874, an act of the General Assembly of Missouri, "to authorize the issue of new state bonds in renewal of certain other bonds heretofore issued to the Hannibal and St. Joseph Railroad Company, and to maintain and perpetuate the first lien of the state to secure the payment thereof," was approved. Stats. Missouri, 1874, 123. Down to this time the company had not availed itself of the privileges of the act of February 20, 1865, but it had promptly met and provided for, at maturity, the interest on all its state bonds. By this new act it was provided that whenever the owner or owners of any of the bonds issued to the company under the authority of the act of February 22, 1851, "shall present such bond or bonds for renewal to the treasurer of the state, and shall satisfy such treasurer that he or they are the real and *bona fide* holders and owners of such bond or bonds, and that

the same have not been paid by the state, or by the said company, and that they have not been taken up and placed in the hands of the trustees to secure the payment of other bonds issued by said company, as authorized by the act entitled 'An act to provide for reducing the indebtedness of the state,' approved February 20, 1865, the treasurer shall certify the facts to the Governor of the state, and the Governor shall thereupon cause to be issued in renewal of such old bonds, and deliver to the holder or holders thereof, new bonds of the State of Missouri, in lieu thereof, said bonds to be signed by the Governor and countersigned by the Secretary of State, sealed with the seal of the state, and registered in the office of the state auditor, and they shall be of the same denomination and tenor of the old bonds, for which they are to be exchanged; and they shall have the same rate of interest with like coupons, and be payable in the same time and manner as said old bonds."

Ample provision was then made for the preservation of the original security, and the company was made liable for the payment of the renewal bonds to the same extent and in the same way it had been for the originals. The company formally accepted the provisions of this act, and under it renewal bonds were issued to the amount of $1,499,000, one of the original bonds for $1000 having been paid. These renewal bonds mature as follows:

July 1, 1894	$500,000
July 1, 1895	203,000
January 1, 1896	165,000
July 1, 1896	614,000
July 1, 1897	17,000

The company having at all times met the interest on these bonds as it matured, as well as that on the bonds issued under the act of 1855, the board of directors, on the 19th of January, 1881, adopted a plan for refunding its debt, which contemplated a discharge of its obligations to the state in the way provided for in the act of February 20, 1865. A few days previous to this time the officers of the state had been infor-

mally approached on the subject, but on that day negotiations were regularly opened by the following letter from the president of the company to the Governor of the state:

"Hon. Thos. T. Crittenden,

"*Governor of the State of Missouri.*

"Dear Sir: It is the desire of the directors of the Hannibal and St. Joseph Railroad Company to relieve the State of Missouri from the burden which the state assumed in pursuance of a wise and liberal policy to aid the construction of the road when the company was in its infancy.

"The interest upon the three millions of state aid bonds has been regularly paid by us, including the coupons due January 1st, 1881. We now wish to pay into the treasury of the state the entire sum of principal and the accrued interest since that date, in fulfilment of the obligation which rests upon the company to provide for the payment of bonds. This course appears to have been contemplated in the act of the Legislature of the State of Missouri, entitled 'An act to provide for reducing the indebtedness of the state,' approved February 20th, 1865. So long a time has elapsed since the passage of that act that we have considered it our duty to communicate with you upon the subject, in the first instance, in order that there may be a full understanding and coöperation in the action of the railroad company and the officers of the state.

"We should be very glad to receive any suggestion which may occur to you affecting the convenience of the state, or the duties of the officers of the state, depending upon our proposed action. It is our desire to complete the transaction as soon as possible after the period which must expire before a meeting of the company can be had to approve the necessary arrangements.

"I remain, with great respect, your obedient servant,

"Wm. Dowd, *President.*"

After this letter was received by the Governor, Mr. Walker, the auditor of state, went to New York, where he had an

interview with the officers of the company. At this interview propositions were made on both sides, but no conclusion was reached. On the return of Mr. Walker from New York he made a report in writing to the Board of Fund Commissioners, under date of February 24, 1881, giving an account of what he had done and the suggestions he had made. This report was communicated by the Governor to the General Assembly the next day, accompanied by a message, of which the following is a copy:

"EXECUTIVE OFFICE,

"CITY OF JEFFERSON, February 25, 1881.

"SIR: I have the honor to lay before you a communication from Hon. John Walker to the Board of Fund Commissioners of Missouri. Mr. Walker, as a member of that board, recently visited the city of New York for the purpose of conferring with the officers of the Hannibal and St. Joseph Railroad Company in regard to the proposition of that company to discharge the full amount of what it claims is its present indebtedness to the state. The result of Mr. Walker's conference with those officials is fully set forth in the accompanying communication.

"I recommend that you adopt such legislation as will enable the Fund Commissioners to use or dispose of whatever sum, if any, may be accepted by the state from the Hannibal and St. Joseph Railroad Company.

"I do not mean to say that the state will accept the sum of $3,000,000 in complete satisfaction of the liability incurred by the state in aid of said company. I think the liability extends to the maturity of the bonds; and as the company has heretofore met its obligations to the state promptly, and has thereby secured the confidence of the people of the state, who were for many years in doubt as to the final result of our complications with that road, I trust that it will be equally as honorable in the future, and so act as to retain the confidence which its past conduct has inspired.

"In case the whole or any part of the money due from the

company is accepted, its receipt ought not to find us unprepared for its prompt and profitable disposal.

"Very respectfully,

"THOS. T. CRITTENDEN.

"Hon. T. P. BASHAW, Speaker of the House of Representatives."

Afterwards the General Assembly passed the following act, which was approved March 26, 1881. Stats. Missouri, 1881, 191:

"AN ACT to provide for the transfer to the state sinking fund [of] any surplus money that may be in the state treasury, not necessary to defray the current expenses of the state government and to meet the appropriations made by law, and to authorize the Fund Commissioners to invest the same in the redemption or purchase of the bonds of the state and bonds of the United States, Hannibal and St. Joseph Railroad bonds excepted.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"SECTION 1. Whenever there is any money in the state treasury not necessary to defray the current expenses of the state government and to meet the appropriations made by law, it shall be the duty of the state auditor, and he is hereby authorized and required, to transfer the same to the credit of the State Sinking Fund for the purpose of paying the state debt, or any portion thereof, and the interest thereon as it becomes due.

"SEC. 2. Whenever there is sufficient money in the sinking fund to redeem or purchase one or more of the bonds of the State of Missouri, such sum is hereby appropriated for such purpose, and the Fund Commissioners shall immediately call in for payment a like amount of the option bonds of the state, known as 'five-twenty bonds.' *Provided*, That if there are no option bonds which can be called in for payment, they may invest such money in the purchase of any of the bonds of the state, or bonds of the United States, the Hannibal and St. Joseph Railroad bonds excepted."

On the 30th of April, 1881, the company executed to Rolston, Dowd, and Root, trustees, a mortgage such as was contemplated by the act of February 20, 1865, and in which the provisions of that act were recited, to secure an issue of bonds to the amount of $3,000,000. These bonds were negotiated by the trustees, and with the money realized therefrom, and $90,000 furnished by the company, they, on the 20th of June, 1881, paid to the treasurer of state the full face of the bonds of the state for which the company was liable, and the unpaid interest thereon, to fall due July 1 thereafter, the total amount of principal and interest being $3,090,000, and demanded from him the certificate provided for by the act of February 20, 1865, to entitle them to an assignment from the Governor of the liens of the state. The treasurer thereupon gave the trustees a receipt, of which the following is a copy:

"TREASURER'S OFFICE, STATE OF MISSOURI,
"CITY OF JEFFERSON, June 20, 1881.

"Received of R. G. Rolston, Heman Dowd, and Oren Root, Jr., trustees Hannibal & St. Joseph Railroad Company, three million and ninety thousand dollars $\frac{00}{100}$ on account of the statutory mortgage now held by the State of Missouri against said railroad.

"In testimony whereof I have hereunto set my hand and affixed my seal of office the day and year above.

"$3,090,000. (Signed) PHIL. E. CHAPPELL,
"*Treasurer.*"

[The State treasurer's seal of office.]

At the same time he gave to them the following certificate:

"To THOMAS T. CRITTENDEN,
"*Governor of Missouri.*

"I, Phil. E. Chappell, treasurer of the State of Missouri, do hereby certify that R. G. Rolston, Heman Dowd, and Oren Root, Jr., trustees, have paid into the treasury of the State of Missouri three millions and ninety thousand dollars, ($3,090,000,) under the act entitled 'An act to provide for reducing the indebtedness of the state,' approved February 20, 1865, on

account of the statutory mortgage the state holds against the Hannibal & St. Joseph Railroad Company.

"Given under my hand this 20th day of June, 1881.

"(Signed) PHIL. E. CHAPPELL,

"*State Treasurer.*"

He refused to put the certificate in any other form, although requested to do so by the company.

No special provision was made by the company for the payment of the interest which fell due January 1, 1882, and on such failure the Governor threatened to take measures for the enforcement of the lien which the state held under its statutory mortgages as upon a default by the company in the payment of interest. Thereupon the trustees began this suit, on the 6th of January, 1882, which was at first against the Governor alone, to have him execute the assignment provided for by the act of 1865, and also to enjoin him from selling the road under the statutory mortgage. On the filing of the bill a temporary restraining order was granted by the circuit judge. Afterwards, on the 10th of February, 1882, the court in session, being of opinion that the payment which had been made did not operate as a satisfaction of the obligation of the company to the state under the act of 1865, refused to grant a temporary injunction, but did not pass further on the rights of the parties. *Rolston* v. *Crittenden*, 10 Fed. Rep. 254; *S. C.* 3 McCrary, 332. The company thereupon, to stop a sale by the Governor, paid to the state the interest which fell due January 1, 1882, and the cause proceeded without any injunction. Afterwards, on the 20th of March, an amended and supplemental bill was filed, on leave of the court, by which Chappell, the treasurer of state, and Walker, the auditor, were added as parties, and the railroad company also. The Governor and auditor, with whom was united D. H. McIntyre, were also proceeded against as Fund Commissioners of the state, so that, if necessary, a decree might be had for a return of the money which had been paid. In other respects the prayer of the bill was not materially changed. Answers and replications were filed and testimony taken. After hearing upon bill, answers,

replication and proofs, a decree was entered September 15, 1882, to the effect that the trustees were entitled under the act of 1865 to an assignment by the Governor of the liens of the state upon payment to the treasurer of state of a sum of money, which, together with that already paid, if it had been applied and invested within a reasonable time in accordance with the provisions of the act of March 26, 1881, would have indemnified the state against loss by reason of its obligation to pay interest on the bonds to their maturity, and "that the complainants were and are entitled to have the said $3,000,000 paid as aforesaid to the said treasurer of the State of Missouri, under the provisions of the aforesaid act of February 20, 1865, applied and invested under and in accordance with the provisions of the said act of March 26, 1881, to the payment of the option bonds of the State of Missouri known as 5–20 bonds as rapidly as they were subject to call and payment, and in the meantime, and until such bonds became subject to call and payment or other portions of the state debt or interest thereon became due, to have the remaining and unapplied balance of the said moneys invested in bonds of the United States at the market rates, and when any portion of the said 5–20 bonds became or should become subject to call and payment, or any portion of the state debt or interest thereon became or should be subject to redemption or payment, to have the said moneys applied from time to time to the redemption or payment thereof."

The case was then referred to a master to ascertain and report "what sum, including the said $3,000,000, was necessary to indemnify the state as aforesaid, if the same were applied and invested as hereinbefore provided within reasonable time in the exercise of due diligence by the officers of the state after the 20th of June, 1881." In this decree the Governor was enjoined from selling the road until a final judgment in the cause.

From the report of the master it appears that after the order of the court referring the case, the state officers used $1,446,000 of the money that had been paid in by the company to take up and pay an equal amount of option and other bonds of the

state which might have been called in at different times before while the money was in the treasury to the credit of the sinking fund. The remainder of the money was then invested, as it might have been before, in state bonds and United States bonds, at rates which would yield an interest on the investment equal to three per cent. per annum.

The court below gave a decree finding the amount to be paid to the state before the trustees could claim an assignment of the prior liens, calculated on the basis of applying the payment to taking up the bonds which had been issued to the company as they matured, and crediting the fund with six per cent. interest on the amount actually used to take up other bonds than those issued to the company at the rate of six per cent. from the time it ought to have been so used, and on the remainder at the rate of three per cent. per annum, which it was agreed was all that the investment that had been made in the purchase of state bonds and United States securities would produce. The amount thus found to be due was $476,049.27, and interest at the rate of three per cent. per annum from May 11, 1883.

The officers of the state claimed that the amount due should have been ascertained by charging the company with the face of the bonds and interest to the date of their maturity, and crediting it only with the amount invested and the interest thereon at the rate of three per cent. until actually used to take up the bonds for which the company was liable.

Each of the parties appealed from this decree.

What the state did under the acts of 1851 and 1855 was to loan its credit to the railroad company. For this purpose it issued its bonds, with coupons for semiannual interest attached, redeemable part at the end of twenty years and part at the end of thirty. These bonds were delivered to the company to be disposed of to raise money to enable it to expedite and secure the completion of its railroad, and in this way the state incurred a liability for the company not only to pay the principal of the bonds to the holders thereof, but also to pay the interest semiannually, at the rate of six per cent. per annum, on some, for at least twenty years, and on others for thirty.

The holder could not be required to take the principal and stop the interest until the state had the right by the terms of the bond to pay the principal. This was the liability of the state to the holders of the bonds for the benefit of the company, and the corresponding liability of the company to the state was to provide the state with the means for the punctual payment of the interest as it matured during the whole time the bonds had to run, and of the principal when it fell due. The company could no more require the state to take the principal before it became due and stop interest thereafter, than the state could require the bondholders to do the same thing. The liability of the company to the state was identical with that of the state to the bondholders, for the duty of the company was to make such provision for the payment of both interest and principal as would "exonerate the treasury of the state from any advances of money for that purpose."

This was the condition of the liability of the parties to and for each other under the original statutes when that of February 20, 1865, was enacted, during the late civil war, while the state was largely in default for interest on its debt and when of necessity its securities were much depreciated. The avowed purpose of the statute was, according to its title, to reduce the indebtedness of the state, and it related only to the Hannibal and St. Joseph Company, which was not in default for either the interest or the principal of the bonds it was bound to make provision for. That company was authorized to raise money to get up the lien on its property in favor of the state, and pass it over to the holders of the new security upon the faith of which the money was to be got. Such a transfer could be obtained by paying "into the treasury of the state a sum of money equal in amount to all indebtedness due or owing by said company to the state, and all liabilities incurred by the state by reason of having issued her bonds and loaned the same to said company as a loan of the credit of the state, together with all interest that has and may at the time when said payment shall be made have accrued and remain unpaid by said company," (§ 2,) or by delivering to the treasurer "any of the outstanding bonds of the state bearing no less than six

per cent. interest, or . . . unpaid coupons thereof at their par value," amounting to "three millions of dollars and interest;" that is to say, to the amount of the bonds issued to the company by the state and the accrued interest thereon, which had not already been paid by the company. (§ 3.) This, as we construe the statute, means that if payment is made in money and not in state bonds or coupons, it must be of an amount equal to the face value of the bonds issued to the company and the accrued interest thereon to the time of payment, together with such further sum, if any, as would be necessary to enable the state to cancel then, or within a reasonable time thereafter, three millions of dollars of its outstanding liabilities, bearing interest at the rate of six per cent. per annum.

This, we think, is shown in many ways. The avowed purpose of the act was to reduce the debt of the state. This could not be done by a simple payment by the company to the state of the amount of the bonds for which that company was liable. To reduce the debt there must be a payment by the state to its own creditors and an actual cancellation of its own obligations. As by accepting the money the state discharged the company from all further obligation to provide for the payment of the principal or the interest of the bonds for which it had become bound, it was necessary, in order to save the state from loss in the transaction, that the payment by the company should be enough to enable the state to take up and cancel an equal amount of its other indebtedness bearing the same rate of interest. The apparent object of the statute was to relieve the state to some extent from its immediate embarrassments. There was then existing a past due interest-bearing debt in the shape of unpaid coupons, amounting to more than the face value of the bonds for which the company was liable, and if the payment had been made at or about that time, the money could have been used at once in discharging an equal amount of debt then due and unpaid, without loss to the company or the state. Looked at in the light of the surrounding circumstances, the statute appears like a plan by the state to get relief to some extent from its present embarrassments by an arrangement which would be equivalent to an issue of new

bonds, payable at the times when those which had been lent to the company fell due. Apparently the state was in no condition to borrow at favorable rates upon its own credit, and so a scheme was devised by which the prior lien of the state upon the railroad of this company might be used for that purpose, without any actual loss to the state and possibly with some advantage to the company, for the company was allowed to make its payment in any of the bonds or past due coupons of the state bearing six per cent. interest at their par value, and if these could be got at a discount the company would be correspondingly a gainer.

Thus it appears that if the payment had been made at or near the time the statute was enacted, an equal amount of the interest-bearing debt of the state, which was immediately pressing for payment, could have been taken up, and a cancellation of the obligations of the company secured. But no such payment was made, and the question now is whether, sixteen years afterwards, when the credit of the state had been reëstablished without any help from the company, and when all its six per cent. interest-bearing securities were commanding a high premium, the payment of the same amount would produce the same effect so far as the company was concerned.

Under the statute of 1865, as has already been seen, if payment was made in money, it must be of a sum, in addition to the face of the bonds, which would enable the state to take up and cancel an equal amount of its other six per cent. indebtedness then outstanding. Accordingly, when the company offered the amount of the face of the bonds only, and interest, the state officers insisted upon more, and, the parties failing to come to a satisfactory understanding on the subject, the whole matter was referred by the Governor to the General Assembly then in session. The statute of March 26, 1881, was the result of this reference, and, construed in connection with the circumstances which surrounded its enactment, it may be looked upon as a direction to the state officers to take the money when offered by the company and use it as fast as needed to pay the option bonds when they were called in, which must be done at the earliest possible moment, and in the redemption and pay-

ment of other state bonds as they fell due. Whatever amount was not so used at once was to be invested and kept invested until it should afterwards be needed for that purpose. In this way the act of 1865 was recognized as being still in force, with the effect we have already given it, and the use of the money paid into the treasury by the company in taking up the six per cent. bonds of the state, whether option bonds or others, was made to operate as a discharge of the company from all liability for the payment of either the principal or interest of an equal amount of the bonds which had been issued for its benefit. The Fund Commissioners were also required to use the money as fast as it was needed for the payment of called or maturing bonds.

With this statute in force the company paid and the state officers received the money in question. There is some conflict of testimony as to what took place between Mr. Walker, the auditor of state, and the officers of the company, in New York, in February, 1881, and also as to what occurred between the company and the state officers when the payment was made in June of the same year; but we have not deemed it necessary to give either of these matters any considerable attention, because the officers of the state could only do what was authorized by the statutes which were enacted for the government of their conduct in the matter, and the rights of the parties depend alone upon the legal effect of those statutes.

By the constitution of Missouri, which went into effect in 1875, Art. X, § 14, it is made the duty of the legislature to levy and collect annually a tax sufficient to pay the accruing interest on the bonded debt of the state, and to reduce the principal thereof annually $250,000. This $250,000 is to be paid into and made a part of the sinking fund of the state. The tax thus provided for has been regularly levied and collected.

From the report of the master it now appears that $1,446,000 of the money paid in by the company was actually used by the Fund Commissioners on or before the 23d of August, 1882, in taking up option and other bonds of the state, and that if this sum had been actually applied for that purpose at

the times when the bonds so taken up became subject to call or payment, and the remainder of the fund had been applied to taking up other bonds of the state as they became due and payable, after making due allowance for the proper use of the $250,000 constitutional sinking fund each year, including the year 1881, it would require a further payment by the company, on the third day of October, 1882, of $153,646.46, to entitle the company to a discharge of its liability to the state on account of the bonds, and the trustees to an assignment of the liens of the state. It is conceded that the calculation of the master is right. The only question is as to the correctness of the principles on which it rests, and of this we are satisfied. In passing the act of March 26, 1881, the state substantially said to this company that any money it paid into the treasury under the act of 1865 should be put into the sinking fund and used as soon as it was needed to meet the maturing debt of the state, and that in order to use it at the earliest possible moment all option bonds should be called in and paid as soon as it could be done according to law. Inasmuch as, before the act of 1881 was passed, the state had by its constitution made it imperative that a certain amount should be raised each year by taxation and paid into the sinking fund to be applied to the liquidation of the state debt, it is but right that this should be exhausted as far as available before the money of the company is used, but after that is exhausted the statute made it the duty of the commissioners to use any other money there might be in the fund to pay its bonds, whenever the right to make such payment should be complete. The state was not required to do this, but it did it, and the executive officers must govern themselves accordingly. It may be true, that if no such provision had been made, money might have been got by the state to take up such of its maturing bonds as could not be met by the accumulations of the annual contributions to the sinking fund out of the tax which the constitution had provided for that purpose, at a less rate of interest than six per cent., and thus a saving made, but this was for the consideration of the legislature when it passed the statute, not for the state officers afterwards. The state had the right

to pass the law, and when passed it was binding on those whose duty it was to obey.

It was said, however, in argument, that if the acts of 1865 and 1881 are construed in this way they are invalid, because in conflict with the following provisions of the Missouri constitution, which went into effect November 30, 1875:

Article IV., Sec. 50. "The General Assembly shall have no power to release or alienate the lien held by the state upon any railroad, or in any wise change the tenor or meaning, or pass any act explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired."

Sec. 51. "The General Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual, to this state, or to any county or other municipal corporation therein."

The Supreme Court of Missouri did say in *State* v. *Chappell*, 74 Mo. 335, a suit brought by these trustees to compel the state treasurer to give them a certificate of payment in the form required by the act of 1865 to enable them to get from the Governor an assignment of the state's liens, that if the statutes required the acceptance of the $3,090,000 at the time it was paid in full satisfaction of the liability of the company to the state they were unconstitutional and void. But here the question is whether the same result must follow when the statutes are construed so as to require the payment of a sum of money which will enable the state to take up an equal amount of its other indebtedness bearing an equal rate of interest, and we have no hesitation in saying it does not. Section 50 deals with the lien, and section 51 with the "indebtedness, liability, or obligation." The lien cannot be released or alienated until the debt is extinguished, and the debt cannot be released or extinguished except in the manner contemplated by the law under which it was created, or by something legally equivalent. Here there is a payment of the obligation in advance of its maturity, with a view to the use of the money so paid by the state in taking up other debts at

their maturity for which no other provision has been made. This is, in our opinion, the legal equivalent of a payment of the liability of the company in accordance with the original terms on which it was created. By the acts under which the payment was made the money was appropriated for use in this particular way. In the meantime it was to be kept invested until that use could be made, the company indemnifying the state against its liability for interest in the meantime. A statute having such an effect violates neither the letter nor the spirit of the constitution, which was no doubt intended, as was said by the Supreme Court of Missouri in the case just cited, to prevent the "frittering away" and "extinguishment" of "the liens held by the state on railroads" without payment in full. The payment in this case in the way which the statutes contemplate will be the complete legal equivalent of such a "payment in full."

It is next contended that this suit cannot be maintained because it is in its effect a suit against the state, which is prohibited by the Eleventh Amendment of the Constitution of the United States, and *Louisiana* v. *Jumel*, 107 U. S. 711, is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state. The law makes it his duty to assign the liens in question to the trustees when they make a certain payment. The trustees claim they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied; but as the parties are all before the court, and the suit is in equity, it may be retained so as to determine what the trustees must do in order to fulfil the law, and under what circumstances the Governor can be compelled to execute the assignment which has been provided for.

Statement of Facts.

The decree of the Circuit Court is reversed, so far as it fixed the amount to be paid to get an assignment of the lien, and the cause remanded with instructions to strike out the sum of $476,049.47, with interest from May 11, 1883, as the amount found due, and insert in lieu thereof $153,646.46, and interest at the rate of three per cent. per annum from October 3, 1882. In all other respects the decree is affirmed, each party to pay its own costs in this court, the expenses of printing the record and the fees of the clerk for supervision to be taxed one half to each.

MR. JUSTICE BLATCHFORD took no part in the decision of this case.

GRIER *v.* WILT.

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

Submitted January 24, 1886. — Decided March 7, 1887.

In view of the state of the art, claim 4 of letters-patent No. 190,368, granted to Asa Quincy Reynolds, May 1, 1877, for an "improvement in automatic fruit-driers," namely, "4. In combination with a fruit-drier, the outer wall of which is made up of the frames of the several trays, as explained, a suspending device, operating substantially as described, and supporting said drier from a point in or on the lowermost tray thereof, for the objects named," is not infringed by an apparatus constructed in accordance with the description in letters-patent No. 221,056, granted to George S. Grier, October 28, 1879, for an "improvement in fruit-driers."

In a suit in equity for the infringement of letters-patent, prior letters-patent, though not set up in the answer, are receivable in evidence to show the state of the art, and to aid in the construction of the claim of the patent sued on, though not to invalidate that claim on the ground of want of novelty, when properly construed.

THIS was a bill in equity to prevent the infringement of letters-patent. Decree for a perpetual injunction, from which the defendants appealed. The case is stated in the opinion of the court.

Mr. F. O. McCleary for appellant.

Mr. Samuel A. Duncan and *Mr. Leonard E. Curtis* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

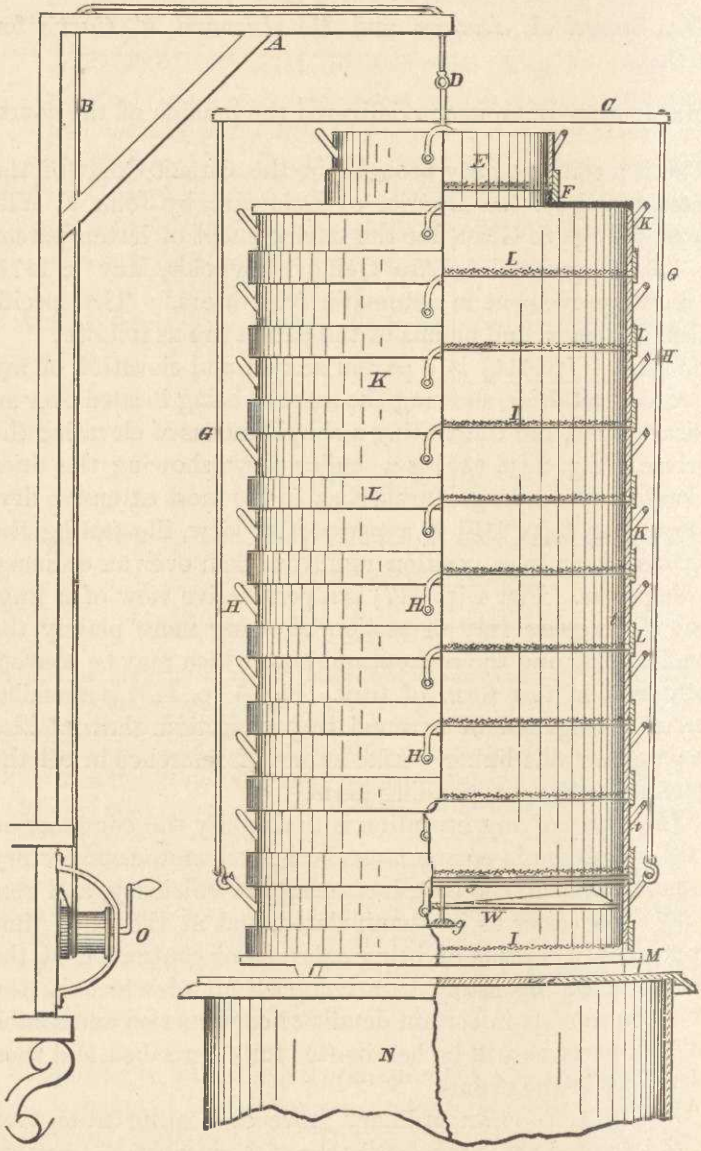
This is a suit in equity brought in the Circuit Court of the United States for the District of Delaware, by John F. Wilt against George S. Grier, for the infringement of letters-patent No. 190,368, granted to Asa Quincy Reynolds, May 1, 1877, for an "improvement in automatic fruit-driers." The specification, drawings, and claims of the patent are as follows:

"Figure 1 [p. 414] is a partial section and elevation of my improved fruit-drier, showing the same as being located over an ordinary stove, and illustrating a simple means of elevating the machine. Fig. 2 [p. 415] is a similar view, showing the drier as located over a large furnace, as in the most extensive dry-houses. Fig. 3 [p. 416] is a perspective view, illustrating the improved drier in a position removed from over an ordinary cooking-stove. Fig. 4 [p. 417] is a perspective view of a fragment of a square tray or section, showing more plainly the metallic lining and the sockets and pins, which may be conveniently used in this form of tray. Fig. 5 [p. 418] is a similar view of a fragment of a round tray or section, showing also the tin or metallic lining. Like letters of reference in all the figures indicate corresponding parts.

"The object of my invention is to simplify the construction of the fruit-driers in common use, both for domestic and factory purposes, reducing the cost, increasing the efficiency, and rendering them easier to be manipulated, and at the same time fire-proof, and capable of being enlarged or contracted at the pleasure of the operator; to accomplish all of which it (the invention) consists in certain details of construction and combination of parts, as will be hereinafter fully described, and then pointed out in the claims.

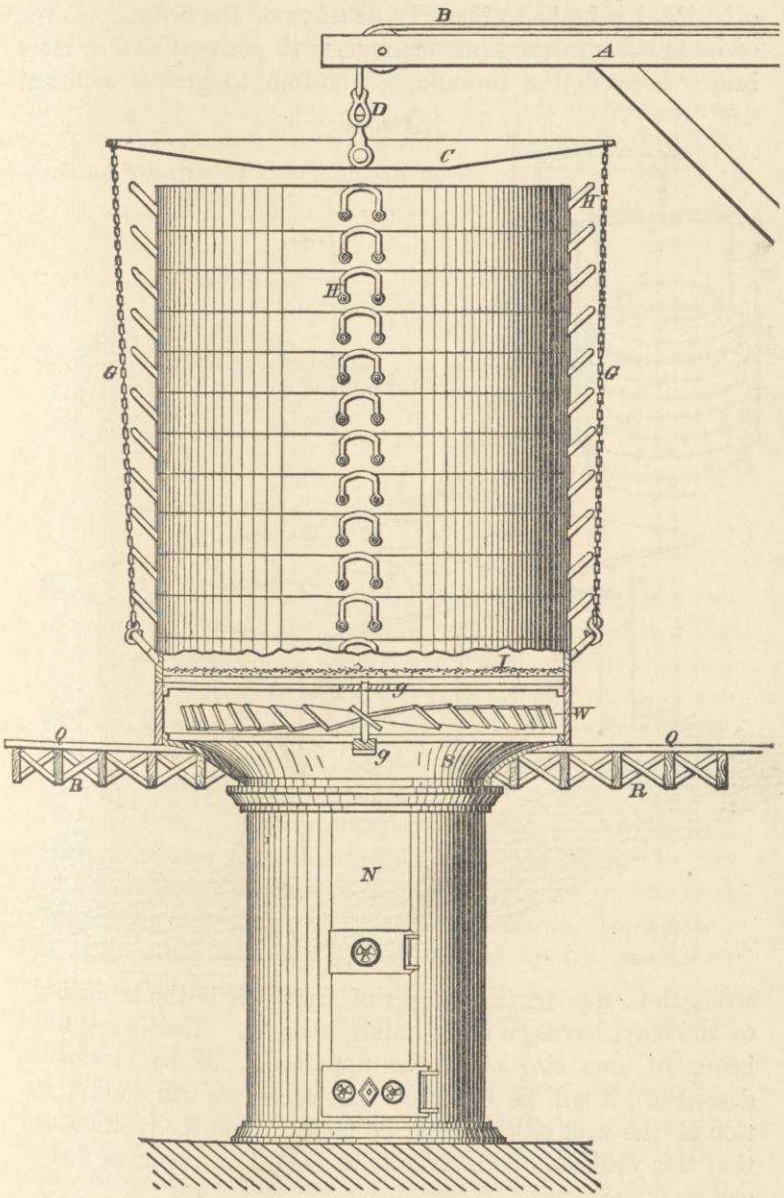
"In Fig. 1, N is an ordinary stove or heating-drum, over which is located the drier, consisting of a number of trays so constructed as that any one will receive a similar one above

Fig, 1.



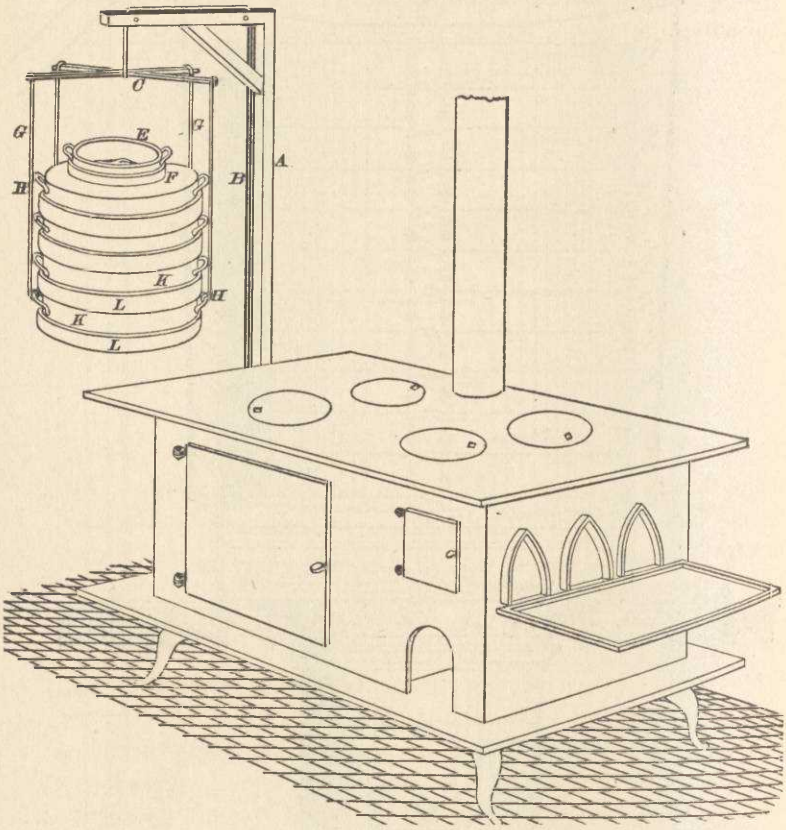
Opinion of the Court.

Fig. 2.



and also fit over a similar one below. For the lighter forms of driers I propose to make these trays of the ordinary sieves, or build them in the same manner, with perhaps two or more braces beneath the foraminated bottom, to give it sufficient

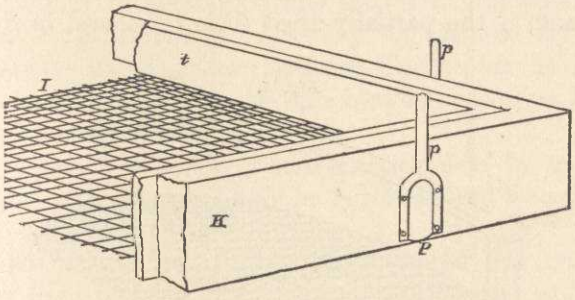
Fig. 3.



strength to support the weight of fruit. K is the main body of the tray, having a surrounding hoop, L. The several trays being of one size (save the uppermost, to be hereinafter described), it will be observed that each one will form a section of the wall of the drier, no matter what its position, and that this wall may be increased in height as much as desired or found necessary.

"A is a crane and B a rope or chain running over it and controlled by the windlass O. From the cross-bars C the ropes or chains G depend, and these are made to suspend the drier through the medium of the handles H H, &c., upon each tray. In order to prevent the drier from tipping when elevated, three or more handles should be employed in connection with a corresponding number of chains or ropes, G.

Fig. 4.

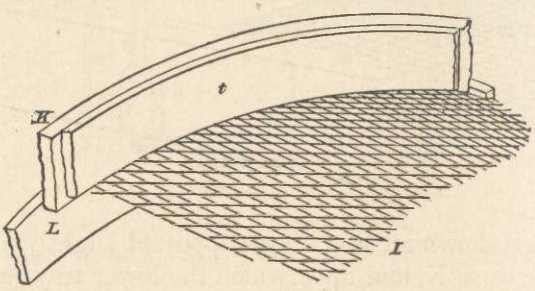


"At M is shown an iron ring, supported slightly above the top of the stove N, and upon which the lower tray rests. The drier is built up as follows: Fruit having been suitably disposed in a tray, the hooks upon the lower ends of the ropes G are placed under two or more of the handles H H, on the lowermost tray of the drier already over the stove, and the whole is elevated, by means of the windlass O, a trifle more than the depth of one tray. The fresh tray is then placed upon the ring M, and those above lowered upon it, being so guided by the hands that the hoop of the one to which the ropes are attached will fit over the top of the one placed thereunder. In this way the drier may be built as high as desired by the successive introduction of trays below. The swinging crane and windlass combined is regarded as the simplest means likely to be employed for elevating the drier.

"As the drying progresses and the trays are elevated, the fruit therein becomes more and more compact or shrivelled up, leaving a comparatively free passage for the heated air through the body of the drier, in consequence of which very

much of said air would pass off without accomplishing the work intended, and, the partially-cured fruit occupying considerably less space than the fresh, it is desirable that one or more smaller-sized trays be provided for its reception. Upon the top of the uppermost of the main series of trays I place a flange, F, having a circular opening, with upwardly-projecting collar, over which flange is located the tray E, made in all respects similar to those below save as to its size. This flange serves to contract the flue formed by the series of trays below, and, if the partially-dried fruit be placed in the tray

Fig. 5.



E, it will partially retard the flow of the air, and thus utilize so much thereof as would otherwise be wasted in the completion of the drying process. Above the flange F any number of small trays, E, may be placed, being matched one upon the other in a manner similar to those below.

"Within each tray I propose to place a metallic lining, *t t*, (preferably of bright tin,) the object of which is to protect the wood of the trays from heat and prevent moisture from penetrating the same.

"In Fig. 2 the series of trays forming the dry-house is shown as located over a large furnace placed below the flooring Q. This form is intended for the larger sizes of dry-houses, and is not different in principle or construction from that already described, except in that no hoops are illustrated as being placed upon the trays. These may be connected or matched with each other by any desirable and appropriate means.

"It may be found advantageous to construct the trays in other forms than circular, as indicated in Fig. 4, wherein the pin *p* and socket P are secured at suitable points upon the outside, and arranged to engage with similar sockets and pins upon the trays above and below, after the manner adopted in 'molders' flasks' and the like.

"With the swinging crane the drier may be removed from over the stove, as shown at Fig. 3, when the ordinary cooking operations may be performed and the drier returned at pleasure; or, if desirable, the drier may be elevated above the stove, leaving sufficient space between the two for the cooking utensils, and thus the drying and cooking processes be conducted simultaneously.

"At D, Figs. 1 and 2, is a swivel connection, by means of which the series of trays may be revolved, and thus the drying equalized throughout.

"As fast as the fruit is thoroughly cured the trays are removed from the top, and may then be inserted at bottom, after having been charged with a fresh supply.

"In all fruit-driers it is observed that the material is liable to contract or shrivel in such a manner as to open passages for the heated air, in consequence of which the fruit in the trays is unequally dried, the air passing off through these passages without coming in contact with the surrounding fruit. This difficulty has given rise to numerous inventions calculated to obviate it, among the most noticeable of which are revolving trays and revolving covers or shields for said trays. These are found in practice expensive to build, difficult to handle and move, and liable to get out of order; and it is a very important feature of the present invention to do away with all these objections. This I accomplish by the introduction of a fan-wheel calculated to retard the ascending currents of heated air, and to distribute them uniformly across the whole area of the fruit-containing tray. In Fig. 1, the wheel W, composed of a series of inclined blades, is pivoted between the two bars *g g*, which are attached to the metallic lining *i*, before alluded to. It is sufficiently elevated above the foraminated bottom, I, as not to interfere with the placing of fruit

upon said bottom, if desired. The inclined blades cause the wheel to be rapidly revolved by the ascending currents of air, and these, meeting with a resistance, are compelled to pass by the blades in a uniform manner, said blades being so cut or separated as that they shall permit the passage of an equal quantity of air at every point below the bottom of the tray placed next above. Any number of these fans may be placed in the series of trays, as is apparent from the construction above described. They are automatically operated, not liable to get out of repair, and they are found to be very efficient for the purposes intended. If the currents of air be very rapid and strong, the revolutions of the wheels are correspondingly rapid, and thus, under all circumstances, the currents are automatically regulated and always evenly distributed. For the larger-sized driers the wheel W may advantageously be placed immediately over the funnel-mouth S, conducting the heated air from the furnace below, as in Fig. 2. It may be pivoted in any desirable way, and other fans may be distributed throughout the series of trays. When the trays are made in square form, one fan, occupying as much space therein as possible, will be found to work satisfactorily. If the trays be made oblong, then two fans might be introduced, the better to occupy the necessary space. They should, of course, be made to work upon the same level. These wheels have now come to be denominated 'flutter-wheels,' and I desire to be understood as not limiting my invention to any particular number to be employed, to any specified location of said wheels in the drier, or to any particular method of suspending the same, so long as they are made to revolve independently of the trays, and to accomplish the results intended.

"Having thus fully described my invention, what I claim as new and desire to secure by letters-patent is —

"1. In combination with a series of fruit-drying trays, located one above the other, a second or supplementary series smaller than the first, and adapted to operate as and for the purposes explained.

"2. The plate F, adapted to cover the flue formed by the lower series of trays, and to receive and hold the upper series,

the whole being arranged and combined substantially as set forth.

"3. In combination with a fruit-drying tray, a fan-wheel operated by the ascending currents of heated air, movable independently of said tray, and adapted to equalize the currents of air, in the manner set forth.

"4. In combination with a fruit-drier, the outer wall of which is made up of the frames of the several trays, as explained, a suspending device, operating substantially as described, and supporting said drier from a point in or on the lowermost tray thereof, for the objects named.

"5. In combination with a fruit-drier adapted to be elevated, in the manner described, and suspended above a stove or furnace, a suspending device, substantially as shown, provided with a swivel-connection, as and for the purposes set forth."

Infringement of the 4th claim only is alleged, the defendant's apparatus being that described in letters-patent No. 221,056, granted to him October 28, 1879, for an "improvement in fruit-driers." The description and drawings of that apparatus, in the specification of that patent, are as follows:

"The nature of my invention consists in the construction and arrangement of a fruit-evaporator, as will be hereinafter more fully set forth. In order to enable others skilled in the art to which my invention appertains to make and use the same, I will now proceed to describe its construction and operation, referring to the annexed drawings, in which Figure 1 [p. 422] is a side elevation of my improved fruit-evaporator. Fig. 2 [p. 423] is a sectional view of the same. Fig. 3 [p. 423] shows the bottom of the drier. Fig. 4 [p. 423] is a vertical section of the roof. Fig. 5 [p. 422] shows one of the boxes with removable trays.

"A represents a bed-frame, of suitable dimensions, provided with four upright posts, B B, between which the boxes are placed for forming the walls of the evaporator and holding the trays. In the bottom frame, A, are two straight bars, C C, crossing each other at right angles, in the centre, and dividing the bottom of the evaporator into four equal divisions. In each division is arranged a series of inclined slats, *a a*, and the

Fig. 1.

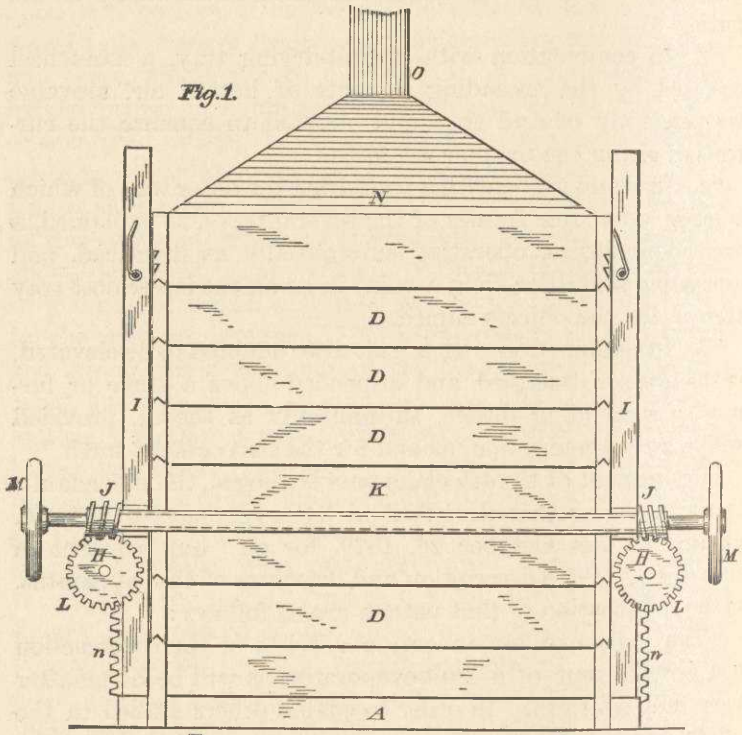
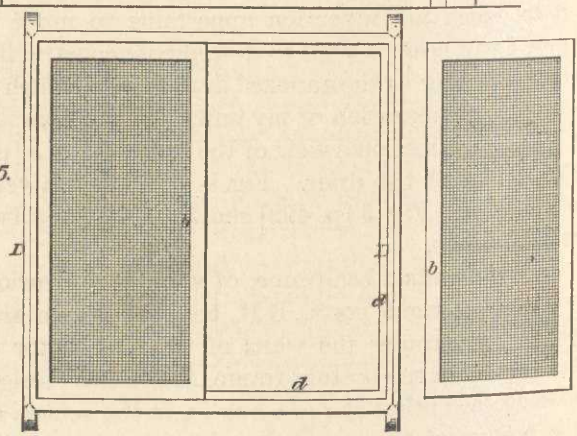


Fig. 5.



Opinion of the Court.

Fig. 2.

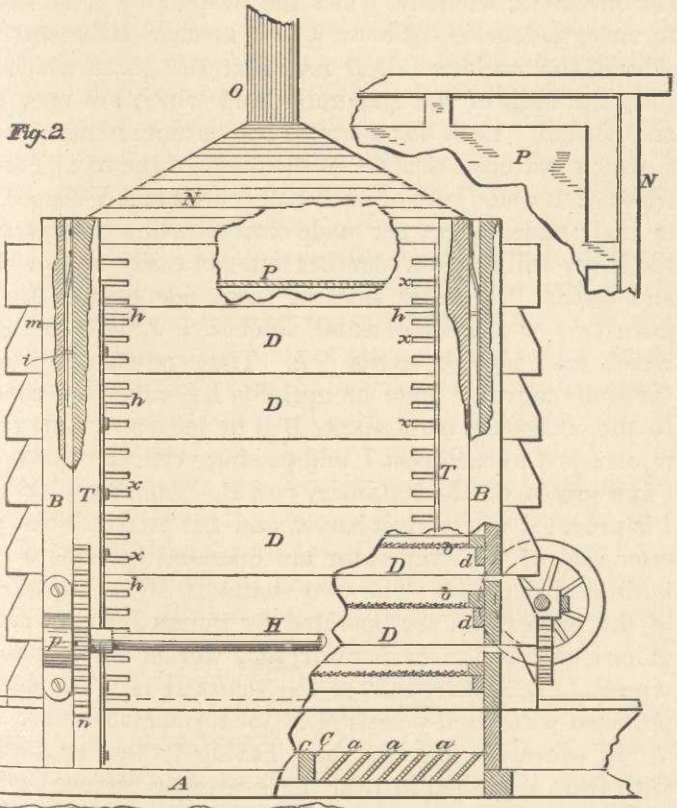


Fig. 3.

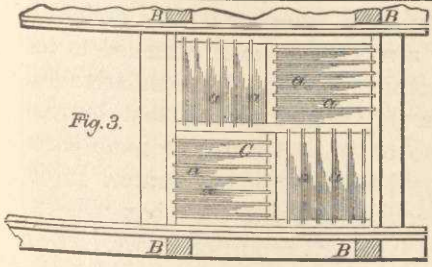
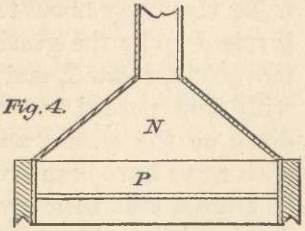


Fig. 4.



four series of said slats are inclined outward in the four different directions, whereby, when the evaporator is set over the furnace, the current of hot air, as it ascends, is directed to the sides of the machine. D D represent the boxes which go to form the walls of the evaporator, and which are open at top and bottom. Each box contains one or more removable trays, *b*, which rest upon cleats *d* on the inside of the box. The upper edges of the side bars of each box D are made V-shaped, while in their under edges are made corresponding grooves, so that the boxes will fit close together and can easily be moved back and forth. The outer sides of these side bars of the boxes have two or more horizontal notches, *x x*, at each end, into which take pivoted pawls *h h*. These pawls are pivoted to vertically-movable posts or uprights I I, which are connected to the stationary corner-posts B B by means of rods or bars, *m*, attached to each post I, and passing vertically through eyes *i* in a groove on the stationary post B. Each movable upright I is provided with a rack-bar, *n*, and the two rack-bars on the same side of the evaporator are operated by pinions *p* on a horizontal shaft, H. The two shafts H H, on opposite sides of the evaporator, are operated by worms J J on a shaft, K, at one end of the evaporator, said worms taking into gear-wheels L L on the ends of the shafts H H. The shaft K is provided with hand-wheels M M for turning the same.

"In operation, the first box, having its tray or trays filled with fruit, is pushed in over the heater or furnace, and after being there, say about ten minutes, more or less, as desired, it is raised up by the gearing and the pawls *h*, attached to the movable uprights I, and another or second box similarly filled with fruit pushed in under the first, and the first lowered down on the second, and so on until twenty or more boxes with trays have been arranged to form the evaporator. It will be noticed that with my mechanism I lift each box independently of the others, so that I can lift a portion above, leaving the boxes of the lower part stationary, by disengaging the pawls below. This enables the operator to examine any one or more of the boxes by sliding them out while those above are suspended.

Opinion of the Court.

"N represents the cover with central stack O. This cover is put on the first box to cause a draft, and it is raised by resting on the top or first box, so that the evaporator is complete at all times, whether one or twenty, or more, boxes are inserted.

"In the cover N is a bottom, P, which does not extend to the outer edges of the cover, thereby causing the vapor and heated air to be drawn from the middle to the sides to dry evenly; and it also aids in carrying off the fumes of the sulphur, when such is used to bleach the fruit.

"I am aware that a fruit-evaporator has been made with upright sliding bars or posts provided with spring-pawls, which pass under the trays to support the same, but in such case the pawls are inaccessible, and none of them can be thrown out of the way; whereas in my case the operator can easily disengage any one or more pawls on each post, so as to lift any one or more boxes, or all the boxes together, as may be desired."

The case was brought to a hearing on pleadings and proofs, the main issue raised by the answer, and contested, being that of infringement. The Circuit Court entered a decree in favor of the plaintiff, awarding a perpetual injunction and a reference as to profits and damages, in pursuance of which a final decree was rendered against the defendant for $1918.97, with interest and costs, from which he has appealed.

The Circuit Court, in its decision, (5 Fed. Rep. 450,) said: "This patent" (the plaintiff's) "is for an improvement in automatic fruit-driers, and its peculiarity and novelty consist in mechanical arrangements and devices by which a stack of trays, fitting into each other, the outer edges of which constitute the outer side of the stack of trays or drying-house, are moved upwards, and suspended by attachments to the lower tray, in order that a fresh tray of fruit can be inserted at the bottom, and the process repeated at pleasure, thus building up the drying-house or stack from the bottom. It is not contended that the patentee is the inventor of the movable trays, the outer walls of which constitute the drying-house. It is admitted that the existence of such trays, for such purpose, is old in the art; but the complainant contends that the patentee is the originator of an idea, which is a novel and useful

one, of raising the stack of trays from a point on the lowermost tray of the stack, thus making an opening for the insertion of a fresh tray containing fruit, and in this manner building the stack up from the bottom instead of from the top; . . . the object and value of the patent consisting not in the use of any special machinery for elevating the stack for the purposes intended, but the elevation and opening of the said stack at the bottom, for those purposes, by any machinery best calculated to attain that end. . . . The court is, therefore, of the opinion, that any attempt by defendant, or any other person, to elevate the stack of trays so constructed as aforesaid, and from a point at or on the lowermost tray thereof, so as to insert new trays at the bottom successively, by any mechanism whatever, adapted to accomplish that purpose, and which is a mechanical equivalent to the means employed by the complainant, is an infringement of his patent. . . .

"The two machines, as will be manifest upon reference to the specifications and drawings in the respective patents, are alike in principle, having a stack in each case composed of sections of trays, fitting upon and into each other, the outer wall of which makes up and forms the exterior of said stack or drying-house; and they are also alike in their purpose and capacity of being moved upward from a point in or on the lowermost tray, and of being suspended in that position, so as to admit the insertion of fresh trays in succession. They are unlike in their respective appliances and devices by which these objects are accomplished, and also in the facility by which intermediate trays between the top and bottom can be removed. The devices by which the trays in the complainant's patent are elevated in the manner described, for the purposes mentioned, are the cord and pulley passing over an upright crane, regulated by a windlass, or wheel and axle, with its ratchet and pawls, . . . the point of suspension . . . being directly over the centre of the stack; and from the ends of the cross-bars to which the rope passing through the pulley is attached, depend ropes or chains, which are attached by hooks to handles upon the lowermost tray to be removed, thus contributing both a

lifting and suspending device. . . . The machine embodying the defendant's invention . . . exhibits the following means for effecting the elevation of the stack of trays, and their suspension, for the purpose of allowing new trays to be inserted at the bottom, to wit, four movable uprights, each having a series of pivoted pawls, and arranged to slide in four stationary posts, secured in a frame, in combination with a series of boxes, or trays, having notches in their sides, whereby the boxes may be lifted independently of each other, or all together. The power is applied through the medium of two worms, situated at each end of a drum, or shaft, extending along the side of, and at least the width of, the stack to be lifted. These worms engage into appropriate cog-wheels, affixed to two other drums, or shafts, running at right angles to the first-named shaft, on opposite sides of the stack, and extend horizontally the length of the same. Upon each of these last-mentioned shafts are geared, at the ends of the same, small cog-wheels, which, in turn, gear into vertical rack-bars on the four sliding-posts of the machine. The power is applied by means of a crank at the end of the first-named drum or shaft.

"Now, here is undoubtedly a contrivance and device by which the novel and useful invention, first patented in the Reynolds patent, . . . of elevating the stack of trays from a point in or on the lowermost tray thereof, so as to permit the insertion of a fresh tray at the bottom, is accomplished. It matters not whether this device has the capacity of lifting the upper trays in the series, so as to open the same for inspection or for any other purposes. So long as it accomplishes the purpose, or possesses the capacity, of moving up the whole series of trays from a point on the lowermost tray of the same, so as to permit the introduction of a fresh tray, it is, in that respect, an infringement of the complainant's patent; nor is this conclusion altered because of any supposed advantages gained by the greater facility afforded by the Grier patent in opening the stack at any point above the lowermost tray, for purposes of inspection, or otherwise. . . . The court, upon the best consideration it can give to this subject, has come to the conclusion that the defendant in this cause has used, in the eleva-

tion and suspension of the stack of trays in this drier, mechanical appliances and contrivances which, while they differ somewhat in form from those used by the complainant, are mechanical substitutes and equivalents for the same; and in the use of the same for the accomplishment of the same results as those produced by the complainant's invention, the defendant has infringed upon the exclusive rights secured to the complainant."

The specification of the plaintiff's patent states that the invention "consists in certain details of construction and combinations of parts." The existence in a fruit-drier of movable trays, the outer walls of which constitute the drying-house, being old, the subject of the fourth claim is the arrangement, in a fruit-drier with such trays, of a suspending device connected with the drier in or on the lowermost tray, so as to raise that tray, with all the trays above it, and allow the insertion, underneath all, of a fresh tray, and then lower the trays above it, and couple the suspending device again to the lowermost tray, and so on. This is the effect or result of the mode of operation of the devices. The claim, however, is not for a process, but is only for mechanism. The decision of the Circuit Court seems to be based on the view, that the claim covers all methods of raising the lowermost tray with those above it, if opportunity is given to insert a fresh tray underneath; and that, while the appliances and devices of the plaintiff and defendant are unlike each other, the defendant infringes because he attains the same result, of inserting a fresh tray underneath, while the trays before inserted are moved up and held up by a force imparted to the lowermost one of them. The decision describes the invention as consisting in "elevating the stack of trays from a point in or on the lowermost tray thereof, so as to permit the insertion of a fresh tray at the bottom;" and it, in effect, regards all mechanism for causing such elevation in such manner as a mechanical equivalent for the patented mechanism, because the result is to allow a fresh tray to be inserted underneath. And this is the view urged here by the appellee.

The defendant introduced in evidence three United States

patents — one to Adam Snyder, No. 48,733, July 11, 1865, for a "fruit-drier"; one to Joseph B. Okey and Ferdinand A. Lehr, No. 108,289, October 11, 1870, for an "improvement in fruit-driers"; and one to Joel Orlando Button, No. 155,286, September 22, 1874, for an "improvement in fruit-driers." Their introduction was objected to by the plaintiff, because they were not set up in the answer. But they were receivable in evidence to show the state of the art, and to aid in the construction of the plaintiff's claim, though not to invalidate that claim on the ground of want of novelty, when properly construed. *Vance* v. *Campbell*, 1 Black, 427, 430; *Railroad Co.* v. *Dubois*, 12 Wall. 47, 65; *Brown* v. *Piper*, 91 U. S. 37, 41; *Eachus* v. *Broomall*, 115 U. S. 429, 434.

The Snyder patent and the Okey and Lehr patent show, each of them, in a fruit-drier, a series of trays, arranged one above another, so that the frames of the trays form the wall of the drier. The Button patent shows a fruit-drier, within which is a movable frame, which carries racks that rest upon each other. The racks are inserted through a door immediately above the frame, one by one, and each one is separately elevated on the frame by cam levers till it is held by spring-catches, which move back while a rack is being elevated, and as soon as it passes spring out and support it, while the frame is being lowered for another rack. Each rack goes up with the frame, and, having been inserted at the extreme bottom, it carries up the racks above it, when it reaches them, and so on until they can be successively taken out at the top. The frames of the trays, which thus rest on each other, constitute, in a measure and to a degree, the walls of a chamber in which the drying takes place.

Movable trays, the outer walls of which constituted the drying chambers, being old, and apparatus having existed before to raise a tray or rack, and a column of racks above it, and insert a fresh one at the bottom, and the two having been used in connection, the fourth claim of the plaintiff's patent must be limited to the mechanism described and shown. The Circuit Court made no reference to the Button patent.

The plaintiff's patent describes and claims "a suspending

device, operating substantially as described." The defendant has no such suspending device. The plaintiff has a crane, with suspended ropes, and his lowermost tray, while being raised, necessarily carries on it the weight of all the trays and fruit above it. In the defendant's apparatus each tray can be lifted independently of the others, and each tray is supported independently, so that the weight of the series of trays, and of the fruit on them, need not rest entirely on the lowermost tray. This result being different from that in the plaintiff's device, the mechanism is different and is not an equivalent of that of the plaintiff any more than the plaintiff's is the equivalent of Button's. The fourth claim of the patent, if valid, cannot be construed so as to cover the defendant's apparatus.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to dismiss the bill of complaint, with costs.

HOPT *v.* UTAH.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Argued January 21, 1887. — Decided March 7, 1887.

Evidence, or what purports to be evidence, in a criminal case, printed in a newspaper, is "a statement in a public journal" within the meaning of the act of Utah declaring that no person shall be disqualified as a juror by reason of his having formed or expressed an opinion upon the matter or cause to be submitted to him, "founded upon public rumor, statements in public journals, or common notoriety, provided it appear to the court, upon his declaration under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him."

The judgment of the court as to the competency of the juror upon his declaration under oath or otherwise, as above, is conclusive.

When a challenge by a defendant in a criminal action to a juror, for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant, and excused, and an impartial and competent juror is obtained in his place, no injury is done to the defendant, if until the jury is completed he has other peremptory challenges which he can use.

Opinion of the Court.

The opinion of a physician, after making a post-mortem examination of the deceased, who came to his death by a blow inflicted upon his head, as to the direction from which the blow was delivered, is admissible in evidence.

If the evidence produced in a criminal action be of such a convincing character that the jurors would unhesitatingly be governed by it in the weighty and important matters of life, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty which attends all human evidence. Therefore, a charge to the jury that if, after an impartial comparison and consideration of all the evidence, they can truthfully say that they have an abiding conviction of the defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, is not erroneous.

An allusion, in the final argument to the jury by the counsel for the prosecution, to the case as having been many times brought before the tribunals, is not a ground for reversing a judgment under the statute of Utah, which declares that on a new trial the "former verdict cannot be used or referred to either in evidence or argument."

THIS writ of error was sued out by the defendant below, who was indicted, tried and convicted of murder, to review the proceedings and judgment there. The case is stated in the opinion of the court.

Mr. Benjamin Sheeks and *Mr. P. L. Williams* for plaintiff in error.

Mr. Assistant Attorney General Maury for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

The defendant below, the plaintiff in error here, Frederick Hopt, was indicted in the District Court of the Third Judicial District of Utah, in December, 1880, for the murder of John F. Turner on the 3d of the preceding July. He was four times convicted in that court, upon this indictment, of murder in the first degree. The judgment of death pronounced against him on each previous conviction was reversed by this court. The decisions are found in 104 U. S. 631; 110 U. S. 574; and 114 U. S. 488. The last conviction took place in September, 1885; judgment was passed in October following;

and on appeal to the Supreme Court of the territory it was affirmed in January, 1886, except as to the time of its execution; that was to be fixed by the District Court, to which the cause was remanded for that purpose. To secure a reversal of this judgment the case is brought before us on a writ of error.

The errors assigned are: 1st, the ruling of the trial court upon challenges to several jurors; 2d, the admission in evidence of the opinion of a witness as to the direction from which the blow was delivered which caused the death of the deceased; 3d, the instruction to the jury as to the meaning of the words "reasonable doubt;" and, 4th, the reference on the argument by the district attorney to previous trials of the case.

1st. Four persons summoned as jurors were examined on their *voir dire*, and challenged by the defendant, one for actual bias, under § 241 of the act of the territory regulating proceedings in criminal cases, passed in 1878; and the other three for both actual and implied bias. Actual bias is defined by that act to be "the existence of a state of mind, on the part of a juror, which leads to a just inference in reference to the case that he will not act with entire impartiality."

The juror Young, challenged as having that state of mind, that is, for actual bias, testified that he had heard of the case, but had never talked with any one who pretended to know about it; that he had impressions as to the guilt or innocence of the defendant, but could not say that he had ever formed any opinion on the subject, and did not remember that he had ever expressed any; that possibly his impressions were strong enough to create, from sympathy, some bias or prejudice, but he thought he could sit on the jury and be guided by the evidence, and try the case impartially as if he had never heard of it before. Upon this testimony, the court was of opinion that he was a competent juror; and accordingly the challenge was disallowed. In this ruling we see no error. The juror was then peremptorily challenged by the defendant, and was excused.

That act also provides, in § 242, that a challenge for implied

bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offence charged, or on whose complaint the prosecution was instituted, or to the defendant;

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offence charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

3. Being the party adverse to the defendant in a civil action, or having complaint against or being accused by him in a criminal prosecution;

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

5. Having served on a trial jury which has tried another person for the offence charged in the indictment;

6. Having been one of the jury formerly sworn to try the same indictment, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it;

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offence;

8. Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offence charged;

9. If the offence charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

The act provides, in § 244, that, "in a challenge for implied bias, one or more of the causes stated in § 242 must be alleged." (Laws of 1878, pp. 111, 112.)

Another act of the territory, passed in March, 1884, declares that "no person shall be disqualified as a juror by reason of

having formed or expressed an opinion upon the matter or cause to be submitted to such jury [juror], founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him. The challenge may be oral, but must be entered in the minutes of the court or of the phonographic reporter." (Laws 1884, p. 124.)

The juror Gabott, challenged for both actual and implied bias, testified on his direct examination, in substance, as follows: that he had heard of the case through the newspapers, and read what was represented to be the evidence; that he had talked about it since that time; that he did not think he had ever expressed an opinion on the case, but that he had formed a qualified opinion; that is, if the evidence were true, or the reports were true; that he had an opinion touching the guilt or innocence of the accused which it would take evidence to remove; but that he thought he could go into the jury-box and sit as if he had never heard of the case, and that what he had heard would not make the least difference. On his cross-examination, he testified that he knew nothing about the case, except what he had read from time to time in the public press; that, if what he had heard turned out to be the facts in the case, he had an opinion, otherwise not; that is, his opinion was a qualified one, and that, according to his present state of mind, he could sit on the jury and determine the case without reference to anything he had heard; that he was not conscious of any bias or prejudice that might prevent him from dealing with the defendant impartially; and that he thought he could try the case according to the law and the evidence given in court. On his reëxamination he further stated that he would be guided by the evidence altogether, without being influenced by any opinion he might then have, or may have previously formed.

The court held that the juror was competent. By the express terms of the statute of 1884 he could not be disqualified as a juror for an opinion formed or expressed upon statements

in public journals, if it appear to the court, upon his declaration under oath or otherwise, that he could and would, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him. We think that evidence, or what purports to be evidence, printed in a newspaper is a "statement in a public journal" within the meaning of the statute; and that the judgment of the court upon the competency of the juror in such cases is conclusive.

The juror Winchester, who was also challenged for actual and implied bias, testified that he had heard of the case through the papers; that he had heard it talked of some years ago; that he believed he had heard what purported to be the evidence as given in the newspapers on previous trials, and believed he had formed and expressed an opinion as to the guilt or innocence of the accused, and though it was an unqualified opinion, it was not a fixed or settled one; that at the time he read the papers, he had formed such an opinion as would have required testimony to remove it from his mind, and if his memory was refreshed as to the testimony there would probably be a renewal of the opinion he had formed; that he had not talked with any one, and could hardly tell the circumstances now; that he believed that his mind was free from any impression, and that he could sit on the jury and try the case precisely as if he had never heard of it or read of any of the facts. To inquiries of the court, the juror repeated, in substance, what he had previously said, that he thought he could sit in the jury-box and try the case according to the evidence without reference to any opinion he may then or theretofore have formed; that he could try defendant impartially according to the evidence, and that he would do so. The court thereupon held that he was competent, and the challenge was disallowed. This ruling disposed of the challenge, and the judgment of the court, for the reasons stated, was conclusive under the statute of March, 1884. The defendant thereupon peremptorily challenged the juror, and he was excused.

The fourth juror, Harker, who was challenged for actual and implied bias by the defendant, was examined on his *voir*

dire, but after hearing his testimony the challenge was disallowed; and thereupon the district attorney peremptorily challenged him, and he was excused.

The challenges for implied bias fell, as there was no specification of the grounds for such challenges, as required by § 242 of the act of 1878.

In capital cases in Utah, the government and the accused are each allowed fifteen peremptory challenges. (Laws of Utah of 1884, c. 48, § 24.) Notwithstanding the peremptory challenges made by the defendant to two of the jurors, he had several such challenges which had not been used when the jury was completed. If, therefore, the ruling of the court in disallowing the challenges to the two for bias, actual or implied, was erroneous, no injury to the defendant followed. Those jurors were not on the jury, and impartial and competent jurors were obtained in their place, to whom no objection was made. *Hayes* v. *Missouri*, *ante*, 68; *Mimms* v. *The State*, 16 Ohio St. 221; *Erwin* v. *The State*, 29 Ohio St. 186, 190. It is therefore only the ruling on the challenge to the juror Gabott which can properly be assigned as error here; and, for the reasons stated, that ruling was in our judgment correct.

2d. The deceased came to his death from a blow inflicted upon the left side of his head, which crushed his skull. A post-mortem examination of the body was made by a physician, who was allowed, against the objection of the defendant, to give his opinion as to the direction from which the blow was delivered, after he had stated that his examination of the body had enabled him to form an intelligent opinion upon that point. The ground of the objection was that the direction in which the blow was delivered was not a matter for the opinion of an expert, but one which should be left to the jury. The court overruled the objection, and the defendant excepted. The witness stated, as his opinion, that the blow was delivered from behind and above the head of the person struck, and from the left toward the right. This testimony was supposed to have some bearing upon the case when considered in connection with the fact that the accused was a left-handed man. On the following morning, counsel on behalf of the prosecu-

tion moved that this evidence should be stricken from the record, and the jury be instructed to disregard it. The counsel for the defendant did not object to that, but he wished the record to show that the application was made on the following morning. The court thereupon instructed the jury that the evidence was stricken out, and that they were not to consider it at all. The defendant now contends that it was error to admit the evidence, and that the error was not cured by striking it out and the instruction to the jury. To this the answer is, 1st, that the evidence was admissible; and, 2d, that, if not admissible, the error was cured by the evidence being stricken out with the accompanying instruction.

The opinions of witnesses are constantly taken as to the result of their observations on a great variety of subjects. All that is required in such cases is that the witnesses should be able to properly make the observations, the result of which they give; and the confidence bestowed on their conclusions will depend upon the extent and completeness of their examination, and the ability with which it is made. The court below, after observing that every person is competent to express an opinion on a question of identity, as applied to persons in his family or to handwriting, and to give his judgment in regard to the size, color, and weight of objects, and to make an estimate as to time and distance, cited a great number of cases illustrative of this doctrine. We quote a passage containing them. "He may state his opinion," says the court, "with regard to sounds, their character, from what they proceed, and the direction from which they seem to come. *State* v. *Shinborn*, 46 N. H. 497; *Commonwealth* v. *Pope*, 103 Mass. 440; *Commonwealth* v. *Dorsey*, 103 Mass. 412. Non-experts have been allowed to testify whether certain hairs were human, *Commonwealth* v. *Dorsey*, 103 Mass. 412; that one person appeared to be sincerely attached to another, *McKee* v. *Nelson*, 4 Cowen, 355 [*S. C.* 15 Am. Dec. 384]; as to whether another was intoxicated, *People* v. *Eastwood*, 14 N. Y. 562; as to whether a person's conduct was insulting, *Raisler* v. *Springer*, 38 Ala. 703 [*S. C.* 82 Am. Dec. 736]; as to resemblance of foot-tracks, *Hotchkiss* v. *Germania Ins. Co.*, 5

Hun, 90; as to value of property, when competent, *Brown* v. *Hoburger*, 52 Barb. 15; *Bank* v. *Mudgett*, 44 N. Y. 514; *Bedell* v. *Long Island Railroad*, 44 N. Y. 367; *Swan* v. *Middlesex Co.*, 101 Mass. 173; *Synder* v. *Western Union Tel. Co.*, 25 Wis. 60; *Brackett* v. *Edgerton*, 14 Minn. 174; as to market value of cattle derived from newspapers, *Cleveland, &c., Railroad* v. *Perkins*, 17 Mich. 296; whether there was hard pan in an excavation, *Currier* v. *Boston & Maine Railroad*, 34 N. H. 498; whether one acted as if she felt sad, *Culver* v. *Dwight*, 6 Gray, 444; as to rate of speed of a railroad train on a certain occasion, *Detroit, &c., Railroad* v. *Von Steinburg*, 17 Mich. 99; as to whether noisome odors render a dwelling uncomfortable, *Kearney* v. *Farrell*, 28 Conn. 317 [*S. C.* 73 Am. Dec. 677]; whether the witness noticed any change in the intelligence or understanding or any want of coherence in the remark of another, *Barker* v. *Comins*, 110 Mass. 477; *Nash* v. *Hunt*, 116 Mass. 237."

Upon the same principle, the testimony of the physician as to the direction from which the blow was delivered was admissible. It was a conclusion of fact which he would naturally draw from the examination of the wound. It was not expert testimony in the strict sense of the term, but a statement of a conclusion of fact, such as men who use their senses constantly draw from what they see and hear in the daily concerns of life. *Conn. Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 620. But, independently of this consideration, as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with the accompanying instruction, cured the error. It is true, in some instances, there may be such strong impressions made upon the minds of a jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal with proper instructions from the court to disregard it. We think the present

case one of that kind. *State* v. *May*, 4 Devereux, Law, 328, 330; *Goodnow* v. *Hill*, 125 Mass. 587, 589; *Smith* v. *Whitman*, 6 Allen, 562; *Hawes* v. *Gustin*, 2 Allen, 402, 406; *Dillin* v. *The People*, 8 Mich. 357, 369; *Specht* v. *Howard*, 16 Wall. 564.

3d. The instruction to the jury, which is the subject of exception, relates to the meaning of the words "reasonable doubt," which should control them in their decision. The following is that portion which bears upon this subject:

"The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. That if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt.

"The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

The word "abiding" here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence. It is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs. Out of the domain of the exact sciences and actual observation there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of

speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities.

In *Commonwealth* v. *Webster*, 5 Cush. (Mass.) 295, 320, [*S. C.* 52 Am. Dec. 711,] the Supreme Judicial Court of Massachusetts stated in its charge that it was not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged against the prisoner was more likely to be true than the contrary, and said: "The evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt."

The difficulty with this instruction is, that the words "to a reasonable and moral certainty" add nothing to the words "beyond a reasonable doubt;" one may require explanation as much as the other. In *Commonwealth* v. *Costley*, 118 Mass. 1, the same court held that, as applied to a judicial trial for crime, the two phrases were synonymous and equivalent, and that each signified such proof as would satisfy the judgment and consciences of the jury that the crime charged had been committed by the defendant, and so satisfy them as to leave no other reasonable conclusion possible. It was there also said, that an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt, had often been held sufficient, without further explanation. In many cases it may undoubtedly be sufficient. It is simple, and as a rule to guide the jury is as intelligible to them generally as any which could be stated, with respect to the conviction they should have of the defendant's guilt to justify a verdict against him. But in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. As a matter of fact, it has been the general practice in this country of courts holding criminal trials to give such explanation or illustration. The rule may be, and often is, rendered obscure by

attempts at definition, which serve to create doubts instead of removing them. But an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion, when an attempted definition might fail. If the evidence produced be of such a convincing character that they would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty that attends all human evidence. The instruction in the case before us is as just a guide to practical men as can well be given; and if it were open to criticism it could not have misled the jury, when considered in connection with the further charge, that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence they should do so, and in that case find him not guilty. The evidence must satisfy the judgment of the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion.

The instruction is not materially different from that given by Lord Tenterden, as repeated and adopted by Chief Baron Pollock, in *Rex* v. *Muller*. "I have heard," said the Chief Baron, addressing the jury, "the late Lord Tenterden frequently lay down a rule which I will pronounce to you in his own language: 'It is not necessary that you should have a certainty which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in life.' No doubt the question before you to-day — involving as it does the life of the prisoner at the bar — must be deemed to be of the highest importance; but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life. To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect." 4 Fost. & Fin., 388–89, note. We are satisfied that the defendant was in no way prejudiced by the instructions of the court.

Syllabus.

4th. On the final argument to the jury, the counsel for the prosecution alluded to the case as the most remarkable one ever tried in the territory, and to "the many times it had been brought before the tribunals." To this latter remark exception was taken. Thereupon the remark was withdrawn by the counsel, and the court said to the jury that the case was to be tried on the evidence, and that they were not to consider it with respect to any previous trial, but only on the evidence given on this trial. The counsel for the defendant now contends that this allusion was in contravention of that section of the act of the territory regulating proceedings in criminal cases, which declares that "the granting of a new trial places the parties in the same position as if no trial had been had," and that "all the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument." (Laws of Utah of 1878, p. 126, § 317.) The object of this law was to prevent the accused from being prejudiced by reference to any former conviction on the same indictment. There was, in fact, no reference to any verdict on a previous trial, but merely a mention of the times the case had been before the courts, so as to magnify its importance. If allusions to previous trials, such as were here made, were to vitiate a subsequent trial, a new element of uncertainty would be introduced into the administration of justice in criminal cases. We do not see that the defendant was in any way prejudiced by such reference. The fact that previous trials had proved unavailing may perhaps have induced greater care and caution on the part of the jury in the consideration of the case.

The judgment of the court below is

Affirmed.

PLUMMER *v.* SARGENT.

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

Argued January 10, 11, 1887. — Decided March 7, 1887.

The reissued letters-patent No. 2355, dated September 11, 1866, granted to the Tucker Manufacturing Company as assignee of Hiram Tucker, for

an improved process of bronzing or coloring iron, and No. 2356, of like date and grantee for the product resulting from that process, are in fact for but one invention, and the new article of manufacture called Tucker bronze is a product which results from the use of the process described in the patent, and not one which may be produced in any other way: and they are not infringed by the manufacture, by the defendants, by the different process used by them, of an article which cannot be distinguished, by mere inspection, from Tucker bronze.

THIS was a bill in equity to restrain the infringement of letters-patent. Decree that the bill be dismissed, from which the complainant appealed. The case is stated in the opinion of the court.

Mr. Elihu G. Loomis and *Mr. James E. Maynadier* for appellant.

Mr. John K. Beach and *Mr. Charles E. Mitchell* for appellees. *Mr. John S. Beach* was with them on the brief.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is a bill in equity to restrain the alleged infringement of reissued letters-patent Nos. 2355 and 2356, dated September 11, 1866, granted to the Tucker Manufacturing Company, as assignee of Hiram Tucker, and owned by the complainant; the former being for an improved process of bronzing or coloring iron, the latter for the product resulting from that process.

The specifications in the reissued patent No. 2355 are as follows:

"Metals have heretofore been lacquered or bronzed by the application of a solution of resin and metallic powders or salts, and dried by exposure to air or heat. Iron has been japanned by covering its surface with oily solutions of asphaltum and pigments and subsequent application of heat sufficient to produce hardness. These are well known operations.

"My invention consists in a process of covering iron with a very thin coating of oil, and then subjecting it to heat, the effect of which is to leave upon the iron a firm film, which is very durable, and gives the iron a highly ornamental appearance, like that of bronze.

"In practice I proceed as follows: The surface of the iron

is cleansed from sand, scale, or other foreign matter, and where fine effects are desired the surface is best made smooth or polished. Under given conditions of heating and oiling the finer the polish, the lighter is the bronze tint produced. In cases where ornamentation is obtained by relief the salient parts should be the most highly polished or most smoothly surfaced in order that the color produced upon them shall not be so deep as it is on those parts which are in the rear, so as to imitate thereby more nearly the effects of genuine bronze, in which its natural oxidation is apt to be worn somewhat away from its salient parts, and therefore lighter in color.

"When the iron is thus prepared, I cover it with a very thin coating of linseed oil, or any oil which is the equivalent therefor, for the purpose here specified (such a coating as I find best attained by applying the oil with a brush, and then rubbing off the oiled surface thoroughly with a rag, sponge, or other suitable implement), and then place it in an oven, where it is submitted to a degree of heat which may be measured by an intensity sufficient to change a brightened surface of clean, unoiled iron to a color varying from a light straw color to a deep blue, the lowest degree of heat producing the lightest colored changes and the lightest bronze, and the highest degree of heat producing the darkest colored changes and the darkest bronze. It is important that the coating of oil be made extremely thin, as a coating of any material thickness will leave a rough or varied surface after the heat is applied. As the oiled iron becomes heated the color obtained will be bronze, of an intensity corresponding to the degree of heat employed; but it should be observed that the heat may be made so intense and so long continued as to destroy the oil, in which case the iron will lose the bronze tint acquired and will assume the dark blue shade.

"The perfection of the results obtained under these instructions will of course depend, in a considerable degree, upon the dexterity and watchfulness of the operator in applying the oil and in regulating the heat.

"In practice I prefer to use boiled linseed oil. When the desired shade of bronzing is obtained, the iron is removed from

the oven or furnace, and, if desired, may again be treated with oil as before, even if not cool, and then again submitted to the action of heat, as described, and the operation of oiling and heating may be repeated indefinitely, each repetition deepening the shade of the bronzing. I recommend that at each repetition the degree of heat should be less than the degree immediately before employed; and in oiling and heating more than once I recommend for the second and succeeding oilings the use of a dry hog-hair brush to take off the surplus oil. The process may be carried to such an extent by repetition of oiling and heating as to produce a very dark color; black even may be thus produced.

"I have specially described linseed oil as preferred by me for the practice of my invention because of its good drying quality and its capacity of giving a good, uniform, smooth film when spread thinly upon the iron, as before described.

"Slight variations from the degree of heat above mentioned may be allowed without departing from the principle of my invention.

"What I claim and desire to secure by letters-patent is the process of ornamenting iron in imitation of bronze by the application of oil and heat, substantially as described."

Reissued patent No. 2356 is for a new article of manufacture, but the description of the method is the same as that contained in the specifications in the patent for the process; the claim, however, being as follows: "What I claim and desire to secure by letters-patent is the new manufacture hereinabove described, consisting of iron ornamented in imitation of bronze by the application of oil and heat, substantially as described."

These two reissues were based upon the surrender of a prior original patent, dated December 15, 1863, covering both claims. These reissued patents were the subject of litigation before Mr. Justice Clifford in *Tucker* v. *The Tucker Manufacturing Company*, 4 Clifford, 397, and before Judge Lowell in *Tucker* v. *Burditt*, 5 Fed. Rep. 808, and *Tucker* v. *Dana*, 7 Fed. Rep. 213. The decree below was in favor of the defendants on the ground that there was no infringement. *Tucker* v. *Sargent & Co.*, 19 Blatchford, 538. The infringement alleged

was in the manufacture and sale of cast-iron butts, samples of which were produced and marked as exhibits. These are described in the opinion of the Circuit Court, from whose decree this appeal is prosecuted, as follows:

"These butts are colored in this way: The sunken parts are first covered with a black japan, and this coat of blacking is baked in an oven at a temperature not exceeding 320 degrees Fahrenheit. This japanning of the sunken parts is immaterial. It is not really claimed to be a Tucker bronzing. The object probably is to make a marked contrast between the sunken and salient parts of the butt. All but the sunken parts are then ground and subjected to a heat of 480 degrees Fahrenheit, which colors the iron a dark straw color. The ground parts of one of the exhibits are nearly or quite blue. A coat of copal varnish of substantial thickness is then put on and baked in a heat of not over 300 degrees Fahrenheit. This produces a material coating of oxidized varnish upon the surface of the iron, which can be scraped up by a rapidly drawn knife-blade as a shaving rolls up before the knife of a plane. It was not claimed by the defendant that the varnish was not oxidized by the heat. No proof was offered by the plaintiff in regard to the oxidation of the iron during the second heating, and I do not think it of importance. The plaintiff relies upon the uncontradicted fact that by successive applications of heat the iron and varnish were oxidized, and if an iron surface oxidized by heat with a coating of varnish oxidized by heat necessarily make Tucker bronze, then the defendant infringes the plaintiff's patents."

In order to determine the question of infringement it is necessary to consider the state of the art at the date of the patent. It appears from the evidence that one F. W. Brocksieper, in the employ of certain firms and companies, the predecessors of the defendant, between 1849 and 1859, as a foreman in the ornamental department of their work, in the year 1857, introduced into the business a mode of treating hat-hooks, coat-hooks, jamb-hooks, sash-fasteners, match-boxes, looking-glass frames, and cast-iron horses for saddlers' windows, in the following way:

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"We had the castings cast with a facing, so as to come out of the sand very nearly entirely free of sand, then those castings rolled, drilled and countersunk, the highest parts or the prominent parts of the ornaments brightened with sand-paper or emery-paper, brushed clean from dust, then sized and baked. In order to handle them easy, those hooks, we had them fastened on a block with a spring and sized them in quantities as they were ordered, let them stand long enough so that the size would not stick to the fingers, then we put them in pans, or on hooks, and put them in the kiln to bake. The size was a mixture of equal parts of turpentine, copal varnish, and linseed oil, and was applied in a very thin coat, put on with a stiff, fine brush as lightly as he could. The kiln was heated to 420 degrees Fahrenheit. Several batches of hooks of from twelve dozen to twenty-four dozen each, between one hundred dozen and two hundred dozen sash-fasteners, about one hundred looking-glass frames, and horses in 'considerable quantities,' were made and sold. The match-boxes were probably made in larger quantities."

It was contended by the plaintiff that this process was not the same as that covered by his patents, for two reasons: 1st, because, as he claimed, the iron was not oxidized by the heat; and, 2d, because the coating of size was too thick to make genuine Tucker bronze. The Circuit Court, in its opinion in this case, agreed upon this point with the plaintiff, that the process and article produced were different from those covered by the plaintiff's patents, on the ground that the coating of baked size over the iron was too thick, although it held that Brocksieper's method must have resulted in oxidizing the iron. The inference was that bright cast iron oxidized and covered with a coat of oxidized oil, varnish, or size might be, but was not necessarily, Tucker bronze. The latter product and process were defined by that court in its opinion as follows:

"Tucker bronze is a new surface of the iron produced by the joint oxidation or by the successive oxidations of the iron and a film of oil or varnish thereon, by means of high heat, and is not a new coating of oxidized oil or varnish upon the iron. The oil must be applied in such a way that after oxidation there is no

substantial covering of baked oil upon the surface of the iron. The surface of the iron is a bronzed surface, because the film of the oil is so thin and is so closely united with the pores of the iron as to be almost a part of it, and does not form a substantial covering like a coat of varnish over the surface of the iron.

"In Tucker bronze which has been subjected to one heat, the film of oil can with difficulty be scraped off with a knife. When the iron has had two or three successive applications of oil, and has been heated two or three times, the oil comes off by scraping in the form of little flakes or of powder.

"Tucker's discovery was, that bright cast iron, covered with a thin film of oil, would take on, by the action of high heat, a new surface resembling bronze."

It was found from the evidence that the defendant covered the oxidized surface of iron with an oxidized coat of varnish, doing no more than what Brocksieper did in 1857, except that he did it in two successive stages instead of one, and for that reason there was no infringement. Although there are two patents, one for a process and the other for a product, there is in fact but one invention; and it may be assumed that the new article of manufacture called Tucker bronze is a product which results from the use of the process described in the patent, and not one which may be produced in any other way. So that, whatever likeness may appear between the product of the process described in the patent and the article made by the defendants, their identity is not established unless it is shown that they are made by the same process. The specimens exhibited in the case, as made by Brocksieper, have not the same external appearance as Tucker bronze; they are easily distinguished by inspection, and the process employed by Brocksieper seems to differ from that of the Tucker patents only in respect to the thickness of the sizing of oil or varnish applied upon the surface of the iron, unless the peculiarity of the Tucker bronze can be attributed to the fact that the thin film of oil or varnish was applied upon the surface of the iron before the application of the heat, and not after. For, although the patent contemplates and describes successive applications of heat, yet in each case it is to an oiled surface of iron. On

the other hand, the method employed by the defendants consists, first, in subjecting the cleansed surface of the iron to a heat of 480 degrees Fahrenheit, sufficient to change its color by oxidizing, and then applying a coat of copal varnish and heating again to a point not in excess of 300 degrees Fahrenheit, which, while sufficient to harden and color the varnish by what is called the process of oxidation, yet is not sufficient to oxidize the iron itself. It is difficult, if not impossible, to distinguish by the eye the result of this process from Tucker bronze made according to the patents, but the two processes differ in the particulars pointed out; the effect in Tucker bronze appearing to be produced by the joint oxidation of the iron and the oil, while in the defendant's product the result is attained by successive heatings, first of the iron, and then of the iron and oil, the heat, in the second step of the process, not being sufficient to cause a joint oxidation of the iron and the oil.

It seems necessarily to follow from this view either that the Tucker patents are void by reason of the anticipation practised by Brocksieper, or that the patented process and product must be restricted to exactly what is described, that is, to a simultaneous and joint oxidation of the iron and the oil after the application of the oil to a cleansed surface of cast iron. To that extent the patents may be sustained, but upon that construction they do not include the process and product of the defendants; there is consequently no infringement.

In opposition to this conclusion it is contended, on the part of the appellants, that the witnesses who testify to the methods employed by Brocksieper in 1857 have confounded in their memory the actual facts in regard to that method as then practised with processes subsequently employed, and which could have been learned only after the issue of the Tucker patent in 1863; and in corroboration of that criticism upon this evidence it is shown that reproductions of the Brocksieper method, made under the eye of the examiner by a competent expert, during the progress of the taking of the testimony, were not distinguishable in appearance from Tucker bronze made according to the patents. We are not, however,

able to adopt that view of the evidence. The fact that by careful workmanship the products are indistinguishable by mere inspection does not establish the identity of the processes, and as the patent for the product must be limited to an article made by the particular process, the inquiry must be determined by a comparison between the methods actually employed. As that used by the defendants differs from that described in the patent, just as that employed by Brocksieper does, the process of the defendants cannot be construed as an infringement without at the same time declaring that used by Brocksieper to be an anticipation.

The decree of the Circuit Court must, therefore, be

Affirmed.

ROSENBAUM *v.* BAUER.

ROSENBAUM *v.* SAN FRANCISCO.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Submitted January 17, 1887. — Decided March 7, 1887.

A Circuit Court of the United States cannot acquire jurisdiction, by removal from a state court, under § 2 of the act of March 3, 1875, c. 137 (18 Stat. 470) of an original proceeding to obtain a mandamus against the treasurer or the board of supervisors of a city, to compel them to take action, in accordance with a statute of the state, to pay the interest or principal of bonds issued by the city.

Section 716 of the Revised Statutes, giving power to a Circuit Court to issue all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law, construed in connection with §§ 1 and 2 of the act of 1875, operates to prevent the issuing by the Circuit Court of a writ of mandamus, except in aid of a jurisdiction previously acquired by that court.

THESE actions were commenced in a state court of California, were removed thence into the Circuit Court of the United States on the plaintiff's motion, and were remanded to the

state court on the defendant's motion. The plaintiff sued out these writs of error. The case is stated in the opinion of the court.

Mr. Attorney General and *Mr. A. L. Rhodes* for plaintiff in error.

Mr. Philip G. Galpin and *Mr. George Flourney, Jr.*, for defendants in error.

Mr. Justice Blatchford delivered the opinion of the court.

On the 13th of October, 1885, Albert S. Rosenbaum brought an action in the Superior Court of the city and county of San Francisco, in the State of California, against John A. Bauer, treasurer of the city and county of San Francisco. The complaint set forth the issuing of certain bonds, called Montgomery Avenue bonds, by the Board of Public Works of the city and county of San Francisco, under an act of the legislature of California, approved April 1, 1872, Stats. of 1871–2, c. 626, entitled "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." The act provided for the creation by taxation of a fund for the payment of interest on the bonds, and of a sinking fund for their redemption; and enacted that whenever such treasurer should have in his custody $10,000 or more belonging to the sinking fund, he should advertise for proposals for the surrender and redemption of the bonds. The complaint alleged that the plaintiff owned twenty-one of the bonds of $1000 each; that the treasurer had in his hands over $12,000 belonging to the sinking fund; that the plaintiff had exhibited his bonds to the treasurer and demanded that he advertise for proposals for the surrender of bonds issued under the act; that he refused so to do; and that no part of such bonds had been paid. The complaint prayed for a judgment that the defendant, "as treasurer of the city and county of San Francisco, be commanded to advertise for the redemption of Montgomery Avenue

bonds, as in section eleven of the act hereinabove referred to provided."

Three days afterwards, the plaintiff filed a petition for the removal of the suit into the Circuit Court of the United States for the District of California, on the ground that the plaintiff was a citizen of New York and the defendant a citizen of California. The state court made an order of removal. The record being filed in the Federal court, the defendant demurred to the complaint, specifying as a ground of demurrer that the Federal court had no jurisdiction of the subject of the action. The case being heard on the demurrer, the court made an order, on the 18th of January, 1886, that the cause be remanded to the state court, "this court having no jurisdiction of this cause in this form." The plaintiff has brought a writ of error to review that order.

The same act provided that an annual tax should be levied on the property therein mentioned to raise money to pay the coupons annexed to the bonds, and another annual tax to create a sinking fund for the redemption of the bonds, the taxes to be levied in the manner in which other taxes are levied, that is, by the Board of Supervisors. The same Rosenbaum, being the owner of twenty-one of the bonds, and of eight matured coupons, of $30 each, attached to each bond, each coupon being for six months' interest, the first of them having matured January 1, 1882, brought an action, on the 12th of December, 1885, in the said Superior Court of the city and county of San Francisco, against the Board of Supervisors of the city and county of San Francisco. The complaint set forth that there were no funds in the hands of the treasurer applicable to the payment of any of the coupons; and that the plaintiff had demanded of the Board that it levy a tax sufficient to pay the coupons, but it had refused so to do. The complaint prayed for a judgment "against said Board of Supervisors, commanding them to levy the tax hereinabove mentioned, and to continue to levy said tax from year to year until all the interest upon said bonds, and said bonds themselves, are fully paid."

On the 21st of December, 1885, the plaintiff filed a petition

for the removal of this latter suit into the Circuit Court of the United States for the District of California, on the ground of diversity of citizenship in the parties. The state court made an order of removal. The defendant made a motion in the Federal court to remand the case to the state court on the ground of want of jurisdiction by the Federal court "of the subject-matter contained in the complaint." On the 24th of May, 1886, the court made an order granting the motion, and the plaintiff has brought a writ of error to review that order.

The Circuit Court, in remanding the causes, 28 Fed. Rep. 223, proceeded on these grounds: (1) That it had always been held by this court that the Circuit Courts had no jurisdiction to award a *mandamus* except as ancillary to some other proceeding establishing a demand, and reducing it to judgment, the *mandamus* being in the nature of process for executing the judgment. (2) That a proceeding for a *mandamus* was not a suit of a civil nature, within the meaning of any provision of the act of March 3, 1875, c. 137, 18 Stat. 470, and was not removable under it.

Prior to the act of 1875, it was well settled that the Circuit Courts had no jurisdiction to issue a writ of *mandamus* in a case like the present.

In *McIntire* v. *Wood*, in 1813, 7 Cranch, 504, it was held that a Circuit Court had no power to issue a *mandamus* to the register of a land office of the United States, commanding him to grant a final certificate of purchase to the plaintiff for lands to which he supposed himself entitled under the laws of the United States. In that case, the plaintiff's alleged right to a certificate of purchase was claimed under the laws of the United States, but this court, speaking by Mr. Justice Johnson, said, that the power of the Circuit Courts to issue the writ was confined by § 14 of the Judiciary Act of 1789, 1 Stat. 81, to those cases in which it might be necessary to the exercise of their jurisdiction. This provision of § 14 appears now in § 716 of the Revised Statutes in these words: "SEC. 716. The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be

necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In *McClung* v. *Silliman*, in 1821, 6 Wheat. 598, a *mandamus* was applied for in a Circuit Court of the United States to compel the register of a land office of the United States to issue papers to show the preëmptive interest of the plaintiff in certain land. The writ was refused. In this court, the case was sought to be distinguished from *McIntire* v. *Wood*, on the ground that the parties were citizens of different states. But the court, speaking again by Mr. Justice Johnson, said that no just inference was to be drawn from the decision in *McIntire* v. *Wood*, in favor of a case in which the Circuit Court was vested with jurisdiction by citizenship under § 11 of the act of 1789. And then, in answer to the argument, that, as the parties were citizens of different states, and competent to sue under § 11, the Circuit Court was, by § 14, vested with power to issue the writ as one "necessary for the exercise of its jurisdiction," the court said: "It cannot be denied that the exercise of this power is necessary to the exercise of jurisdiction in the court below: but why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it. It must exercise this power and compel the emanation of the legal document, or the execution of the legal act by the register of the land office, or the party cannot sue. The 14th section of the act under consideration could only have been intended to vest the power now contended for in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out."

Consistently with the views in those cases, this court, in *Riggs* v. *Johnson County*, in 1867, 6 Wall. 166, held that a Circuit Court had power to issue a *mandamus* to officers of a county, commanding them to levy a tax to pay a judgment rendered in that court against the county for interest on bonds issued by the county, where a statute of the state, under which the bonds were issued, had made such levy obligatory on the county. This ruling has been repeatedly followed since, and rests on the view that the issue of the *mandamus* is an award of execution on the judgment, and is a proceeding

necessary to complete the jurisdiction exercised by rendering the judgment.

In many cases adjudged in this court since *McIntire* v. *Wood*, that case has been referred to as settling the law on the point to which it relates; as in *The Secretary* v. *McGarrahan*, 9 Wall. 298, 311; *Bath County* v. *Amy*, 13 Wall. 244; and *Heine* v. *The Levee Commissioners*, 19 Wall. 655.

In *Bath County* v. *Amy*, in 1871, (*ubi supra*,) the holder of bonds issued by a county in Kentucky applied to the Circuit Court of the United States for a *mandamus* to compel the county court to levy a tax to pay the interest on the bonds, on the ground that a statute of the state required the county court to do so. No judgment had been obtained for the interest. In Kentucky such a proceeding could have been maintained in a court of the state, without a prior judgment, and would have been there treated as a suit of a civil nature at common law, and not a mere incident to another suit. The Circuit Court awarded the *mandamus*, but this court reversed the judgment, holding that it was doubtful whether the writ of *mandamus* was intended to be embraced in the grant of power in the 11th section of the Judiciary Act of 1789, to the Circuit Courts, to take cognizance of suits of a civil nature, at common law, where the diversity of citizenship there specified existed; but that the special provision of the 14th section of the act, while, no doubt, including *mandamus* under the term "other writs," indicated that the power to grant that writ generally was not understood to be covered by the 11th section. Citing the prior cases, the court said: "The writ cannot be used to confer a jurisdiction which the Circuit Court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired."

The same doctrine was applied, in *Graham* v. *Norton*, in 1872, 15 Wall. 427, where a Circuit Court of the United States had affirmed the action of a District Court in granting a *mandamus* to compel a state auditor to issue certificates as to the amount of illegal taxes paid by the applicant, the issuing of such certificates being provided for by a statute of the state. This court held that neither the Circuit Court nor the District Court had jurisdiction to issue the writ.

The same principles have been asserted by this court in cases arising since the act of March 3, 1875; as in *County of Greene* v. *Daniel*, 102 U. S. 187, 195; in *United States* v. *Schurz*, 102 U. S. 378, 393; in *Davenport* v. *County of Dodge*, 105 U. S. 237, 242, 243; and in *Louisiana* v. *Jumel*, 107 U. S. 711, 727.

But now it is contended for the plaintiff in error that the Circuit Court can obtain jurisdiction of these cases by their removal under § 2 of the act of 1875. It was evidently thought that the Circuit Court would have no original cognizance of them, if commenced in that court, for they were not brought in that court, although in the petition for removal in each proceeding the plaintiff states that he was a citizen of New York when it was commenced, and in the petition for removal in the first proceeding he states that Bauer was at its commencement a citizen of California, the defendant in the second proceeding being, when it was brought, a municipal corporation of California. The proceedings were evidently instituted with the purpose of removing them, for the petitions for removal were severally filed by the plaintiff three days and ten days after process was served on the defendant, and nothing was done in the state court but to file a complaint, and to serve a summons, and to take proceedings for a removal.

To maintain the jurisdiction by removal, it is contended that that jurisdiction does not depend on the original jurisdiction of the Circuit Court; that the former may exist without the latter; and that in the present case it does exist.

The only possible ground of jurisdiction in the present cases, is diversity of citizenship; for the right of action claimed does not arise under the Constitution or a law or treaty of the United States. It exists, if at all, under a statute of the state. The state is not alleged to have passed any law imparing the obligation of any contract of which the plaintiff claims the benefit, or to have deprived him of any right secured to him by the Constitution of the United States. In respect to jurisdiction by citizenship, as applicable to this case, § 1 of the act of 1875, in regard to original jurisdiction, and § 2, in regard to jurisdiction by removal, describe the subject-matter of the suit

in terms which are the same legally. In § 1, the suit of which "original cognizance" is given is a suit "of a civil nature, *at common law* or in equity," where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and "in which there shall be a controversy between citizens of different states." In § 2 the language is identical, except that the suit is to be a suit "of a civil nature, *at law* or in equity." In § 11 of the act of 1789, the original cognizance given to the Circuit Courts was of "all suits of a civil nature, at common law or in equity," where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and "the suit is between a citizen of the state where the suit is brought and a citizen of another state." In § 12 of that act, jurisdiction by removal was given to the Circuit Courts of a like suit. Now, if, as has always been held, "original cognizance," under § 11 of the act of 1789, did not exist, of proceedings like those before us, founded on citizenship, it must necessarily follow that original cognizance cannot exist, under § 1 of the act of 1875, of such a proceeding, founded on citizenship. If so, it is impossible to see how, with legally identical language in § 2 with that in § 1, jurisdiction by removal can exist, under § 2 of the act of 1875, of proceedings like those before us, founded on citizenship. This view is entirely aside from the principle which has controlled in some cases, where a restriction as to original jurisdiction, contained in other provisions of § 11 of the act of 1789, did not exist in § 12 of that act, in regard to jurisdiction by removal, or in other removal statutes. Of that character was the restriction in § 11 on the right of an assignee of a chose in action to sue if the suit could not have been prosecuted in the court had the assignment not been made; as illustrated by the cases cited by the plaintiff in error, of *City of Lexington* v. *Butler*, 14 Wall. 282, and *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81.

In *Gaines* v. *Fuentes*, 92 U. S. 10, an application for removal was sustained under the local prejudice act of March 2, 1867, 14 Stat. 558, of a suit to annul a will, on the ground that the act, in authorizing the removal, invested the Federal court by that fact with all needed jurisdiction to adjudicate the case

But that case was not one of a *mandamus*, to which the implied restriction of the statute in respect to that writ was applicable. The same remark may be made as to *Boom Company* v. *Patterson*, 98 U. S. 403, where the removed proceeding was one to condemn lands for the use of a boom company; and as to *Hess* v. *Reynolds*, 113 U. S. 73, where the removal was of a proceeding in a Probate Court to obtain payment of a claim against the estate of a deceased person; and as to *Bliven* v. *New England Screw Co.*, 3 Blatchford, 111, and *Barney* v. *Globe Bank*, 5 Blatchford, 107, where foreign corporations successfully maintained jurisdiction by removal, in ordinary suits, although they could not have been compulsorily brought into the Circuit Court, by original process.

As this court, while §§ 11 and 12 of the act of 1789 were in force, and § 14 of that act was also in force, always held, even where the requisite diversity of citizenship existed, that the restriction of § 14 operated to prevent original cognizance by a Circuit Court, under § 11, of a proceeding by *mandamus* not necessary for the exercise of a jurisdiction which had previously otherwise attached, so, with §§ 1 and 2 of the act of 1875 in force at the same time with § 716 of the Revised Statutes, the restriction of § 716 must operate to prevent cognizance by removal, by a Circuit Court, under § 2 of the act of 1875, even where the requisite diversity of citizenship exists, of a like proceeding by *mandamus*. As was said by this court, speaking by Mr. Justice Miller, in *Hess* v. *Reynolds*, 113 U. S. 73, 79, 80, the language of the repealing clause of the act of 1875, is, "that all acts and parts of acts in conflict with the provisions of this act are hereby repealed," and the statute to be repealed must be in conflict with the act of 1875, or that effect does not follow. There is nothing in § 2, or any other part of the act of 1875, which is in conflict with, or has the effect to abolish, the restriction of § 716, just as there was nothing in § 11 or § 12, or any other part of the act of 1789, which was in conflict with, or had the effect to abolish, the restriction of § 14 of that act.

These cases fall directly within the provision of § 5 of the act of 1875, that if, in any suit removed from a state court

to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly "within the jurisdiction" of said Circuit Court, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require. What is meant by the expression "within the jurisdiction"? It means, within the judicial cognizance — within the capacity to determine the merits of the dispute or controversy, and to grant the relief asked for. The provision does not give countenance to the idea that the suit or proceeding is to be retained in the Circuit Court till brought to a formal adjudication on the merits, when, at that ultimate stage, the court must say that the case is not within its jurisdiction, after the party successfully challenging the jurisdiction has been harassed by expense and injured by delay. But it means what it says, that the dismissal or remanding "shall" be made whenever, "at any time" after the suit is brought or removed to the Circuit Court, it shall appear to the satisfaction of that court that there is, really and substantially, no dispute or controversy of which it has jurisdiction, in the sense above pointed out; the right to have a review by this court of the order dismissing or remanding the suit being given to the aggrieved party at once, instead of his being compelled to await the making of such an order at the end of a full and formal hearing or trial, on issues and proofs, on the merits alleged on either side.

Orders affirmed.

Mr. Justice Bradley, with whom concurred Mr. Justice Harlan and Mr. Justice Matthews, dissenting.

Mr. Justice Harlan and Mr. Justice Matthews agree with me in dissenting from the judgment of the court in this case.

It is a constitutional right of the citizens of the several states having controversies with the citizens of other states, to have a national forum in which such controversies may be liti-

gated. It was one of the declared purposes of the Constitution, that the judicial power of the United States should extend to certain cases enumerated, one of which was, "to controversies between citizens of different states;" and it was declared that this power should be vested in one Supreme Court, and in such inferior courts as the Congress might from time to time ordain and establish; thus making it the duty of Congress to establish such tribunals. If Congress fails in this constitutional duty, the citizens have no redress but the ballot-box. But Congress has not failed. It has established the requisite tribunals, and has invested them with the powers necessary to give the citizens their constitutional rights. Or, if it has failed in any respect, either with regard to persons or causes, we think it has not failed in respect to the class of cases to which the present belong.

Congress, by the act of March 3, 1875, passed to determine the jurisdiction of the Circuit Courts, has declared that they shall have original cognizance, concurrent with the courts of the several states, amongst other things, of all suits of a civil nature at common law or in equity, involving over five hundred dollars, in which there shall be a controversy between citizens of different states; and that any such suit brought in any state court may be removed by either party into the Circuit Court for the proper district. This jurisdiction should be liberally construed so as to give full effect, as far as may be, to the constitutional right, as presumably within the intent of Congress. The terms "suits at common law and in equity," or "suits at law and in equity" (which is the same thing), are, in themselves, of the most general character and of the broadest signification; and this court ought not, by its decisions, to restrict their application. It is not meant by the expression "suits at common law," to confine the jurisdiction of the Circuit Courts to the old technical actions of trespass, trover, trespass on the case, debt, detinue, assumpsit, &c., but it extends to and includes any form of proceeding of a civil nature in which a legal right cognizable by the courts of common law is sought to be judicially enforced, by whatever name, under the new-fangled nomenclature adopted by the different states, the proceeding

may be called. Suits at law and equity include every form of proceeding except those peculiar to Admiralty, Ecclesiastical or Probate and Military jurisdictions. And even in matters savoring of Ecclesiastical process, after an issue has been formed between definite parties, we have held that the controversy came under the head of a suit at law. *Gaines* v. *Fuentes*, 92 U. S. 10, 17; *Hess* v. *Reynolds*, 113 U. S. 73. The broad terms used in the law were purposely employed, as it seems to us, to make the jurisdiction complete to the full extent which the Constitution intended it should have. It is true, that in one or two cases we have intimated a distinction between the extent of jurisdiction given in the first and that given in the second sections of the act of 1875; but that distinction, if well founded, does not affect the present cases, since they arise under the second section, which has been supposed to be the broader of the two, and, in any event, the ground of distinction is not here involved.

Now, a mandamus, which was originally a prerogative writ only, has come to be in many cases, and in most states, a private suit, brought for the purpose of enforcing a private right. This is true in the two cases now before us. The appellant has a money demand against the city and county of San Francisco, and is seeking to collect it in the usual way in which such demands are collectible by the law of procedure of California. The mandamus which he seeks is the mere process for commencing his action, and is a proper process suited to his case. The city and county of San Francisco can set up any defences to the action in this form which it could do in the ordinary action of debt or upon contract. It is essentially a civil suit at law, no matter by what name it is called, — certainly as much so as were the proceedings in *Gaines* v. *Fuentes*, *Hess* v. *Reynolds*, already cited, and in *Boom Company* v. *Patterson*, 98 U. S. 403, 404, where there was an issue to ascertain the value of property taken by virtue of eminent domain. In *Davies* v. *Corbin*, 112 U. S. 36, we sustained a writ of error from this court to the Circuit Court on a judgment in a proceeding for mandamus to carry into effect a judgment for a debt. The Chief Justice there said: "While the writ of mandamus, in

cases like this, partakes of the nature of an execution to enforce the collection of a judgment, it can only be got by instituting an independent suit for that purpose. There must be, first, a showing by the relator in support of his right to the writ; and, second, process to bring in the adverse party, whose action is to be coerced, to show cause, if he can, against it. If he appears and presents a defence, the showings of the parties make up the pleadings in the cause, and any issue of law or fact that may be raised must be judicially determined by the court before the writ can go out. Such a determination is, under the circumstances, a judgment in a civil action brought to secure a right, that is to say, process to enforce a judgment. . . . Such a judgment is, in our opinion, a final judgment in a civil action, within the meaning of that term as used in the statutes regulating writs of error to this court."

In the jurisprudence of California, it has frequently been held that a mandamus is a civil action. It is only necessary to refer to the cases to show that this is a point beyond all dispute. *Perry* v. *Ames*, 26 Cal. 372; *Cariaga* v. *Dryden*, 30 Cal. 244, 246; *Courtwright* v. *Bear River Mining Co.*, 30 Cal. 573, 583; *Knowles* v. *Yeates*, 31 Cal. 90; *People* v. *Kern County*, 45 Cal. 679; *People* v. *Thompson*, 66 Cal. 398.

But it is urged that the power given to the Circuit Courts of the United States to issue writs of mandamus is limited by act of Congress to certain special cases, namely, only where they may be necessary for the exercise of their ordinary jurisdiction, Rev. Stat., § 716, and that, according to the decisions of this court, in suits for the collection of money, the writ can only be used as ancillary to an execution after a judgment has been obtained in an ordinary suit. It is sufficient to say that all of these decisions, except two, relate to the law as it was before the passage of the act of 1875. That act, as we have seen, is expressed in general terms without any qualification as to the writs or process which shall be employed, and repeals any restraining effect of § 716 of the Revised Statutes if in conflict with it. The two cases to which we have referred as decided since the act are *County of Greene* v. *Daniel*, 102 U. S. 187, and *Davenport* v. *County of Dodge*, 105 U. S. 237. But the

point decided in these cases was, that, although the state law gave the remedy of mandamus to compel the levy of taxes for the payment of bonds, an ordinary action might nevertheless be brought on the bonds for the purpose of obtaining a judgment. They do not decide, whatever *dicta* may appear to have been made, that mandamus might not have been brought originally.

The inference drawn from § 716, Rev. Stat., is, that as it grants power to this court and the Circuit Courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law," (which is rightly supposed to include the writ of mandamus,) it must be construed as denying the power to issue that writ in any other case. This conclusion might be admissible if it is restrained to the instance of the particular writ of mandamus which alone was in contemplation; that is, the prerogative writ of mandamus as known to the practice of the King's Bench in England. The object of this section of the statute was to give the courts of the United States the power to issue such a writ when necessary in the exercise of a jurisdiction in which the use of such a writ was conformable to law. But the section had no reference to mandamus as a form of civil action, as it has become in modern times, having a definite purpose and scope, and as distinct in its use, for the purpose of enforcing private rights of a particular description, as are the forms of actions known to the common law, such as assumpsit, debt, or trespass. Viewed as a civil action, authorized by the laws of the state in which the suit is brought, the jurisdiction of the Circuit Courts is established by § 1 of the act of 1875, which embraces "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, . . . in which there shall be a controversy between citizens of different states." If there be such a suit, in which, by the law of the state, the form of proceeding is required to be in mandamus, § 914, Rev. Stat., applies, which requires that "the practice, pleadings, and forms and modes of proceeding in civil cases, other than equity

and admiralty cases, 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." Effect may be given in the present case to this provision of the statute, without running counter to § 716. The fallacy of the argument against the jurisdiction of the Circuit Court, in such cases, is in construing § 716 as an exception out of the general grant of jurisdiction to that court over all suits in which the controversy is between citizens of different states; whereas it is a general grant of power to issue all writs necessary to the exercise of their jurisdiction — a power which would probably have been implied without an express grant.

In our judgment, the cases ought not to have been remanded, and that the judgments of the Circuit Court remanding the same should be reversed.

HERRON *v.* DATER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued January 19, 20, 1887.— Decided March 7, 1887.

In Pennsylvania a warrant and survey, and payment of the purchase money, confer a legal estate as against all but the Commonwealth, together with a legal right of entry which will support ejectment; and this action of ejectment may be maintained by the owner who paid the purchase money, without any conveyance from the person in whose name the application was made and the warrant issued.

The plaintiff in an action of ejectment in Pennsylvania, to prove title, offered in evidence certified copies of (1) an application numbered 12,969, in the names of six separate persons for six separate tracts of four hundred acres each, adjoining lands of A; (2) of old purchase voucher, dated November 26, 1793, also numbered 12,969, in the same names, with like quantities of land also adjoining lands of A; (3) of old purchase blotter dated June 14, 1794, also numbered 12,969, at the side of which were

written the words: "A gen'l rec't wrote," and in the body of which, after the number and date and the name of A, were the words "6 W'r'ts of 400 a's Am't, 2400 a's 50*s* p. c't p'd specie ch. £60 = =. Fees 60*s* p'd, rem'r charge of 168 D's. Rec't d'd." *Held*, (1) That these documents were competent evidence to prove the payment of the money and by whom it was paid; (2) That the money for the six tracts was all paid in full by A; (3) That he was the owner of the warrant by virtue thereof; (4) That notwithstanding the differences between the date of the application and warrant (November 26, 1793), and the date of the receipt of the purchase money (June 14, 1794), the issue of the warrant was, in view of the settled practice in Pennsylvania, evidence of the payment of the purchase money sufficient to establish *prima facie* a legal title in A, which was not liable to be overcome by a subsequent patent from the Commonwealth, purporting on its face, but not otherwise proved, to be connected with the warrant and survey, and under which no claim of title had been asserted for more than seventy-five years.

When the Orphans' Court in Pennsylvania has jurisdiction of a subject matter, its orders, judgments, and decrees therein cannot be impeached collaterally.

The plaintiff in ejectment in Pennsylvania having proved title to the premises by establishing a warrant and survey and payment of the purchase money perfected by return of the deputy surveyor into the land office, evidence on the part of the defendant of a subsequent patent from the Commonwealth, with no proof of its connection with the warrant and survey except recitals to that effect in it, is inadmissible.

EJECTMENT. Plea: The general issue. Judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. R. P. Allen for plaintiffs in error. *Mr. A. H. Dill* and *Mr. John G. Reading, Jr.*, were with him on the brief.

Mr. John W. Ryon and *Mr. James Ryon* for defendants in error. *Mr. Samuel Linn* was with them on the brief.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is an action of ejectment brought by the defendants in error in the Circuit Court of the United States for the Western District of Pennsylvania to recover possession of a tract of land situated in Northumberland and Columbia counties, containing about two hundred and thirty acres. There was a

verdict and judgment in favor of the plaintiffs below, to reverse which this writ of error is brought.

Both parties claim title under the Commonwealth of Pennsylvania. It appears from the bills of exception taken during the progress of the trial that the plaintiffs put in evidence a certified copy of a document called an application, No. 12,969, as follows:

"William Elliott applies for four hundred acres of land on a branch of Roaring Creek, adjoining Dr. Thomas Ruston's lands, in Catawissa Township, Northumberland County.

"Joseph Tyson applies for four hundred acres of land lying one mile north of a road leading from Reading to Sunbury, adjoining Dr. Thomas Ruston's other land, in Catawissa Township, in North'd County.

"William Shannon applies for four hundred acres of land lying one mile north of a road leading from Reading to Sunbury, adjoining other lands of Dr. Thomas Ruston in Catawissa Township, North'd County.

"Lewis Walker applies for four hundred acres of land lying one mile north of a road leading from Reading to Sunbury, adjoining Dr. Thomas Ruston's other lands, in Catawissa Township, North'd County.

"Nathaniel Brown applies for four hundred acres of land on a branch of Roaring Creek, adjoining Dr. Thomas Ruston's lands, in Catawissa Township, North'd County.

"Ebenezer Branham applies for four hundred acres of land on a branch of Roaring Creek, adjoining Dr. Thomas Ruston's lands, in Catawissa Township, North'd County."

Also a certified copy of old purchase voucher No. 12,969, as follows:

"26 November, 1793. Certified copy of old purchase voucher No. 12,969. Joseph Tyson, 400 a's lying one mile north of a road leading from Reading to Sunbury, adjoining Dr. Thomas Ruston's other land, in Northumberland County.

"William Elliott — 400 a's situate on a branch of Roaring Creek, adjoining Dr. Thomas Ruston's other land, in Catawissa Township, — said county.

"Lewis Walker — 400 a's lying one mile north of a road

leading from Reading to Sunbury, adjoining Dr. Thomas Ruston's other land, in said county.

"William Shannon — 400 a's lying one mile north of a road leading from Reading to Sunbury, adjoining Dr. Thomas Ruston's other lands, in said county.

"Ebenezer Branham — 400 a's on a branch of Roaring Creek, joining Dr. Thomas Ruston, in said county.

"Nathaniel Brown — 400 a's on a branch of Roaring Creek, joining land of Dr. Thomas Ruston, in said county.

"Amount, £60 — interest from date thereof.

"[On the side]: A gen'l rec't wrote."

The plaintiffs also offered in evidence a copy of old purchase blotter No. 12,969, as follows:

"1794, June 14. } 12969. Dr. Ruston. 6 W'r'ts of 400 a's Am't, 2400 a's, 50*s* p. c't p'd specie ch., £60 = =

Fees 60*s* p'd, rem'r charge of 168 D's.

"Rec't d'd."

To this the counsel for the defendants objected on two grounds: 1st, that the warrant to Lewis Walker appearing to be dated November 26, 1793, it was not competent to prove payment of the purchase money by Ruston on June 14, 1794; and, 2d, that if any title whatever accrued to Ruston, it would be but a resulting trust, as the plaintiffs did not propose to follow it with any evidence showing a conveyance of the legal title to Ruston or those claiming under him, or any possession of the land by him or them, or the bringing of any action of ejectment to recover it within twenty-one years from the date of the warrant. The objections were overruled, and an exception taken.

The plaintiffs also put in evidence a copy of the warrant to Lewis Walker, dated the 26th of November, 1793, for 400 acres adjoining Dr. Thomas Ruston's other lands; and a copy of a survey for Lewis Walker, dated the 22d of October, 1794, in pursuance of the warrant, containing 371¼ acres. The survey was followed by a certified copy of the return made by William Gray, deputy surveyor, into the land office, show-

ing that on February 23, 1795, he returned to the land office the Lewis Walker survey for 371¼ acres. Warrants and surveys of five other tracts were introduced in evidence in connection with the warrant and survey of the Lewis Walker tract, being the same tracts of land which are mentioned in the application and purchase voucher. The plaintiffs then traced title into Nicholas Le Favre by virtue of a judgment against Thomas Ruston in 1796, and levy on lands of the defendant Ruston, including the Lewis Walker tract, and a sale and conveyance of the same to Le Favre by a marshal's deed. Nicholas Le Favre having died, his will was admitted to probate on the 12th of August, 1815, on which day William R. Smith took out letters of administration with the will annexed. A schedule attached to the will of the testator, of his lands in Pennsylvania, included the Lewis Walker tract for 371¼ acres. In 1836, William R. Smith, the administrator with the will annexed of Nicholas Le Favre, petitioned the Orphans' Court of Philadelphia for an order to sell real estate to pay the debts of the decedent. By further proceedings upon said application in the Orphans' Court of Northumberland County, where a portion of the lands of Le Favre were located, a decree of sale was obtained, and the Lewis Walker tract, among others, was sold on the 9th of May, 1837, to Joseph Brobst, as the property of Nicholas Le Favre. A deed was made to Brobst for the land, and the sale confirmed in Northumberland County, where the lands were located. By sundry mesne conveyances the title of Brobst was vested in the plaintiffs below.

There was evidence tending to show that the lands in controversy were wild and unimproved until 1864, when the parties through whom the plaintiffs claim title took actual possession thereof, and improved the same by the erection of a house and sawmill, and put to work a corps of men for the purpose of proving the coal veins. These operations and expenditures were continued for a period of about eighteen months, at a cost of between $40,000 and $50,000, when the work was suspended as not being profitable, but possession was maintained through agents and tenants until 1875, when the defendants took forcible possession, claiming title.

Opinion of the Court.

The defendants below objected to the admission in evidence of the records from the Orphans' Court of Philadelphia, showing the proceedings resulting in the sale of the lands of Nicholas Le Favre to Joseph Brobst, on the ground that the debts of the decedent, as set forth in the petition of the administrator, to pay which the order of sale issued, were barred by the statute of limitations and their lien extinguished, by reason of which it was claimed that the Orphans' Court had no jurisdiction to grant the order. The objection was overruled, and an exception taken.

There was also evidence introduced by the plaintiffs, which was objected to, tending to show payment of taxes by those under whom the plaintiffs claim.

The defendants below offered in evidence on their part an application of Daniel Reese, Lewis Walker, and others, filed in the land office November 26, 1793, indorsed "Ent'd by Wm. Lane for Daniel Rees;" also the warrant from the Commonwealth to Lewis Walker for 400 acres, dated November 26, 1793; also the survey to Lewis Walker made October 22, 1794, in pursuance of the warrant of November 26, 1793, describing the tract in dispute; and then offered a certified copy of a patent from the Commonwealth of Pennsylvania to Peter Grahl, dated April 12, 1797, for the same tract, which patent contained a recital to the effect that Lewis Walker, by deed dated November 27, 1793, had conveyed the said tract with the appurtenances to Peter Grahl. Counsel for the plaintiffs below objected to the introduction in evidence of this patent on the ground that Dr. Ruston held a prior title to the land from the Commonwealth. This objection was sustained, the court refusing to allow the patent to be read to the jury, to which the defendants excepted.

The defendants below then renewed the offer of the patent to Peter Grahl for the land in dispute, in connection with an offer to prove a connected chain of title from Peter Grahl to themselves, to be followed by proof that they took actual possession of the land in dispute in 1875, paid taxes by redeeming the land from tax sales, made improvements, expended large sums of money in opening coal mines, and have ever

since held actual possession of the land; and also that Nicholas Le Favre, who purchased the alleged title of Dr. Ruston at marshal's sale on October 11, 1803, received notice in October, 1814, of the title of Peter Grahl under the patent to him, and that the plaintiffs below, when they purchased at sheriff's sale in 1872, received notice of the same facts. This offer was rejected, and an exception duly taken.

The court below also refused to allow the defendants to read in evidence certain parts of the return of William Gray, deputy surveyor, to the commissioners of Northumberland County, made in 1796, other parts of which had been read by the plaintiffs below, in order to show that the taxes paid by Dr. Ruston on the lands which he did in fact own in the same county, and paid into the same office during the same time, were paid to or by a different person than the taxes paid on the land in dispute; and to show that there was another tract surveyed by the Commonwealth in the same locality and in the same county in the name of Lewis Walker as warrantee, which was claimed by Dr. Ruston. These offers were also rejected by the court, to which ruling the defendants excepted.

The court below charged the jury, among other things, as follows:

"The plaintiffs put in evidence a certified copy of an ancient paper, dated November 26th, 1793, on file in the land office, designated as old purchase voucher No. 12,969, and in connection therewith a certified copy of an entry, under date of June 14th, 1794, from the old purchase blotter in the land office. These documents were offered to show, and they are evidence tending to show, that Dr. Thomas Ruston was the owner of the Lewis Walker warrant, and paid to the Commonwealth the purchase money for said tract of land."

And also:

"The plaintiffs have shown that by sundry mesne conveyances the title which Nicholas Le Favre thus acquired became vested in them prior to the bringing of this action. In connection with their paper title the plaintiffs gave evidence tending to show that for many years they and those under whom

they claim asserted title to the land and paid taxes thereon without any hostile claim being set up against them until the year 1875, when the defendants took possession. If the evidence on the part of the plaintiffs is believed by the jury, it makes out a *prima facie* case for the plaintiffs, and they are entitled to your verdict upon this branch of their title."

To these charges the defendants excepted. These several rulings of the court are now assigned for error.

In the case of *Sims* v. *Irvine*, 3 Dall. 425, which was an ejectment for land lying in Pennsylvania, decided by this court in 1799, it was said that, in that state, "payment, or, as in this case, consideration passed, and a survey, though unaccompanied by a patent, gave a legal right of entry which is sufficient in ejectment. Why they have been adjudged to give such right, whether from a defect of chancery powers or for other reasons of policy or justice, is not now material. The right once having become an established legal right, and having incorporated itself as such with property and tenures, it remains a legal right notwithstanding any new distribution of judicial powers, and must be regarded by the common law courts of the United States in Pennsylvania as a rule of decision."

The case of *Evans* v. *Patterson*, 4 Wall. 224, 230, decided in 1886, was similar. In that case Mr. Justice Grier, delivering the opinion of the court, said: "The case cannot be made intelligible without a brief notice of the very peculiar land law of Pennsylvania. The proprietors of the province, in the beginning, allowed no one man to locate and survey more than three hundred acres. To evade this rule in after times, it was the custom for speculators in land to make application in the names of third persons, and, having obtained a warrant, to take from them what was called a "deed-poll" or a brief conveyance of their inchoate equitable claim. Pennsylvania, until of late years, had no courts of equity. Hence, in an action of ejectment, the plaintiff might recover without showing a legal title. If he had a prior inchoate or equitable title, either as trustee or *cestui que trust*, he might recover. The courts treated the applicant, or warrantee, as trustee for the party who paid the purchase money, or paid even the surveying fees; for the

purchase money, under the location or application system, was not paid at the time, and sometimes never. When the state succeeded to the title of the proprietors, the application system was abandoned, and warrants were granted on payment of the purchase money for the number of acres for which his warrant called. Hence, where the claimant of the warrant was unable to show his deed-poll, he might recover by showing that he paid the purchase money; that the warrantee whose name was used was, therefore, trustee for him. And an ejectment might also be maintained in the name of the warrantee, although he had no beneficial interest in the land, and had no knowledge of the institution of the suit. See *Campbell* v. *Galbreath*, 1 Watts, 78, and also *Ross* v. *Barker*, 5 Watts, 391, which was decided on the title now in question."

It is equally well established that the action of ejectment may be maintained upon a warrant and survey by the owner who paid the purchase money, without any conveyance from the person in whose name the application was made and the warrant issued. *Brown* v. *Galloway*, Peters C. C. 291; *Willink* v. *Miles*, Peters C. C. 429. It was said by Mr. Justice Washington in *Huidekoper* v. *Burrus*, 1 Wash. C. C. 109, 113, that "the person whose name appears on the warrant is considered as merely a nominal grantee, and a trustee for the person who pays for the warrant and has it executed;" stating, as a matter of fact in the history of the practice of the state, that "wherever one person takes out many warrants he borrows the names of certain persons, no matter who they are." See also *Griffith* v. *Tunckhouser*, Peters C. C. 418; *James* v. *Gordon*, 1 Wash. C. C. 333; *Copley* v. *Riddle*, 2 Wash. C. C. 354. This doctrine is established as the law of Pennsylvania by many decisions of the Supreme Court of that state. In *Duer* v. *Boyd*, 1 S. & R. 203, 210, that court said: "For above fifty years past lands held by warrant and survey, without patents, have been considered as the legal estate in England, subject to the liens of judgments, courtesy, dower, and other incidents of real property.

In *Maclay* v. *Work*, 5 Binney, 154, 158, it is said: "An estate held by warrant and survey, or other imperfect title, without

patent, is of a singular nature. In many, and indeed in most respects, it is considered as a legal estate against all persons but the commonwealth. It is subject to the same laws of descent, devise, and conveyance as the legal estate. Tenancy by the courtesy and in dower are attached to it. An ejectment may be supported on it." And in *Gingrich* v. *Foltz*, 19 Penn. St. 38, 40 [*S. C.* 57 Am. Dec. 631], it is said: "In Pennsylvania a warrant and survey, attended with payment of the purchase money, is to be considered, as against all but the commonwealth, in the same light as the *legal* estate in England, and is not to be distinguished, as to the mode of conveying, entailing, and barring entails, from estates *strictly legal*. . . . If the warrant, survey, and payment of the purchase money constitute the *legal title*, it is impossible to comprehend how the commonwealth can, by any act whatever, after she has parted with that title, prejudice, much less extinguish, it."

Upon this view of the law, it appears from the record that the plaintiffs below proved a legal title to the Lewis Walker tract in controversy in Dr. Thomas Ruston. The old purchase voucher No. 12,969, offered in evidence, shows that the purchase money for the six tracts described was paid by one person; and the receipt, being a copy from the old purchase blotter, also No. 12,969 to correspond, shows that the owner of the warrants, by virtue of the payment of the purchase money, was Dr. Ruston.

Counsel for the plaintiffs in error seek to read the abbreviations in that extract from the old purchase blotter as showing that the purchase money had not been paid in full, but we think it otherwise sufficiently appears, not only on the face of the receipt itself, but also from the statement on the margin of the old purchase voucher, that a general receipt had been given, corroborated by the fact that the warrants were actually issued.

A point is made on behalf of the plaintiffs in error that the issue of the warrant cannot be considered as evidence of the payment of the purchase money, because it is dated prior to the date of the receipt taken from the old purchase blotter, the warrant being dated the 26th of November, 1793, and the

receipt the 14th of June, 1794. This, however, is explained by the practice, known to have existed, that while a warrant was never issued except after the payment of the purchase money, yet it was dated as of the date of the entry in the old purchase voucher, which was the authority given to the surveyor to locate the land, the warrant being subsequently issued so as to relate back to that date.

In *Brown* v. *Galloway*, Peters C. C. 291, Mr. Justice Washington said: A warrant for land "according to long and uniform practice, is dated as of the day of the application, although it is retained until the purchase money is paid, when, and not before, it issues to the party." To the same effect is *Lewis* v. *Meredith*, 3 Wash. C. C. 81.

The competency and value of the two documents from the old purchase voucher and the old purchase blotter, to prove the fact of the payment of the purchase money, and by whom it was paid, are stated by the Supreme Court of Pennsylvania, in the case of *Oliphant* v. *Ferren*, 1 Watts, 57. It is there said that these entries were made by John Keble, who was chief clerk in the Receiver General's Office. Prior to 1823, proof of the payment of the purchase money was made by the production of the original receipt, or the testimony of Keble during his lifetime, and after his death, proof of his handwriting and entry in these books. In 1823, however, by a statute passed during that year, the books themselves, and copies from them, were made *prima facie* evidence.

The matter is thus explained by Judge Huston in his Essay on the History and Nature of Original Titles to Land in the Province and State of Pennsylvania, Charles Huston, p. 335:

"Even on warrants where money was paid, there was sometimes difficulty as to who was the owner. The warrant, being in a name different from that of the claimant on its face, proved nothing. Where the owner, when he took out his warrant, took a receipt for his purchase money and preserved it, this often decided the question of ownership, and it became usual for a plaintiff to recover on such a receipt, without producing any conveyance from the person whose name was used in the warrant. But where the owner either took no receipt,

or it was lost or mislaid, the ownership must be proved by other means. The common books of the land office charged the warrantee with the land and credited him with the payment of the money. When it became necessary to pay the money before you got the warrant, and while John Keble was chief clerk in the Receiver General's Office, he kept an account of who paid the money on every warrant sealed in that office. The entry, however, is not easily understood, except by those acquainted with the office. Every application was numbered successively, as they were handed in, from one up to near twenty thousand. Some of these applications were for a single tract, and many for more than one hundred, the last written on a single sheet of paper, or several sheets attached together. On each of these was marked the date when filed, and the name of the man who payed the money always appeared. When you applied for a warrant, there were marks by which you could refer to and find the application, and from the application and its number and date, you could find the entry in John Keble's blotter, and there see who paid the purchase money. The right to many tracts has been ascertained by searching as here mentioned; and a copy of that blotter under seal of office, is now evidence in a court of justice, by a particular act of assembly. So careful was John Keble that if the person who paid the money told him by whom it was sent, that also appeared in the blotter." Vide, also, *Campbell* v. *Galbreath*, 1 Watts, 70.

There is nothing in the case of *Strimpfler* v. *Roberts*, 18 Penn. St. 283 [*S. C.* 57 Am. Dec. 606], cited and relied upon by the plaintiffs in error, inconsistent with the foregoing. In that case the plaintiffs in the ejectment were permitted to prove that Benson, under whom they claimed, had paid the purchase money, and they did so by the blotters, vouchers, &c., as in the present instance; and it was admitted and decided in that case that such proof established a *prima facie* title in them, but one, however, which might be overcome by proof of the fact that Benson, who appeared to have paid the purchase money, had done so, not on his own behalf, but as agent for others; and that fact

being made to appear, it was held that a patent issued to the assignee of the warrantee conveyed a superior legal title. The conclusion is summed up by Chief Justice Black, in the opinion of the court, as follows (p. 302): "That where a warrant is issued to one person and the purchase money is paid by another, and the patent is afterwards taken out by the nominal warrantee, the right of him who paid the purchase money is gone, unless he takes possession of the land or brings ejectment to recover it within twenty-one years from the date of the warrant; and after that lapse of time he cannot recover, no matter how clearly he may be able to prove that the legal owner was in the beginning a trustee for him. . . . When I say that the suit must be brought within twenty-one years from the date of the warrant, I speak of a case like the present one in which the alleged trust is proved by the naked and solitary fact of the payment of purchase money. Where the *cestui que trust* has superintended the survey, and paid the officer's fees, or exercised other acts of ownership over the land, the presumption in favor of the trustee would perhaps not begin to arise until he did some act of hostility, such as selling his title, or taking out a patent to himself."

In the present case the evidence admitted was held to establish a *prima facie* legal title in Dr. Thomas Ruston. It was sufficient to establish that he paid the purchase money, and the other proof in the case showed that he and those who claimed under him exercised acts of ownership over the property until their possession was disturbed violently by the defendants below in the year 1875. The defendants were able to offer nothing in opposition to this, except the patent under which there had been no claim of title for more than seventy-five years, and which was not connected by any proof, other than its own recitals, with the warrant and survey.

In *Glass* v. *Gilbert*, 58 Penn. St. 266, it was decided that the doctrine of *Strimpfler* v. *Roberts*, 18 Penn. St. 283 [*S. C.* 57 Am. Dec. 606], and *McBarron* v. *Glass*, 30 Penn. St. 133, that a trust will not be sustained between the warrantee and one who has paid the purchase money after twenty-one years, without possession taken by the claimant, &c., does not apply to a

stranger to the title of the warrantee. If twenty-one years elapse before interference by a junior survey, the presumption in favor of the first, although a chamber survey, becomes absolute. It follows from the foregoing that the evidence introduced by the plaintiffs below was competent and sufficient to establish in Dr. Ruston a legal title to the lands in question.

The next assignment of error is founded upon the objection made to the admission of the record and proceedings in the Orphans' Court of Philadelphia County, resulting in the sale of the title of Nicholas Le Favre to the Lewis Walker tract to Joseph Brobst, by the deed of May 9, 1837. This objection was, that it appeared from the face of the petition for the sale of the real estate of the decedent that the debts, to pay which it was alleged that the sale was necessary, were barred by the statute of limitations, and that, as a consequence, the Orphans' Court had no jurisdiction to make the order of sale. The course of proceeding taken in the present case, as shown by the transcript, was, 1st, a petition to the Orphans' Court of Philadelphia for authority to sell, that being the court which had jurisdiction of the accounts of the executor; 2d, a petition to the Orphans' Court of Northumberland County, in which the land was situated, an order of sale granted thereon, and sale made, and, as required by the express provisions of the statute of 1832, then in force, the return of the sale made to and confirmed by the same court sitting in the county where the land is situated. It is scarcely necessary to cite authority in support of the proposition that the orders, judgments, and decrees of the Orphans' Court, in a case where it had jurisdiction of the subject-matter, cannot be impeached collaterally; much less is it so in the present case, because the statute of Pennsylvania of March 29, 1832, 2 Brightly's Purdon's Digest, p. 1279, pl. 3, (11th ed.,) provides as follows: "The Orphans' Court is hereby declared to be a court of record, with all the qualities and incidents of a court of record at common law; its proceedings and decrees in all matters within its jurisdiction shall not be reversed or avoided collaterally in any other court; but they shall be liable to reversal or modification or alteration on appeal to the Supreme Court, as hereinafter

directed." *Iddings* v. *Cairns*, 2 Grant (Penn.), 88; *Riland* v. *Eckret*, 23 Penn. St. 215. In *Dreishner* v. *Allentown Water Co.*, 52 Penn. St. 225, 229, Mr. Justice Strong said: "Orphans' Court decrees are doubtless conclusive. They cannot be impeached collaterally."

The next assignment of error is founded upon the refusal of the court to admit as evidence the certified copy of the patent from the Commonwealth of Pennsylvania to Peter Grahl, dated April 12, 1797, with a recital therein of the fact that Lewis Walker, by deed dated November 27, 1793, had conveyed the tract in question to Peter Grahl. The legal title of Thomas Ruston to the premises in dispute, established by the warrant and survey and payment of the purchase money, was perfected by the return made by the deputy surveyor into the land office on February 23, 1795. According to the doctrine established by the authorities already cited, it was not competent for the Commonwealth of Pennsylvania to affect that title by a subsequent patent to a stranger. Peter Grahl, the patentee, was not connected with the title under the warrant and survey, otherwise than by the recital contained in the patent itself, that the tract had been previously conveyed to him by Lewis Walker. Clearly that recital was not evidence against the plaintiffs, for, if the patent could not take effect against them without it, it could not give any effect to that recital. Their right had already vested prior to the existence of the patent, and the grant to them could not be affected by a subsequent grant to a stranger. That such is the uniform course of decisions in Pennsylvania appears by numerous cases. *Penrose* v. *Griffith*, 4 Binney, 231; *Maclay* v. *Work*, 5 Binney, 154; *Woods* v. *Wilson*, 37 Penn. St. 379; *Delaware & Hudson Canal Co.* v. *Dimock*, 47 Penn. St. 393; *Urket* v. *Coryell*, 5 W. & S. 60; *Balliott* v. *Bauman*, 5 W. & S. 150, 155; *Smith* v. *Vasbinder*, 77 Penn. St. 127, 130.

It is next assigned for error that the court below erred in rejecting that portion of the return of William Gray, deputy surveyor, offered to be read in evidence by the defendants below. That portion of the return related to other surveys in the same township, returned as belonging to Dr. Ruston, and

was offered for the ostensible purpose of explaining that part of the return of William Gray, the deputy surveyor, and the assessment for taxes received in evidence on the part of the plaintiff below, and in order to show that the taxes alleged to have been paid by Dr. Thomas Ruston might have been paid upon other tracts than the Lewis Walker tract in controversy. It seems to us, however, very clear that the offer was rightly rejected; that the part of the return offered related to other lands than the tract in question, was wholly irrelevant to the issue in the case, and did not tend to prove any material fact.

Neither was there any error in the other rulings of the court excepted to, in reference to other offers of evidence by the defendants below, made with the view of showing that Thomas Ruston paid taxes and made claims to other surveys in the name of Lewis Walker than that of the tract in dispute. None of them tended to show that Ruston was not the owner of the Lewis Walker tract in controversy, whatever they may have shown with reference to his claims to other tracts for which warrants and surveys had been made in the same name.

This disposes of all the questions raised by the assignments of error.

We find no error in the record, and the judgment is accordingly

Affirmed.

UNITED STATES *v.* ARJONA.

CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Submitted January 3, 1887. — Decided March 7, 1887.

It is within the constitutional power of Congress to enact laws to provide for the punishment of the offences of counterfeiting notes of a foreign bank or corporation, or of having in possession a plate from which may be printed counterfeits of the notes of a foreign bank or corporation; and it is not necessary to allege in an indictment for such an offence, or to show, that the notes of such a bank or corporation are notes of money or issue of a foreign Government, sovereign, or

power; nor is it necessary to allege that the offence is "an offence against the Law of Nations."

The counterfeiting of foreign securities, whether national or corporate, which have been put out under sanction of public authority at home — especially the counterfeiting of bank notes and bank bills — is an offence against the Law of Nations.

The United States being bound to protect a right secured by the Law of Nations to another nation or its people, Congress has the constitutional power to enact laws for that purpose; but this does not prevent a State from enacting laws to punish the same act when it may be an offence against the authority of the state as well as that of the United States.

INDICTMENT under the act of May 16, 1884, 23 Stat. 22, to prevent and punish the counterfeiting within the United States of notes, bonds, and other securities of foreign governments. The court below certified a Division in Opinion on several points. The case is stated in the opinion of the court.

Mr. Attorney General for plaintiff.

Mr. George W. Wingate and *Mr. Augustus A. Levey* for defendant.

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

This is an indictment containing three counts against Ramon Arjona, for violations of §§ 3 and 6, of the act of May 16, 1884, c. 52, 23 Stat. 22, "to prevent and punish the counterfeiting within the United States of notes, bonds, and other securities of foreign Governments." The first and second counts were found under § 6 of the statute, and the third under § 3.

The statute makes the following things criminal:

1. SEC. 1. Forging or counterfeiting within the United States, with intent to defraud, "any bond, certificate, obligation, or other security of any foreign Government, issued or put forth under the authority of such foreign Government, or any treasury note, bill, or promise to pay issued by such foreign Government, and intended to circulate as money either by law, order, or decree of such foreign Government."

2. SEC. 2. Knowingly, and with intent to defraud, uttering,

passing or putting off in payment or negotiation, within the United States, any forged or counterfeit bonds, &c., such as are described in § 1.

3. SEC. 3. Falsely making, forging or counterfeiting within the United States, with intent to defraud, or knowingly assisting therein, "any bank note or bill issued by a bank or other corporation of any foreign country, and intended by the law or usage of such foreign country to circulate as money, such bank or corporation being authorized by the laws of such country."

4. SEC. 4. Knowingly uttering, passing, putting off or tendering in payment, within the United States, with intent to defraud, any such false or counterfeited bank note or bill as is mentioned in § 3, whether forged or counterfeited in the United States or not.

5. SEC. 5. Having in possession any forged or counterfeit instruments mentioned in the preceding sections, with intent to utter, pass, or put them off, or to deliver them to others, with the intent that they may be uttered or passed.

6. SEC. 6. Having in possession "any plate, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign Government, bank, or corporation, except by lawful authority;" or using such plate, or knowingly permitting or suffering "the same to be used, in counterfeiting such foreign obligations, or any part thereof;" or engraving, or causing or procuring to be engraved, or assisting "in engraving, any plate in the likeness or similitude of any plate designed for the printing of the genuine issues of the obligations of any foreign Government, bank, or corporation;" or printing, photographing, or in any other manner making, executing, or selling, or causing "to be printed, photographed, made, executed, or sold," or aiding "in printing, photographing, making, executing, or selling any engraving, photograph, print, or impression in the likeness of any genuine note, bond, obligation, or other security, or any part thereof, of any foreign Government, bank, or corporation;" or bringing "into the United States . . . any counterfeit plate, engraving, pho-

tograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign Government, bank, or corporation."

The first count of the indictment charges Arjona with having "in his control and custody a certain metallic plate from which there might then and there be printed in part a counterfeit note in the likeness and similitude in part of the notes theretofore issued by a foreign bank, to wit, the bank known as El Banco del Estado de Bolivar, which said bank was then and there a bank authorized by the laws of a foreign state, to wit, the state of Bolivar, said state being then and there one of the states of the United States of Columbia."

In the second count, he is charged with having caused and procured "to be engraved a certain metallic plate in the likeness and similitude of a plate designated for the printing of the genuine issues of the obligations of a foreign bank, that is to say, of the bank notes of the bank known as El Banco del Estado de Bolivar, the same being then and there a bank authorized by the laws of a foreign state, to wit, the state of Bolivar, said state being then and there one of the states of the United States of Columbia."

In the third count, the charge is that he, "unlawfully and with intent to defraud, did cause and procure to be falsely made a certain note in the similitude and resemblance of the notes theretofore issued by a bank of a foreign country, to wit, the bank known as El Banco del Estado de Bolivar, the same being then and there a bank authorized by the laws of one of the states of the United States of Columbia, that is to say, the state of Bolivar, and the notes issued by the said bank being then and by the usage of the said state of Bolivar intended to circulate as money."

To this indictment a demurrer was filed, and the judges holding the court have certified that at the hearing the following questions arose, upon which their opinions were opposed:

1. Whether the third section of the statute is constitutional.

2. Whether the sixth section is constitutional so far as it relates to "foreign banks and corporations."

3. Whether the counterfeiting within the United States of

the notes of a foreign bank or corporation can be constitutionally made by Congress an offence against the law of nations.

4. Whether the obligations of the law of nations, as referred to in the Constitution of the United States, include the punishment of counterfeiting the notes of a foreign bank or corporation, or of having in possession a plate from which may be printed counterfeits of the notes of foreign banks or corporations, as mentioned in the third and sixth sections, "unless it appear or is alleged in the indictment that the notes of said foreign bank or corporation are the notes or money of issue of a foreign Government, prince, potentate, state, or power."

5. Whether, if there is power to "so define the law of nations" as to include the offences mentioned in the third and sixth sections, it is not necessary, in order "to define" the offence, that it be declared in the statute itself "to be an offence against the law of nations."

6. Whether the indictment is sufficient in law.

The fourth of the questions thus stated embraces the 4th, 5th, 6th, 7th, and 8th of those certified, and the fifth embraces the 9th and 10th.

Congress has power to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, Art. I, sec. 8, clause 18; and the Government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. It alone can "regulate commerce with foreign nations," Art. I, sec. 8, clause 3; make treaties and appoint ambassadors and other public ministers and consuls. Art. II, sec. 2, clause 2. A state is expressly prohibited from entering into any "treaty, alliance, or confederation." Art. I, sec. 10, clause 1. Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States. The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, Congress is expressly authorized "to define and punish . . . offences against the law of nations." Art. I, sec. 8, clause 10.

The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized. Vattel, in his Law of Nations, which was first printed at Neuchâtel in 1758, and was translated into English and published in England in 1760, uses this language: "From the principles thus laid down, it is easy to conclude, that if one nation counterfeits the money of another, or if she allows and protects false coiners who presume to do it, she does that nation an injury."[1] When this was written money was the chief thing of this kind that needed protection, but still it was added: "There is another custom more modern, and of no less use to commerce than the establishment of coin, namely, *exchange*, or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other, at very trifling expense, and, if he pleases, without risk. For the same reason that sovereigns are obliged to protect commerce, they are obliged to support this custom, by good laws, in which every merchant, whether citizen or foreigner, may find security. In general, it is equally the interest and duty of every nation to have wise and equitable commercial laws established in the country."[2] Vattel, Law of Nations, Phil. ed. 1876, Book I, chap. 10, pages 46, 47. In a note by Mr. Chitty in his London edition of 1834 it is said: "This is

[1] § 108. Des principes que nous venons d'établir, il est aisé de conclure, que si une Nation contrefait la monnaie d'une autre, ou si elle souffre et protége les faux-monnayeurs qui osent l'entreprendre, elle lui fait injure.

[2] Il est un autre usage plus moderne, et non moins utile au commerce que l'établissement de la monnaie: c'est le *change*, ou le négoce des banquiers, par le moyen duquel un marchand remet d'un bout du monde à l'autre des sommes immenses, presque sans frais, et, s'il le veut, sans péril. Par la même raison que les souverains doivent protéger le commerce, ils sont obligés de soutenir cet usage par de bonnes lois, dans lesquelles tout marchand, étranger ou citoyen, puisse trouver sa sûreté. En général, il est également de l'intérêt et du devoir de toute Nation, d'établir chez elle de sages et justes lois de commerce.

a sound principle, which ought to be extended so as to deny effect to any fraud upon a foreign nation or its subjects." Id. 47, note 50.

This rule was established for the protection of nations in their intercourse with each other. If there were no such intercourse, it would be a matter of no special moment to one nation that its money was counterfeited in another. Its own people could not be defrauded if the false coin did not come among them, and its own sovereignty would not be violated if the counterfeit could not under any circumstances be made to take the place of the true money. But national intercourse includes commercial intercourse between the people of different nations. It is as much the duty of a nation to protect such an intercourse as it is any other, and that is what Vattel meant when he said: "For the same reason that sovereigns are obliged to protect commerce, they are obliged to support this custom;" "namely, *exchange*, or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other," "by good laws, in which every merchant, whether citizen or foreigner, may find security."

In the time of Vattel certificates of the public debt of a nation, government bonds, and other government securities, were rarely seen in any other country than that in which they were put out. Banks of issue were not so common as to need special protection for themselves or the public against forgers and counterfeiters elsewhere than at home, and the great corporations, now so numerous and so important, established by public authority for the promotion of public enterprises, were almost unknown, and certainly they had not got to be extensive borrowers of money wherever it could be had at home or abroad on the faith of their *quasi* public securities. Now, however, the amount of national and corporate debt and of corporate property represented by bonds, certificates, notes, bills, and other forms of commercial securities, which are bought and sold in all the money markets of the world, both in and out of the country under whose authority they were created, is something enormous.

Such being the case, it is easy to see that the same principles

that developed, when it became necessary, the rule of national conduct which was intended to prevent, as far as might be, the counterfeiting of the money of one nation within the dominion of another, and which, in the opinion of so eminent a publicist as Vattel, could be applied to the foreign exchange of bankers, may, with just propriety, be extended to the protection of this more recent custom among bankers of dealing in foreign securities, whether national or corporate, which have been put out under the sanction of public authority at home, and sent abroad as the subjects of trade and commerce. And especially is this so of bank notes and bank bills issued under the authority of law, which, from their very nature, enter into and form part of the circulating medium of exchange — the money — of a country. Under such circumstances, every nation has not only the right to require the protection, as far as possible, of its own credit abroad against fraud, but the banks and other great commercial corporations, which have been created within its own jurisdiction for the advancement of the public good, may call on it to see that their interests are not neglected by a foreign government to whose dominion they have, in the lawful prosecution of their business, become to some extent subjected.

No nation can be more interested in this question than the United States. Their money is practically composed of treasury notes or certificates issued by themselves, or of bank bills issued by banks created under their authority and subject to their control. Their own securities, and those of the states, the cities, and the public corporations, whose interests abroad they alone have the power to guard against foreign national neglect, are found on sale in the principal money markets of Europe. If these securities, whether national, municipal, or corporate, are forged and counterfeited with impunity at the places where they are sold, it is easy to see that a great wrong will be done to the United States and their people. Any uncertainty about the genuineness of the security necessarily depreciates its value as a merchantable commodity, and against this international comity requires that national protection shall, as far as possible, be afforded. If there is neglect

in that, the United States may, with propriety, call on the proper government to provide for the punishment of such an offence, and thus secure the restraining influences of a fear of the consequences of wrong doing. A refusal may not, perhaps, furnish sufficient cause for war, but it would certainly give just ground of complaint, and thus disturb that harmony between the governments which each is bound to cultivate and promote.

But if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other. A right secured by the law of nations to a nation, or its people, is one the United States as the representatives of this nation are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the states. Therefore the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a state from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offence against the authority of a state as well as that of the United States.

Again, our own people may be dealers at home in the public or *quasi* public securities of a foreign government, or of foreign banks or corporations, brought here in the course of our commerce with foreign nations, or sent here from abroad for sale in the money markets of this country. As such they enter into and form part of the foreign commerce of the country. If such securities can be counterfeited here with impunity, our

own people may be made to suffer by a wrong done which affects a business that has been expressly placed by the Constitution under the protection of the government of the United States.

It remains only to consider those questions which present the point whether, in enacting a statute to define and punish an offence against the law of nations, it is necessary, in order "to define" the offence, that it be declared in the statute itself to be "an offence against the law of nations." This statute defines the offence, and if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offence against the law of nations. Such being the case, there is no more need of declaring in the statute that it is such an offence than there would be in any other criminal statute to declare that it was enacted to carry into execution any other particular power vested by the Constitution in the Government of the United States. Whether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress. As has already been seen, it was incumbent on the United States as a nation to use due diligence to prevent any injury to another nation or its people by counterfeiting its money, or its public or *quasi* public securities. This statute was enacted as a means to that end, that is to say, as a means of performing a duty which had been cast on the United States by the law of nations, and it was clearly appropriate legislation for that purpose. Upon its face, therefore, it defines an offence against the law of nations as clearly as if Congress had in express terms so declared. Criminal statutes passed for enforcing and preserving the neutral relations of the United States with other nations were passed by Congress at a very early date; June 5, 1794, c. 50, 1 Stat. 381; June 14, 1797, c. 1, 1 Stat. 520; March 3, 1817, c. 58, 3 Stat. 370; April 20, 1818, c. 88, 3 Stat. 447: and those now in force are found in Title LXVII of the Revised Statutes. These all rest on the same power of Congress that is here invoked, and it has never been supposed they were invalid because they did not expressly declare that the offences there defined were offences against the law of nations.

Syllabus.

If there is anything more in the eleventh question certified than has been already disposed of in answering the others, it is too broad and indefinite for our consideration under the rules which have been long established regulating the practice on a certificate of division.

All the questions certified, except the eleventh, are answered in the affirmative, and as to that, no special answer will be made.

ROBBINS *v.* SHELBY COUNTY TAXING DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

Submitted January 8, 1886. — Argued November 5, 1886. — Decided March 7, 1887.

Chapter 96, § 16, Stats. Tennessee, 1881, enacting that "all drummers and all persons not having a regular licensed house of business in the Taxing District 'of Shelby County,' offering for sale, or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee, the sum of $10 per week, or $25 per month for such privilege," applies to persons soliciting the sale of goods on behalf of individuals or firms doing business in another state; and, so far as it applies to them, it is a regulation of commerce among the states, and violates the provision of the Constitution of the United States which grants to Congress the power to make such regulations.

Interstate commerce cannot be taxed at all by a state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.

The power granted to Congress, to regulate commerce among the states, being exclusive when the subjects are national in their character, or admit only of one uniform system of regulation, the failure of Congress to exercise that power in any case, is an expression of its will that the subject shall be left free from restrictions or impositions upon it by the several states.

A state may enact laws which in practice operate to affect commerce among the states — as by providing in the legitimate exercise of its police power and general jurisdiction, for the security and comfort of persons and the protection of property; by establishing and regulating channels for commercial facilities; by the passage of inspection laws and laws to restrict the sale of articles injurious to health and morals; by the imposition of taxes upon avocations within its borders not interfering with foreign or interstate commerce or employment, or with business exer-

cised under authority of the Constitution of the United States; and in other ways indicated in the opinion of the court, subject in all cases to the limitations therein defined: but the statute of the State of Tennessee, considered in this opinion, is not such a law.

This was an information in a state court of Tennessee, against the plaintiff in error, for doing business in the Taxing District of Shelby County in that state, as a drummer on behalf of a firm doing business in Cincinnati, Ohio, without a license as required by the provision of the statute of Tennessee, which is set out in the opinion of the court. The defendant was found guilty, and this judgment was affirmed by the Supreme Court of the state on appeal. 13 Lea, 303. The defendant sued out this writ of error. The cause was submitted at the last term of court. The court, on the 8th of March, 1886, ordered it argued; and argument was heard accordingly at this term. The case is stated in the opinion of the court.

Mr. Luke E. Wright for plaintiff in error. *Mr. F. T. Edmondson* was with him on the brief.

Mr. S. P. Walker for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This case originated in the following manner: Sabine Robbins, the plaintiff in error, in February, 1884, was engaged at the city of Memphis, in the State of Tennessee, in soliciting the sales of goods for the firm of Rose, Robbins & Co., of Cincinnati, in the State of Ohio, dealers in paper, and other articles of stationery, and exhibited samples for the purpose of effecting such sales, — an employment usually denominated as that of a "drummer." There was in force at that time a statute of Tennessee, relating to the subject of taxation in the Taxing Districts of the state, applicable, however, only to the Taxing Districts of Shelby County, (formerly the city of Memphis,) by which it was enacted, amongst other things, that "All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or

selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege, and no license shall be issued for a longer period than three months." Stats. Tennessee, 1881, c. 96, § 16.

The business of selling by sample and nearly sixty other occupations had been by law declared to be privileges, and were taxed as such, and it was made a misdemeanor, punishable by a fine of not less than five, nor more than fifty dollars, to exercise any of such occupations without having first paid the tax or obtained the license required therefor.

Under this law, Robbins, who had not paid the tax nor taken a license, was prosecuted, convicted and sentenced to pay a fine of ten dollars, together with the state and county tax, and costs; and on appeal to the Supreme Court of the state, the judgment was affirmed. This writ of error is brought to review the judgment of the Supreme Court, on the ground that the law imposing the tax was repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several states.

On the trial of the cause in the inferior court, a jury being waived, the following agreed statement of facts was submitted to the court, to wit:

"Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the — day of ——, 1884, was engaged in the business of drumming in the Taxing District of Shelby County, Tenn.; *i.e.*, soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offence of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or Taxing District police force and carried before the Hon. D. P. Hadden, president of the Taxing District, and fined for the offence of drumming without a license. It is

admitted the firm of 'Rose, Robbins & Co.' are engaged in the selling of paper, writing materials, and such articles as are used in the book stores of the Taxing District of Shelby County, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest."

This was all the evidence, and thereupon the court rendered judgment against the defendant, to which he excepted, and a bill of exceptions was taken.

The principal question argued before the Supreme Court of Tennessee was, as to the constitutionality of the act which imposed the tax on drummers; and the court decided that it was constitutional and valid.

That is the question before us, and it is one of great importance to the people of the United States, both as it respects their business interests and their constitutional rights. It is presented in a nutshell, and does not, at this day, require for its solution any great elaboration of argument or review of authorities. Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following:

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. This was decided in the case of *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319, and was virtually involved in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, and has been confirmed in many subsequent cases, amongst others, in *Brown* v. *Maryland*, 12 Wheat. 419; *The Passenger Cases*, 7 How. 283; *Crandall* v. *Nevada*, 6 Wall. 35, 42; *Ward* v. *Maryland*, 12 Wall. 418, 430; *State Freight Tax Cases*, 15 Wall. 232, 279; *Henderson* v. *Mayor of New York*, 92 U. S. 259, 272; *Railroad Co.* v. *Husen*, 95 U. S. 465, 469; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203; *Wabash, &c., Railway Co.* v. *Illinois*, 118 U. S. 557.

2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons* v. *Ogden*, 9 Wheat. 1, 222, by Mr. Justice Grier in the *Passenger Cases*, 7 How. 283, 462, and has been affirmed in subsequent cases. *State Freight Tax Cases*, 15 Wall. 232, 279; *Railroad Co.* v. *Husen*, 95 U. S. 465, 469; *Welton* v. *Missouri*, 91 U. S. 275, 282; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Brown* v. *Houston*, 114 U. S. 622, 631; *Walling* v. *Michigan*, 116 U. S. 446, 455; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Wabash, &c., Railway Co.* v. *Illinois*, 118 U. S. 557.

3. It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But in making such internal regulations a state cannot impose taxes upon persons

passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject.

For authorities on this last head it is only necessary to refer to those already cited.

In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one state, to sell his goods in another state, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of

articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or a store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and wait for the people of those states to come to him? This would be a silly and ruinous proceeding.

The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly and without due attention to the truth of things.

It may be suggested that the merchant or manufacturer has the post-office at his command, and may solicit orders through the mails. We do not suppose, however, that any one would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the State. Besides, why could not the State to which his letters might be sent, tax him for soliciting orders in this way, as well as in any other way?

The truth is, that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufac-

turer to obtain orders in other states is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. If the right exists, any New York or Chicago merchant visiting New Orleans or Jacksonville, for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts.

But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights

under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them.

To deny to the state the power to lay the tax, or require the license in question, will not, in any perceptible degree, diminish its resources or its just power of taxation. It is very true, that if the goods when sold were in the state, and part of its general mass of property, they would be liable to taxation; but when brought into the state in consequence of the sale they will be equally liable; so that, in the end, the state will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the state and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown* v. *Houston*, 114 U. S. 622. When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them *as* goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. *Brown* v. *Houston*, *qua supra*; *Machine Co.* v. *Gage*, 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself.

It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers — those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of *The State Freight Tax*, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.

A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone.

It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it.

If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which

the commerce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation.

To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the state is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce.

The judgment of the Supreme Court of Tennessee is reversed, and the plaintiff in error must be discharged.

MR. CHIEF JUSTICE WAITE, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE GRAY, dissenting.

I am unable to agree to this judgment. The case, as I understand it, is this:

In January, 1879, the State of Tennessee abolished the charter of the city of Memphis and created the Taxing District of Shelby County as its successor. By a statute passed April 4, 1881, to provide means for the support of the Taxing District, it was, among other things, enacted "that all drummers and all persons not having a licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustees the sum of $10 per week, or $25 per month, for such privilege, and no license shall be issued for a longer period than three months."

Sabine Robbins, a citizen of Ohio, employed by the firm of Rose, Robbins & Co., also citizens of Ohio, engaged in business as merchants at the city of Cincinnati, in that state, has been convicted of a violation of this statute because he solicited trade for his firm in the Taxing District, by the use of samples, without a license. This it is now decided was wrong because

the statute under which the conviction was had, in so far as it applies to the business in which Robbins was engaged, is a regulation of interstate commerce, and, therefore, repugnant to the commerce clause of the Constitution of the United States. To this I cannot give my assent.

The license fee is demanded for the privilege of selling goods by sample within the Taxing District. The fee is exacted from all alike who do that kind of business, unless they have "a licensed house of business" in the district. There is no discrimination between citizens of the state and citizens of other states. The tax is upon the business, and this I have always understood to be lawful, whether the business was carried on by a citizen of the state under whose authority the exaction was made, or a citizen of another state, unless there was discrimination against citizens of other states. In *Osborne* v. *Mobile*, 16 Wall. 481, it is said "the whole court agreed that a tax on business carried on within the state, and without discrimination between its citizens and the citizens of other states, might be constitutionally imposed and collected." And I cannot believe that if Robbins had opened an office for his business within the Taxing District, at which he kept and exhibited his samples, it would be held that he would not be liable to the tax, and this whether he stayed there all the time or came only at intervals. But what can be the difference in principle, so far as this question is concerned, whether he takes a room permanently in a business block of the district where, when he comes, he sends his boxes and exhibits his wares, or engages a room temporarily at a hotel or private house and carries on his business there during his stay? Or even whether he takes his sample boxes around with him to his different customers and shows his wares from them? In either case he goes to the district to ply his trade and make his sales from the goods he exhibits. He does not sell those goods, but he sells others like them. It is true that his business was to solicit orders for his principals, but in doing so he bargained for them, carried on business for them in the district by means of the samples of their goods, which had been furnished him for that purpose. To all intents and purposes he had his goods with him for sale,

for what he sold was like what he exhibited as the subjects of sale. I am unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler, and yet I can hardly believe it would be contended that the provision of the same statute now in question, which fixes a license fee for all peddlers in the district, would be held to be unconstitutional in its application to peddlers who came with their goods from another state and expected to go back again.

As the law is valid so far as the inhabitants of the state are concerned, no inhabitant can engage in this business unless he pays the tax. If citizens of other states cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of Tennessee and in favor of those of other states. This could never have been intended by the legislature, and I cannot believe the Constitution of the United States makes such a thing necessary. The Constitution gives the citizens of each state all the privileges and immunities of citizens in the several states, but this certainly does not guarantee to those who are doing business in states other than their own immunities from taxation on that business to which citizens of the state where the business is carried on are subjected.

This case shows the need of such authority in the states. This Taxing District is situated on the western boundary of Tennessee. To get into another state it is only necessary to cross the Mississippi River to Arkansas. It may be said to be an historical fact that the charter of Memphis was abolished and the Taxing District established because of the oppressive debt of Memphis, and the records of this court furnish abundant evidence of the heavy taxation to which property and business within the limits of both the old corporation and the new have been for many years necessarily subjected. Merchants in Tennessee are by law required to pay taxes on the amount of their stocks on hand and a privilege tax besides. Under these circumstances it is easy to see that if a merchant from another state could carry on a business in the district by sending his agents there with samples of his goods to secure orders for deliveries from his stock at home, he would enjoy a

privilege of exemption from taxation which the local merchant would not have unless in some form he could be subjected to taxation for what he did in the locality. The same would be true in respect to all inhabitants of the state who were sellers by sample in this district, but who had no place of business there. And so they, like citizens of other states, were required to pay for the privilege. Thus all were treated alike, whether they were citizens of Tennessee or of some other state, and under these circumstances I can see no constitutional objection to such a taxation of citizens of the other states for their business in the district.

I have treated the case as a conviction of a "drummer" for selling goods by sample. That is what Robbins was found guilty of, and that is what this statute makes an offence. The license is only required of "drummers and all persons not having a licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein by sample." The Supreme Court of Tennessee decided that this means nothing more than that any person who sells by sample shall pay the tax, and to that I agree. It will be time enough to consider whether a non-resident can be taxed for merely soliciting orders without having samples when such a case arises. That is not this case.

Mr. Justice Field and Mr. Justice Gray concur in this dissent.

CORSON *v.* MARYLAND.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

Argued April 5, 1886. — Reargued November 5, 1886. — Decided March 7, 1887.

The Code of Maryland provided that "no person or corporation other than the grower, maker, or manufacturer, shall barter or sell, or otherwise dispose of, or shall offer for sale any goods, chattels, wares, or merchandise within the state, without first obtaining a license in the manner herein prescribed;" that the application for the license should state on oath "the amount of said applicant's stock of goods, wares, and mer-

Statement of Facts.

chandise generally kept on hand by him, or the concern in which he is engaged, at the principal season of sale; or if said applicant shall not have previously engaged in such trade or business, the amount of such stock he expects to keep as aforesaid;" and it graduated the rate to be paid for the license according to the sworn statement of the applicant's stock in trade, at the principal season of sale, ranging from $15 to $150. A, a citizen and resident of New York, was indicted under this statute for offering to sell by sample in Baltimore, without first obtaining a license, goods for a New York firm, to be shipped by them directly to the purchaser in Baltimore. *Held*, that these enactments in the Code, as applied to A, violated that provision of the Constitution of the United States which grants to Congress the power to make regulations of commerce among the states.

Robbins v. *Shelby County Taxing District*, *ante*, 489, affirmed and applied to this case.

The provisions of the Code of Maryland as amended in 1880, which were questioned in this case, were as follows:

Article 12, *Sec.* 41, provided that "no person or corporation other than the grower, maker, or manufacturer shall barter or sell, or otherwise dispose of, or shall offer for sale, any goods, chattels, wares, or merchandise within this state, without first obtaining a license in the manner herein prescribed." (Then followed certain exceptions not necessary to be here enumerated.)

Sec. 42 provided that "when any person, body politic or corporate, shall propose to sell or barter or dispose of or to offer for sale anything mentioned in the preceding section, except spirituous or fermented liquors, he shall apply to the clerk of the Circuit Court of the county in which he proposes to carry on such selling or bartering, or disposing of goods, wares, chattels, or merchandise, or if he propose to carry on such selling or bartering, or disposing of goods, wares, chattels, or merchandise in the city of Baltimore, to the clerk of the Court of Common Pleas, for a license therefor." (Then followed certain provisions not necessary to be here stated.)

Sec. 43 provided that "upon such application the applicant shall state to the clerk, on oath, . . . the amount of said applicant's stock of goods, wares, and merchandise generally kept on hand by him, or the concern in which he is engaged, at the principal seasons of sale; or if said applicant shall not

have previously engaged in such trade or business, the amount of such stock he expects to keep as aforesaid."

Secs. 44 to 55, inclusive, prescribed the rate or sum to be paid for such license, graduated according to the sworn statement of the applicant's stock in trade, at the principal season of sale; ranging from $15 if the stock exceeded $1000 and was not more than $1500, to $150 if the stock exceeded $40,000.

Sec. 56, as amended, provided that "if the applicant for a license lives out of the country or city wherein he proposes to carry on such business of selling, bartering, or otherwise disposing of, or offering for sale such goods, chattels, wares, and merchandise; or if the applicant lives out of this state, or is unable to apply in person by reason of sickness or bodily infirmity, his or her agent may apply for license and make the affidavit as hereinbefore provided."

The plaintiff in error was indicted for selling by sample to one Kenney, in Baltimore, without first taking out a license therefor as required by the Code.

It was alleged in the indictment that the defendant below was a citizen and resident of the city and State of New York; that the thirty packages of tea so sold were the property of the firm of Rosewell, Skeel & Co., residents and citizens of the city and State of New York, and were stored in the warehouse of said firm in the city of New York; that neither he, the defendant, nor said Rosewell, Skeel & Co., had any store or place of business, temporary or permanent, or any stock in trade other than samples of tea in the State of Maryland, and neither the defendant nor the said Rosewell, Skeel & Co., being the growers, makers, or manufacturers of said thirty packages of tea.

The indictment further charged that neither the defendant nor the said Rosewell, Skeel & Co. intended to keep any stock in the city of Baltimore, or to be engaged in any trade or business in said city or state, otherwise than by selling by samples as aforesaid; that neither had any principal season of sale in said city or state, but that Rosewell, Skeel & Co. had their only place of business in the city of New York, where their stock in trade was and had since been kept, and where their

goods, on being sold, were then and since had been shipped directly to purchasers in the State of Maryland and other parts of the United States.

The defendant demurred to the indictment; his demurrer was overruled, and having waived his right to plead over, judgment was entered against him. This judgment was affirmed by the Court of Appeals of Maryland (57 Maryland, 251). The defendant thereupon sued out this writ of error. The cause was argued at last term, on the 5th April, 1886. A reargument was ordered, and the cause was accordingly argued at this term.

Mr. S. Teakle Wallis and *Mr. Henry D. Loney* for plaintiff in error at October term, 1885. *Mr. Wallis* for same at October term, 1886.

Mr. Charles B. Roberts, Attorney General of Maryland, and *Mr. Charles J. M. Gwinn*, for defendant in error submitted on their brief at each hearing.

Mr. Justice Bradley delivered the opinion of the court.

This case does not differ materially from that of *Robbins* v. *Taxing District of Shelby County*, just decided. The Code of Maryland, as amended in 1880, provides that "no person or corporation other than the grower, maker, or manufacturer shall barter or sell, or otherwise dispose of, or shall offer for sale any goods, chattels, wares, or merchandise within this state, without first obtaining a license in the manner herein prescribed." A violation of this law was made an indictable offence; and the plaintiff in error, a citizen and resident of New York, was indicted for offering to sell, and for selling by sample, in the city of Baltimore, without license, certain goods for a New York firm, to be shipped from New York directly to the purchaser. The plaintiff in error demurred to the indictment, but it was sustained both by the court of original jurisdiction and by the Court of Appeals of Maryland on writ of error. The constitutionality of the law was duly raised, and the law was sustained.

Statement of Facts.

The same principles apply to this case which were considered in that of Robbins, and the same result must be declared.

The judgment of the Court of Appeals of Maryland is reversed, and the plaintiff in error must be discharged.

MR. CHIEF JUSTICE WAITE concurring.

MR. JUSTICE FIELD, MR. JUSTICE GRAY, and myself agree to this judgment, but on different grounds from those stated in the opinion of the court, It is not denied that the statute of Maryland requires a non-resident merchant desiring to sell by sample in that state, to pay for a license to do that business a sum to be ascertained by the amount of his stock in trade in the state where he resides, and in which he has his principal place of business. This differs materially from the statute of Tennessee, which was considered in *Robbins* v. *Taxing District of Shelby County*, just decided, and is in its effect, as we think, a tax on commerce among the states. The charge for the privilege to the non-resident is measured by his capacity for doing business all over the United States, and without any reference to the amount done or to be done in Maryland.

SCHULER *v.* ISRAEL.

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

Submitted January 10, 1887. — Decided March 7, 1887.

A judgment recovered in one court may be pleaded as a defence to a suit on the same cause of action pending in another when by law the cause of action is merged in the judgment.

A garnishee has a right to set up any defence against the attachment process which he could have done against the debtor in the principal action; and if the debtor be insolvent, and owes the garnishee on a note not due for which he has no sufficient security, he is not bound to risk the loss of his debt in answer to the garnishee process.

THIS was an action at law, in the nature of assumpsit, commenced in a state court against defendant in error and a gar-

nishee. Judgment for defendant, and for garnishee. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. D. P. Dyer for appellant.

Mr. J. E. McKeighan for appellees.

Mr. Justice Miller delivered the opinion of the court.

The plaintiff in error, who was plaintiff below, brought two separate suits in the Circuit Court of the city of St. Louis, Missouri, on the same day, against C. W. Israel and J. N. Israel, as partners in the banking business. One case was brought upon a note for the sum of $10,000, and the other upon a draft made by C. W. Israel & Co., for $11,250 on the Laclede Bank, on which payment was refused when presented at the bank and the draft duly protested.

In each of these cases a writ of attachment was issued at the commencement of the suit which was served by way of garnishment on the Laclede Bank, also of St. Louis. An order of publication was made in the state court against C. W. Israel and J. N. Israel on account of their being non-residents, and the two suits were removed into the Circuit Court of the United States for the Eastern District of Missouri, upon the application of the plaintiff, upon the ground that he was a citizen of the state of Kansas and the two Israels were citizens of the state of Texas. They were there consolidated and heard as one case.

J. N. Israel appeared and filed an answer for himself alone in which he made no defence to the suit on the check, but set up as a defence to the suit on the note, that before the institution of the present suit in the Missouri court the plaintiff had commenced an action on the same note in the Circuit Court of the United States for the Northern District of Texas, and had at the time of the plea filed, recovered a judgment against the defendant, J. N. Israel, on said note, whereby he claimed that the note was merged in said judgment, and no judgment could be rendered on it in this action. Judgment was rendered in

favor of plaintiff for the amount of the check. The suit was dismissed by plaintiff before hearing as to C. W. Israel.

The Laclede Bank in its response to the garnishee process served on it under the attachment, and in answer to interrogatories propounded to it by the plaintiff, admitted that there was, on the 24th day of October, 1885, standing on its books to the credit of the three several banking companies of which J. N. Israel was a partner certain sums of money. The attachment process was served on the Laclede Bank, November 2, 1885, and the bank in its answer says that on the 24th of October the said Israel, being wholly insolvent, made, executed, and delivered a deed of general assignment in conformity with the laws of the state of Texas, where he resided, for the benefit of all his creditors, which assignment is set forth in the answer, and that the bank had notice of this assignment immediately after it was made. It further answered that the said J. N. Israel, individually, and as a member of the several banking houses before referred to, namely, C. W. Israel & Co., the Exchange Bank of Harold, and the Exchange Bank of Wichita Falls, was indebted to the Laclede Bank in an amount exceeding all the sums on deposit with that bank at the date of the service of the attachment.

The plaintiff demurred to the answer of the defendant Israel, setting up the judgment recovered in the United States Court for the Northern District of Texas on the note, and he demurred also to the answer of the Laclede Bank as garnishee, and the case was submitted to the court on these demurrers. The court rendered a judgment overruling both demurrers, finding for the defendant Israel in the suit upon the note and rendering judgment against him in the suit on the check. It also discharged the bank as garnishee.

The plaintiff brings this case here by writ of error, and the two questions presented are: first, as to the sufficiency of the answer of J. N. Israel setting up the judgment in the action on the same note in Texas.

While it is certainly true that the pendency of a suit in one court is not a defence, though it may sometimes be good in abatement, to another suit on the same cause of action in

another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action, it may be pleaded as a defence to the action in that court where it is pending and undecided. Neither court would be bound to take notice of the judgment in the other court judicially, but when the matter is pleaded in due time and it is made to appear that a judgment on the same cause of action has been recovered and is in full force and effect, that judgment must be held to merge the evidence of the debt, whether that evidence be parol or written, in the judgment first recovered. Freeman on Judgments, § 221; *Barnes* v. *Gibbs*, 2 Vroom (31 N. J. Law), 317; *McGilvray & Co.* v. *Avery*, 30 Vt. 538; *Rogers* v. *Odell*, 39 N. H. 452; *Bank of North America* v. *Wheeler*, 28 Conn. 433 [*S. C.* 73 Am. Dec. 683]; *Eldred* v. *Bank*, 17 Wall. 545. The court below was right, therefore, in overruling the demurrer to the plea and rendering judgment for the defendant.

As regards the order discharging the garnishee, it seems to us that, without reference to the question of the validity of the assignment of Israel, the answer of the bank sets up a sufficient defence in the fact of the insolvency of J. N. Israel and his indebtedness as partner in the various banking companies above mentioned to the Laclede Bank. The answer of the bank states explicitly that at the time of the service of the summons in garnishment on it, namely, November 2, 1885, it had not, "nor has it since, or has it now, in its possession, custody, or charge, any lands, tenements, goods, chattels, moneys, credits, or effects belonging to the defendants in said cases or either of them. 2d. At said date of garnishment it, the said bank, was not indebted in anywise to said defendants or either of them, nor has it since become so indebted, nor is it now so indebted. 3d. At said date of garnishment said bank was not bound in any contract to pay said defendants, or either of them, any money not then due, nor has it since said date become so indebted."

The bank then goes on to give a detail of its transactions with Israel and his various banks, in which it is shown that

while there was in the bank's hands certain moneys deposited by Israel and his several banking houses, Israel was indebted to the bank in various sums at the time of his failure, October 24, 1885, some of which had matured and others of which had not matured at the time of the service of the garnishee process. But, as Israel and all his banks were insolvent at the time of the service of the garnishee process, we are of opinion that the bank had the right to appropriate any moneys in its hands to the security and payment of these obligations, whether due or not. If we are correct in this proposition, the answer of the bank is sufficient.

As we understand the law concerning the condition of a garnishee in attachment, he has the same rights in defending himself against that process at the time of its service upon him that he would have had against the debtor in the suit for whose property he is called upon to account. And while it may be true that in a suit brought by Israel against the bank it could in an ordinary action at law only make plea of set-off of so much of Israel's debt to the bank as was then due, it could, by filing a bill in chancery in such case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owed it, but which was not due, would be lost, be relieved by a proper decree in equity; and, as a garnishee is only compelled to be responsible for that which, both in law and equity, ought to have gone to pay the principal defendant in the main suit, he can set up all the defences in this proceeding which he would have in either a court of law or a court of equity. *United States* v. *Vaughan*, 3 Binney, 394 [*S. C.* 5 Am. Dec. 375]; *Shattuck* v. *Smith*, 16 Vt. 132; *Ex parte Stephens*, 11 Ves. 24; Drake on Attachment, §§ 528, 531.

The judgment of the Circuit Court is affirmed.

LACLEDE BANK *v.* SCHULER.

SCHULER *v.* LACLEDE BANK.

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

Submitted January 7, 1887. — Decided March 7, 1887.

Without deciding the mooted question whether a check or draft of a person on a bank in which he has deposits operates as an equitable assignment of the fund so on deposit to the holder of the check to the amount of it, it is clear that such check or draft does not bind the fund in the hands of the bank until it has notice of the draft or check by presentation for payment, or otherwise.

Until then, other checks drawn afterward may be paid, or other assignments of the fund, or part of it, may secure priority by giving prior notice.

APPEAL and cross-appeal from a decree upon a bill in equity, filed by Schuler against the Laclede Bank. The case is stated in the opinion of the court.

Mr. David P. Dyer for Schuler.

Mr. J. E. McKeighan for the Laclede Bank and Craig.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal and cross-appeal from a decree of the Circuit Court of the United States for the Eastern District of Missouri.

Harrison B. Schuler, a citizen of the state of Kansas, brought his bill in that court against the Laclede Bank, a corporation under the laws of the state of Missouri, and J. T. Craig, a citizen of the state of Texas. The substance of the bill is, that the plaintiff is the owner and holder of a draft, or bank check, drawn by C. W. Israel & Co. on the Laclede Bank, for the sum of $11,250.00, dated at Henrietta, Texas, October 20, 1885, in favor of the plaintiff, which was duly presented for payment on the 26th day of that month; and

that payment was refused, as the Laclede Bank alleged, on the ground that C. W. Israel & Co., the drawers of the draft, had, on October 24, 1885, made an assignment under the laws of Texas for the benefit of their creditors, of which the said Laclede Bank had been advised by telegraph. The bill proceeds upon the idea that there were funds in the hands of the Laclede Bank to the credit of C. W. Israel & Co. on the presentation of said check for payment, which ought to be applied for that purpose, and charges that, notwithstanding the general assignment for the benefit of creditors made by C. W. Israel & Co. on October 24, 1885, the check in question, made in favor of the plaintiff on October 20, 1885, was an assignment or appropriation of so much of those funds to the benefit of complainant which he is entitled to enforce in this suit.

J. T. Craig, who had become substituted for Davidson, the assignee of C. W. Israel & Co., was also made a party to the suit, and appeared and filed an answer.

The answer of the Laclede Bank, while admitting most of the statements made in the bill, is very long and recites many things not material to the issue as we look upon it, but relies upon two substantial defences to the suit. The first of these is, that on the morning of the 26th day of October, 1885, it received the following telegram from C. W. Israel & Co.: "Henrietta, Texas, 24, [meaning the 24th of October,] Laclede Bank, St. L.: We assigned this day in favor of S. Davidson; hold funds subject to his order. C. W. Israel & Co." It alleges that this telegram was forwarded to the bank as a night message on Saturday night, and, although duly received at the telegraph office, was only delivered at 8 o'clock on Monday morning, and that the check in favor of complainant was presented at the opening of the bank at 10.15 on the same morning, which was the first notice that they had of it. The answer insists that the general assignment, with the notice of it by telegraph, was a complete revocation of the Schuler check, as well as all other checks drawn against this defendant by C. W. Israel & Co., and that the assignment, with this prior notice to the bank, vested in the assignee the better right to

any funds of said C. W. Israel & Co. in the hands of the bank. The answer also sets up transactions between C. W. Israel & Co. and the bank by which said C. W. Israel & Co. would be indebted on a settlement of the transactions between the two banks to the Laclede Bank in a sum beyond anything which they then held on deposit to the credit of C. W. Israel & Co. A part, however, of the transactions which go to make up this claim of set-off against C. W. Israel & Co. consisted of a note or notes discounted by the Laclede Bank for said C. W. Israel & Co., but which had not yet matured. The answer also sets up that C. W. Israel & Co. and the Laclede Bank were corresponding banks, one being in Texas and the other in St. Louis, Missouri, and that there had been a long course of dealing between them, and for this reason they had discounted the notes of C. W. Israel & Co. without any other sufficient security.

Craig, as assignee for C. W. Israel & Co., filed a separate answer, in which he sets out mainly the same matters found in the answer of the Laclede Bank, and he also makes a part of his answer the assignment of C. W. Israel & Co. to Davidson for the benefit of all their creditors.

There were no replications to either of these answers, but a stipulation is filed in regard to facts that are agreed upon by the parties, which closes with this paragraph: "All other facts in the bill and answer not inconsistent herewith are to be taken as part of this agreed statement."

The decree of the court was as follows:

"This cause came on for hearing at this term of the court on the bill of complaint, answers of defendants, and stipulations on file, and the court, being fully advised concerning the premises, finds that at the date of the presentation to the said Laclede Bank of the check set out in the bill of complaint there was to the credit of the account of C. W. Israel & Co. in said bank the sum of $5912.41 subject to the payment of said check, and that said check operated in equity as an assignment of said sum as against said defendants to said complainant.

"It is, therefore, ordered, adjudged, and decreed that the

said complainant have and recover of and from said defendants the said sum of $5912.41, together with interest at six per cent. per annum from the 26th day of October, 1885, amounting to $6073.99, and it is further ordered that execution issue therefor against said defendant, the Laclede Bank."

From this decree both Schuler and the bank appealed. The assignee, Craig, did not appeal.

The question of how far and under what circumstances a check of a depositor in a bank will be considered an equitable assignment to the payee of the check, of all or any portion of the funds or deposits to the credit of the drawer in the bank, is one which has been very much considered of late years in the courts, and about which there is not a unanimity of opinion. In this court it is very well settled that such a check, unless accepted by the bank, will not sustain an action at law by the drawee against the bank, as there is no privity of contract between them. *Marine Bank* v. *Fulton Bank*, 2 Wall. 252; *Bank of Republic* v. *Millard*, 10 Wall. 152; *First National Bank of Washington* v. *Whitman*, 94 U. S. 343.

But while this may be considered as the established doctrine of this court in regard to the rights of the parties at law, and is probably the prevailing doctrine in nearly all the courts, it is urged in this case and several respectable courts have so decided, that such a check is an appropriation of the amount for which it is drawn of the funds of the drawer in the hands of the bank. *Roberts* v. *Austin, Corbin & Co.*, 26 Iowa, 315; *Fogaties* v. *State Bank*, 12 Rich. (S. C.) Law, 518 [*S. C.* 78 Am. Dec. 468]; *Munn* v. *Burch*, 25 Ill. 32; *German Savings Inst.* v. *Adae*, 1 McCrary C. C. 501.

But however this doctrine may operate to secure an equitable interest in the fund deposited in the bank to the credit of the drawer after notice to the bank of the check, or presentation to it for payment — a question which we do not here decide — we are of opinion, that, as to the bank itself, the holder of the fund, and its duties and obligations in regard to it, the bank remains unaffected by the execution of such a check until notice has been given to it or demand made upon it for its payment.

Opinion of the Court.

In the case before us it is a conceded fact that before the bank had any knowledge or notice whatever of the check on which the plaintiff brings this suit, it had received a distinct notification from the drawer of that check that he had made a general assignment for the benefit of his creditors, with an express direction to hold the funds subject to the order of the assignee. Therefore, even if the check could be considered as an attempt on the part of C. W. Israel & Co. to assign or appropriate this amount in the hands of the bank to Schuler, the general assignment for the benefit of all their creditors of all their assets, including those in the hands of the bank, was made and brought to the attention of the bank with directions to turn them over to this assignee before it had any notice of the check in favor of Schuler.

The learned judge who decided the case on the circuit rested his judgment, in an opinion which is found in the record, on the proposition that, as between these two equities, namely, the equities of the general creditors under the assignment to Davidson, and this implied assignment in equity by the drawing of the check, the latter was superior. In this it would seem that he was somewhat influenced by the fact that he was enabled to trace the sources of some of the deposits to the credit of C. W. Israel & Co., in the Laclede Bank, to money which in a roundabout way had been collected for the payment of a debt to Schuler, and had finally been deposited to the credit of C. W. Israel & Co. in the Laclede Bank. But there is no allegation in the bill, nor any evidence in the testimony, nor any reason to believe that the bank knew anything of this connection between the sums received from several of the banks with which Israel was connected at different times and the debt of Schuler. This is expressly denied, and we can see no reason why the bank should be held in any way to regard the deposit made by C. W. Israel & Co. as, in law or in equity, funds in which Schuler had an interest. It must, therefore, be left entirely out of the argument in the contest between the bank and Schuler.

Apart from this matter, it is not easy to see any valid reason why the assignment of an insolvent debtor, for the equal

benefit of all his creditors, and all his property, does not confer on those creditors an equity equal to that of the holder of an unpaid check upon his banker. The holder of this check comes into the distribution of the funds in the hands of the assignee for his share of those funds with other creditors. The mere fact that he had received a check, a few days before the making of the assignment, on the bank, which had not been presented until after the general assignment was made and notified to the bank, does not seem, in and of itself, to give any such superiority of right. The assignment was complete and perfect, and vested in the assignee the right to all the property of the assignor immediately upon its execution and delivery, with due formalities, to the assignee, and the check of this assignee, like the check of Israel & Co., could have been paid by the bank with safety, if first presented. The check given by the same assignor a few days before was only an acknowledgment of a debt by that assignor, and became no valid claim upon the funds against which it was drawn until the holder of those funds was notified of its existence. This, we think, is the fair result of the authorities on that subject.

In the case of *Spain* v. *Hamilton's Administrator*, 1 Wall. 604, 624, this court says:

"Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice."

The same principle is also laid down in *Christmas* v. *Russell*, 14 Wall. 69; Story's Eq. Juris. §§ 1047, 1057, 1035*a*. See especially the authorities cited in note 1 to this latter section.

See also *Ward* v. *Morrison*, 25 Vt. 593, 599, and *Loomis* v. *Loomis*, 26 Vt. 198.

For these reasons we are of opinion that at the time of the presentation of the check to the bank, the bank held no funds subject to its payment, whether we consider the delivery of it by C. W. Israel & Co. to Schuler as intended to create an equitable assignment or not. An earnest effort is made in the argument of counsel in this court to impeach the general assignment as being void under the laws of Texas, where it was made, and also in the state of Missouri, where this fund was. As there is nothing in the statute of Missouri which would make this assignment absolutely void, and there is nothing brought to our attention to prove that it was void by the laws of Texas, and as the assignment, though mentioned in the original bill of complainant, is not assailed, nor any ground set forth to show its invalidity, we do not think there is any reason why it should not be held in this proceeding to be a valid assignment. As this assignment had the effect when the bank was notified of it to transfer to the assignee all right to any funds in its hands which Israel could assert, we need not consider the other questions connected with the case.

The result of these views is, that

The decree against the bank must be reversed and the case remanded, with instructions to dismiss the bill.

CARTER COUNTY *v.* SINTON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Submitted January 7, 1887. — Decided March 7, 1887.

When the title of a statute of a state clearly and distinctly expresses the whole object of the legislature in the enactment, and there is nothing in the body of the act which is not germane to what is there expressed, the act sufficiently complies with a requirement in the constitution of the State that no law "shall relate to more than one subject, and that shall be expressed in the title;" although some provisions in the act

Statement of Facts.

respecting details in the execution of the purpose of the legislature may not be expressed in the title.

The act of the legislature of Kentucky of January 30, 1878, respecting the compromise and settlement of the county of Carter with its creditors is not in conflict with the provision in the constitution of the State that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

Carter County in Kentucky under legislative authority subscribed to the capital stock of a railroad company, and issued its negotiable coupon bonds in payment of the subscription. Subsequently Boyd and Elliott counties were created, in each of which were included townships which formed part of Carter County when the subscription was made and the bonds issued, and in each case legislative provision was made for the continuation of the liability of the persons and property set off to the new counties on the subscription. Default being made in the payment of interest, an act was passed in 1878 authorizing the County Court of Carter County to compromise and settle with the holders of the bonds on behalf of Carter County, and on behalf of the parts of the other counties taken from Carter County, and a compromise was made under which new bonds of Carter County and of those parts of each of the other counties taken from Carter County were issued. Default being made in the payment of interest due on these latter bonds, a holder of the coupons brought suit against Carter County to recover on them. *Held:* (1) That the legislature had authority under the constitution of Kentucky to authorize the County Court of Carter County to bind those parts of the counties of Boyd and Elliott taken from Carter County; (2) that under the act of 1878 the County Court of Carter County was authorized to contract for the issue of negotiable bonds of the county and of the parts of the county in order to retire the old negotiable bonds of the county; (3) that in the suit to recover upon the coupons of the new bonds, it was not necessary to make the parts of Boyd and Elliott counties, which had been parts of Carter County, parties to the suit.

THIS was a suit brought against the county of Carter to recover the amount due on certain bonds and interest coupons, issued under the following circumstances: By an act of the General Assembly of Kentucky "to incorporate the Lexington and Big Sandy Railroad Company," approved January 9, 1852, and an act amendatory thereof, approved March 1, 1854, the county of Carter was authorized to subscribe $75,000 to the stock of the company, and to issue its bonds to raise the money to pay therefor. Under this authority the subscription was made and seventy-five bonds of $1000 each issued by the county. These bonds were in the usual form of negotiable

coupon bonds, payable to the order of the railroad company thirty years from date, with interest at the rate of six per cent. per annum, semiannually at the Bank of America, New York. The railroad company indorsed them in blank, and all but one afterwards came into the hands of Joseph C. Butler and L. Worthington, citizens of Ohio, as purchasers for value before maturity.

In 1859, after this subscription was made, and while the bonds issued on that account were outstanding, the county of Boyd was created by the General Assembly of Kentucky, which included within its boundaries a part of the original county of Carter. In 1869 the county of Elliott was created, and this took in another part of Carter, but in each of the acts creating the new counties it was provided:

"That nothing in this act shall be construed so as to release the citizens and property now subject, or which may hereafter become subject, to taxation within the boundaries of Carter County, included in the first section of this act, from being held and made liable for the bonds and interest, issued to the Lexington and Big Sandy Railroad Company, as though this act had never been passed."

Default having been made in the payment of interest on the bonds, suits were brought by Butler against Carter County for the recovery of the amount due on coupons attached to the bonds he held. The suits resulted in judgments against the county. Afterwards the following act, approved January 30, 1878, was passed by the General Assembly of Kentucky:

"An Act authorizing the county of Carter, and those parts of Boyd and Elliott taken from Carter County, to compromise and settle with the holders of the bonds and coupons of interest executed by Carter County in its subscription to the capital stock of the Lexington and Big Sandy Railroad Company, and to levy and collect a tax for that purpose.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. That power and authority is hereby given to the county of Carter, and those parts of the counties of Boyd and

Elliott taken from Carter County, to compromise and settle with the holders of the bonds and coupons of interest executed by Carter County in its subscription to the capital stock of the Lexington and Big Sandy Railroad Company. Said compromise and settlement shall be made by the Carter County court, composed of the county judge and a majority of the justices of the peace in commission of Carter County, for and on behalf of the county of Carter, and those parts of the counties of Boyd and Elliott taken from Carter County. Said court may make said compromise through a commission appointed for that purpose; but before the same shall become binding on the county of Carter it shall be approved by the Carter County court, constituted as county levy courts are required by law to be constituted. Said court may execute to the holders of said bonds and coupons of interest, severally, the obligations of the county of Carter and those parts of the counties of Boyd and Elliott taken from Carter County in their formation, which shall be signed by the county judge of Carter County, and attested by the clerk of said court. Said obligations shall contain such stipulations as to interest as may be agreed upon by the court and holders of said bonds and coupons of interest, or either of them, but not at a greater rate than six per cent. per annum, payable semiannually. Said obligations shall be due and payable at such times, and be for such amounts, as may be agreed for by the court and holder or holders of said bonds and coupons."

The next three sections of the act contain provisions for the levy and collection of taxes, to pay the interest and principal of the compromise bonds, upon persons and property within the limits of Carter County, as it was when the debt was originally created. The fifth and last section is as follows:

"§ 5. This act shall take effect and be in force from and after its passage; but nothing in this act shall be so construed as to affect or make more valid the bonds and coupons of interest given by Carter County in its subscription to the capital stock of the Lexington and Big Sandy Railroad Company than they were before the passage of this act."

Under the authority of this statute a compromise was made

with the holders of the original bonds, by which the county court of Carter County issued 119 new bonds of the county of Carter and those parts of the counties of Elliott and Boyd taken from Carter County, each for the sum of one thousand dollars, payable to Henry Peachey and Richard O. Butler, executors of Joseph C. Butler, or bearer, with semiannual interest warrants at the rate of six per cent. per annum attached. The principal of the bonds was made payable at different dates.

David Sinton, the defendant in error, purchased nine of these bonds for value before maturity, and five hundred and forty of the coupons, and this suit was brought to recover the amount due thereon. Originally the suit included other bonds and coupons, but, as it was discontinued so far as they were concerned before judgment, no questions arise in this court as to them.

To a petition setting forth the foregoing facts the county demurred: 1, because the petition did not state facts sufficient to constitute a cause of action; and, 2, because the petition shows a defect of parties, plaintiff and defendant. This demurrer was overruled. *Sinton* v. *County of Carter*, 23 Fed. Rep. 535. The defendant then filed an answer, some paragraphs of which were stricken out on motion, and others demurred to, and the demurrer sustained. As no point was made on this branch of the case, a further statement of it is not necessary.

The court gave judgment against the county for $29,121.54, and to reverse that judgment this writ of error was brought.

Mr. W. Lindsay and *Mr. A. Duvall* for plaintiff in error.

Mr. George Hoadly, *Mr. Edgar M. Johnson*, *Mr. Edward Colston*, *Mr. George Hoadly, Jr.*, and *Mr. James O'Hara*, for defendant in error.

Mr. Chief Justice Waite, after stating the facts reported above, delivered the opinion of the court.

The principal points presented by the argument of the plaintiff arise on the demurrer to the petition, and they may be stated thus:

1. The act of January 30, 1878, is void by the constitution of Kentucky, because the subject to which it relates is not clearly expressed in its title.

2. The act is also unconstitutional and void because it vests in the county court of Carter County the power to bind the parts of Elliott and Boyd counties which had been set off from Carter.

3. The act gave no authority to the county court of Carter County to issue negotiable securities which pass by delivery and in the hands of innocent holders are free from defences which would be good as between the original parties.

4. There is a defect of parties defendant, because Carter County is sued alone without joining "those parts of Boyd and Elliott counties taken from Carter."

1. As to the title of the act.

The provision of the constitution of Kentucky relied on is Art. II, § 37, as follows:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

Undoubtedly the design of this provision was, as is said in *Pennington* v. *Woolfolk*, 79 Ky. 20, "to prevent the use of *deceptive* titles as a cover for vicious legislation, by enabling members of the General Assembly to form such opinion of the nature of a bill by merely hearing it read by its title;" but as early as 1859 the Court of Appeals said in *Phillips* v. *Covington & Cincinnati Bridge Company*, 2 Met. (Ky.) 219, 221: "This prohibition should receive a reasonable and not a technical construction; and looking to the evil intended to be remedied, it should be applied to such acts of the legislature alone as are obviously within its spirit and meaning. None of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in its title." This is in accord with the decisions of this court in *Montclair* v. *Ramsdell*, 107 U. S. 147, where we followed the rulings of the Supreme Court of New Jersey upon a similar provision in the constitution of that state; in

Jonesboro City v. *Cairo & St. Louis Railroad*, 110 U. S. 192, and *Mahomet* v. *Quakenbush*, 117 U. S. 509, where the constitution of Illinois and the decisions of the Supreme Court of that state were considered; and in *Otoe County* v. *Baldwin*, 111 U. S. 1, which had reference to the constitution of Nebraska and the settled rule of decision in that state; and in *Ashley School District* v. *Hall*, 113 U. S. 135, which arose in Iowa. It is enough if the law has but one general object, and that object is fairly expressed in its title. Cooley on Const. Lim., 1st ed. 144, § 2; 4th ed. 175.

Here the title is "An act authorizing the county of Carter, and those parts of the counties of Boyd and Elliott taken from Carter County, to compromise and settle with the holders of the bonds and coupons of interest executed by Carter County in its subscription to the capital stock of the Lexington and Big Sandy Railroad Company, and to levy and collect a tax for that purpose." This clearly and distinctly expresses the whole object of the legislation, and there is nothing in the body of the act itself which is not in every way germane to what is there expressed. No one interested in the subject matter of the law could be put off his guard by hearing the bill read by its title. True, it does not state that the county court of Carter County is to act as the representative of the parts of Boyd and Elliott counties, as well as the county of Carter, in making the compromise, or that bonds are to be issued for the purpose of carrying it out, but all this is matter of detail, suitable to the single purpose the legislature had in view, namely, a settlement and compromise with the holders of bonds issued by Carter County before its division, and for which the present Carter County and those parts of Boyd and Elliott which were taken from the old county were liable. It is difficult to see how the subject of the legislation could be stated more clearly without making the title of the act "a detailed statement, or an index or abstract of its contents," which all agree is not necessary. *Montclair* v. *Ramsdell*, 107 U. S. 155.

2. The authority of the county court of Carter County to bind "those parts of the counties of Boyd and Elliott taken from Carter County."

If we understand correctly the position of the county as to this branch of the case, it is that the legislature had no power to authorize the county court of Carter County to act for these parts of counties in compromising the old debt for which they were held, because they were no longer parts of that county, and no opportunity was given them to participate in the arrangement. These parts of counties have no separate organization of their own, corporate or otherwise. For all county purposes, except this debt contracted by Carter County when they were included within its boundaries, they are subject to the government of the counties to which they now respectively belong; but for the debt, they still remain a part of Carter. Such is clearly the effect of that provision in the acts establishing the new counties which declared that the liability of citizens and property in the territory set off from Carter for taxation on account of the bonds and interest should continue the same "as though this act had never been passed." Had the acts never been passed, no one would doubt the power of the legislature to give the county court of Carter the authority to make the settlement in the same way now provided for, even though these parts of the county did not have a justice of the peace in commission to take part in the deliberations. And this because the county court was made the agent of the county, and of those whose property was subject to taxation, for the transaction of this business. The legislature might have appointed a commission for the same purpose, or it might have selected any other suitable agency. In order to bind the county or the tax-payers, it was not necessary that the tax-payers should vote on the subject, or that they should participate in an election of the body that was to act in the matter. All that was properly within the discretion of the legislature. No new debt was to be created, and no new subscription to the stock of a railroad company was to be made. All that had to be done was to compromise and settle an existing debt, and to substitute new liabilities on terms to be agreed on for an old one. Certainly it was within the power of the legislature to designate a suitable agency for that purpose, and what could be more suitable than that department of the governing

body of Carter County which was intrusted with the management of its financial affairs? The cases of *Allison* v. *Louisville & Harrod's Creek and Westport Railway Company*, 9 Bush, 247, 253, and 10 Bush, 1; *Scuffletown Fence Co.* v. *McAllister*, 12 Bush, 312; *Cypress Pond Draining Co.* v. *Hooper*, 2 Met. (Ky.) 350; and *Mercer County Court* v. *Kentucky River Navigation Co.*, 8 Bush, 300, referred to in the argument of counsel, all relate to the creation of new liabilities, not to the settlement of old ones.

3. The right to issue negotiable securities.

It is no doubt true that, without sufficient legislative authority, a municipality cannot issue commercial paper, which will be free from equitable defences in the hands of innocent holders, *Claiborne County* v. *Brooks*, 111 U. S. 400; but, in our opinion, that authority was given here. The county of Carter was authorized to borrow money and to issue its bonds therefor to pay its subscription to the stock of the railroad company. This, all agree, was sufficient authority to issue bonds which were negotiable, and the averments in the declaration are that the bonds which were in fact issued had that character. The debt to be compromised, therefore, under the act of 1878, was a debt which had been created by the issue of such bonds, and the authority was to execute to the "holders of said bonds and coupons of interest" "the obligations of said county of Carter and those parts of the counties of Boyd and Elliott taken from Carter County in their formation, which shall be signed by the county judge of Carter County and attested by the clerk of said court." They were to contain such stipulations as to interest, not exceeding six per cent. per annum, and to be made due and payable at such times, as might be agreed on. As the new obligations were to be executed to take up and cancel old negotiable securities to a large amount, and were to be made payable at a future time, there cannot be a doubt of the intention of the legislature to authorize the execution of "obligations" negotiable in form and in law, if necessary to secure a settlement. The authority to include in the obligations such stipulations as to interest as might be agreed on clearly implies authority to

attach interest coupons, and everything indicates a purpose to invest the court with all the powers as to the form of the obligations that were necessary to enable it to meet the requirements of the holders of the outstanding bonds and coupons in this particular.

4. The want of parties.

As we have already said, the parts of Boyd and Elliott counties which are interested in this matter have no separate organization of their own, and they remain for all the purposes of this debt a part of Carter County. A suit against Carter County on the bonds is, therefore, a suit against them, and a judgment against that county will be payable out of taxes collected within the boundaries of the original county under the provisions of the act of 1878.

A suggestion was made in the argument for the county of a variance between the bond described in the declaration and that which was actually issued, but this is a matter which we cannot consider, as there is no copy of the bond as issued in the record.

Another objection is made to the form of the declaration in that it does not meet the requirements of § 113 of the Civil Code of Kentucky, and set out distinctly in separate paragraphs each one of the sixty separate causes of action sued on. The objection cannot be taken by general demurrer, and besides it does not seem to have been made below.

The objection to the action of the court in respect to the answer is so little relied on that it is only necessary to say we see no error in what was done.

The judgment is affirmed.

ACCIDENT INSURANCE COMPANY *v.* CRANDAL.

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

Submitted December 21, 1886. — Decided March 7, 1887.

The refusal of the court to instruct the jury, at the close of the plaintiff's evidence, that he is not entitled to recover, cannot be assigned for error, if the defendant afterwards introduces evidence.

A policy of insurance against "bodily injuries, effected through external, accidental and violent means," and occasioning death or complete disability to do business; provided that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries;" covers a death by hanging one's self while insane.

Statements in an application for a policy of insurance, expressing the applicant's understanding of what will be the effect of the insurance, cannot control the legal construction of the policy afterwards issued and accepted, although the application warrants the facts stated therein to be true, and the policy is expressed to be made "in consideration of the warranties made in the application."

THIS was an action against an accident insurance company upon a policy beginning thus:

"In consideration of the warranties made in the application for this insurance, and of the sum of fifty dollars, this company hereby insures Edward M. Crandal, by occupation, profession or employment a president of the Crandal Manufacturing Company," in the sum of ten thousand dollars for twelve months, ending May 23, 1885, payable to his wife, the original plaintiff, "within thirty days after sufficient proof that the insured at any time within the continuance of this policy shall have sustained bodily injuries, effected through external, accidental and violent means, within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof; or if the insured shall sustain bodily injuries by means as aforesaid, which shall, independently of all other causes, immediately and

wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time caused thereby in the sum of fifty dollars per week for such period of continuous total disability as shall immediately follow the accident and injuries as aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident."

Then followed certain conditions, the material part of which was as follows: "Provided always, that this insurance shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign; nor to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by the taking of poison, or by any surgical operation or medical or mechanical treatment; and no claim shall be made under this policy when the death or injury may have been caused by duelling, fighting, wrestling, unnecessary lifting, or by over-exertion, or by suicide, or by freezing, or sunstroke, or self-inflicted injuries."

The application was signed by the assured, and began as follows:

"The undersigned hereby applies for a policy of insurance against bodily injuries effected through external and accidental violence, said policy to be based upon the following statement of facts, which I hereby warrant to be true."

The rest of the application consisted of fifteen numbered paragraphs, stating the name, age, residence and occupation of the applicant, the amount, term and payee of the policy applied for; affirming that he had never been "subject to fits, disorders of the brain, or any bodily or mental infirmity," that he had not "in contemplation any special journey or any hazardous undertaking," and that "his habits of life are correct and temperate;" and expressing his understanding of the effect of the insurance in several particulars; the last of which was as follows:

"15. I am aware that this insurance will not extend to hernia, nor to any bodily injury of which there shall be no

Statement of Facts.

external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to death or disability caused wholly or in part by bodily infirmities or by disease, or by the taking of poison, or by any surgical operation or medical or mechanical treatment, nor to any case except when the accidental injury shall be the proximate and sole cause of disability or death."

The assured died July 7, 1884; and the plaintiff soon afterwards gave to the defendant written notice and proofs of the death, which stated that the assured, while temporarily insane, hanged himself with a pair of suspenders attached to a door-knob in his bedroom. At the trial, the plaintiff introduced evidence that the death of the assured was caused by strangulation from his so hanging himself; and, against the defendant's objection and exception, was permitted to introduce evidence tending to show that he was insane at the time. At the close of the plaintiff's evidence, the defendant moved the court to instruct the jury that under the law and the evidence in the case the plaintiff was not entitled to recover. The court overruled the motion, and the defendant excepted. The defendant then introduced evidence, and the case was argued to the jury.

The jury, under instructions to which no exception was taken, and in answer to specific questions from the court, returned a special verdict that Edward M. Crandal made the application; that the defendant issued the policy; that the premiums were fully paid, and the policy was in force at the time of his death; that he hanged himself on July 7, 1884, and thereof died on the same day; that he was insane at the time of his act of self-destruction; and that due notice and proof of death were given to the defendant; and, according to what, upon these facts, the opinion of the court in matter of law might be, found for the plaintiff in the full amount of the policy, or for the defendant.

The court overruled a motion for a new trial, and rendered judgment on the verdict for the plaintiff. 27 Fed. Rep. 40. The defendant sued out this writ of error.

Mr. Emerson B. Tuttle for plaintiff in error cited: *Mallory* v. *Travellers' Ins. Co.*, 47 N. Y. 52; *Providence Ins. Co.* v. *Martin*, 32 Maryland, 310; *North American Ins. Co.* v. *Burroughs*, 69 Penn. St. 43; *Pollock* v. *United States Accident Association*, 102 Penn. St. 230; *Schneider* v. *Provident Ins Co.*, 24 Wis. 28; *Bayless* v. *Travellers' Ins. Co.*, 14 Blatchford, 143; *Life Ins. Co.* v. *Terry*, 15 Wall. 580; *Gay* v. *Union Ins. Co.*, 9 Blatchford, 142; *Breasted* v. *Farmers' Loan & Trust Co.*, 8 N. Y. 299 [*S. C.* 59 Am. Dec. 482]; *Connecticut Ins. Co.* v. *Groom*, 86 Penn. St. 92; *Nimick* v. *Mutual Benefit Ins. Co.*, 10 Amer. Law Reg. (N. S.) 101; *Estabrook* v. *Union Ins. Co.*, 54 Maine, 224; *St. Louis Ins. Co.* v. *Graves*, 6 Bush, 268; *Insurance Co.* v. *Tweed*, 7 Wall. 44; *Ins. Co.* v. *Transportation Co.*, 12 Wall. 194: *Winspear* v. *Accident Ins. Co.*, 6 Q. B. D. 42; *Brady* v. *Northwestern Ins. Co.*, 11 Mich. 425; *McCarthy* v. *Travellers' Ins. Co.*, 8 Bissell, 362; *Peters* v. *Warren Ins. Co.*, 14 Pet. 99; *General Ins. Co.* v. *Sherwood*, 14 How. 351; *St. John* v. *American Ins. Co.*, 11 N. Y. 516; *Strong* v. *Sun Ins. Co.*, 31 N. Y. 103; *Lewis* v. *Springfield Ins. Co.*, 10 Gray, 159; *Montoya* v. *London Assurance Co.*, 6 Exch. 451; *De Gogorza* v. *Knickerbocker Ins. Co.*, 65 N. Y. 232.

Mr. George C. Fry for defendant in error.

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

The refusal of the court to instruct the jury, at the close of the plaintiff's evidence, that she was not entitled to recover, cannot be assigned for error, because the defendant at the time of requesting such an instruction had not rested its case, but afterwards went on and introduced evidence in its own behalf. *Grand Trunk Railway* v. *Cummings*, 106 U. S. 700; *Bradley* v. *Poole*, 98 Mass. 169. The subsequent instructions to the jury were not excepted to. No error is assigned in the previous rulings upon evidence, except in the admission, against the defendant's objection and exception, of evidence tending to prove the insanity of the assured. The only other matter open upon this record is whether the judgment for the plaintiff is supported by the special verdict, which finds that, while the

policy was in force, the assured died by hanging himself, being at the time insane, and that due notice and proof of death were afterwards given.

The single question to be decided therefore is, whether a policy of insurance against "bodily injuries, effected through external, accidental and violent means," and occasioning death or complete disability to do business; and providing that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries;" covers a death by hanging one's self while insane.

The decisions upon the effect of a policy of life insurance, which provides that it shall be void if the assured "shall die by suicide," or "shall die by his own hand," go far towards determining this question. This court, on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words "sane or insane," does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act, or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect. *Life Ins. Co.* v. *Terry*, 15 Wall. 580; *Bigelow* v. *Berkshire Ins. Co.*, 93 U. S. 284; *Insurance Co.* v. *Rodel*, 95 U. S. 232; *Manhattan Ins. Co.* v. *Broughton*, 109 U. S. 121. In the last case, which was one in which the assured hanged himself while insane, the court, repeating the words used by Mr. Justice Nelson, when Chief Justice of New York, said that "self-destruction by a fellow-being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose," and "was no more his act, in the sense of the law, than if he had been impelled by irresistible physical power." 109 U. S. 132; *Breasted* v. *Farmers' Loan & Trust Co.*, 4 Hill, 73. In a like case, Vice Chancellor Wood (since Lord Chancellor Hatherley) observed, that the deceased was "subject to that which is really just as much an accident as if he had fallen from the

top of a house." *Horn* v. *Anglo-Australian Ins. Co.*, 30 Law Journal (N. S.) Ch. 511; *S. C.* 7 Jurist (N. S.) 673. And in another case, Chief Justice Appleton said, that "the insane suicide no more dies by his own hand than the suicide by mistake or accident," and that, under such a policy, "death by the hands of the insured, whether by accident, mistake, or in a fit of insanity, is to be governed by one and the same rule." *Eastabrook* v. *Union Ins. Co.*, 54 Maine, 224, 227, 229.

Many of the cases cited for the plaintiff in error are inconsistent with the settled law of this court, as shown by the decisions above mentioned.

In this state of the law, there can be no doubt that the assured did not die "by suicide," within the meaning of this policy; and the same reasons are conclusive against holding that he died by "self-inflicted injuries." If self-killing, "suicide," "dying by his own hand," cannot be predicated of an insane person, no more can "self-inflicted injuries;" for in either case it is not his act.

Nor does the case come within the clause which provides that the insurance shall not extend to "death or disability which may have been caused wholly or in part by bodily infirmities or disease."

If insanity could be considered as coming within this clause, it would be doubtful, to say the least, whether, under the rule of the law of insurance which attributes an injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured, or anything but the act of hanging himself, could be held to be the cause of his death. *Scheffer* v. *Railroad Co.*, 105 U. S. 249, 252; *Trew* v. *Railway Passengers' Assurance Co.*, 5 H. & N. 211, and 6 H. & N. 839, 845; *Reynolds* v. *Accidental Ins. Co.*, 22 Law Times (N. S.) 820; *Winspear* v. *Accident Ins. Co.*, 42 Law Times (N. S.) 900; affirmed, 6 Q. B. D. 42; *Lawrence* v. *Accidental Ins. Co.*, 7 Q. B. D. 216, 221; *Scheiderer* v. *Travellers' Ins. Co.*, 58 Wisconsin, 13.

But the words "bodily infirmities or disease" do not include insanity. Although, as suggested by Mr. Justice Hunt in *Life Ins. Co.* v. *Terry*, 15 Wall. 589, insanity or unsoundness

of mind often, if not always, is accompanied by, or results from, disease of the body, still, in the common speech of mankind, mental are distinguished from bodily diseases. In the phrase "bodily infirmities or disease," the word "bodily" grammatically applies to "disease," as well as to "infirmities;" and it cannot but be so applied, without disregarding the fundamental rule of interpretation, that policies of insurance are to be construed most strongly against the insurers who frame them. The prefix of "bodily" hardly affects the meaning of "infirmities," and it is difficult to conjecture any purpose in inserting it in this proviso, other than to exclude mental disease from the enumeration of the causes of death or disability to which the insurance does not extend.

In the argument for the plaintiff in error, some stress was laid on the fact that the concluding paragraph of the application differs in form of expression, so as to include mental as well as bodily diseases. It is by no means clear that this is so; but if it were, it would not affect the case. The whole application is not made part of the contract, and the only mention of it in the policy is in the opening words, "In consideration of the warranties made in the application for this insurance." This does not include all the statements in the application, but only those which are warranties. Some of them may be; others clearly are not. The statements as to the age, occupation, previous state of health and present habits of the assured, and as to his other insurance, may be warranties on his part. Those as to the amount, terms and payee of the policy applied for, certainly are not. The statements expressing his understanding of what will be the effect of the insurance are statements not of fact, but of law, and cannot control the legal construction of the policy afterwards issued and accepted.

The death of the assured not having been the effect of any cause specified in the proviso of the policy, and not coming within any warranty in the application, the question recurs whether it is within the general words of the leading sentence of the policy, by which he is declared to be insured "against bodily injuries effected through external, accidental and violent means." This sentence does not, like the proviso, speak

of what the injury is "caused by;" but it looks only to the "means" by which it is effected. No one doubts that hanging is a violent means of death. As it affects the body from without, it is external, just as suffocation by drowning was held to be, in the cases of *Trew*, *Reynolds* and *Winspear*, above cited. And, according to the decisions as to suicide under policies of life insurance, before referred to, it cannot, when done by an insane person, be held to be other than accidental.

The result is, that the judgment of the Circuit Court in favor of the plaintiff was correct, and must be

Affirmed.

FLETCHER *v.* FULLER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

Argued January 18, 19, 1887. — Decided March 7, 1887.

Defendants in ejectment having produced a regular chain of title under a deed from a grandson of the original owner of a lot in Rhode Island, including the land in controversy, which was executed in 1768 and recorded soon afterwards in the land records of the town in which it was situated; and having shown that the ancestors in title paid the taxes on said lot for twenty years preceding 1805, and that afterward, up to the trial of the action in 1882, a period of seventy-seven years, they or their ancestors in title had uninterruptedly paid the taxes on the lot; and having shown an entry in 1835 by their ancestor upon the lot under a deed, for the purpose of quarrying a ledge of rock running through it, and the quarrying of the ledge with occasional intervals from 1846 to the commencement of this action in 1874, a period of twenty-eight years, the said entry being made with claim of title to the whole lot. *Held*, in an action brought by the heirs of the devisee of the original proprietor, under a will executed in 1749, and probated in 1756, none of whom had made any claim to the premises for three quarters of a century after the death of the original proprietor, under whose will they now assert title, nor paid taxes on the property, nor after that time ever taken possession of the premises or paid taxes upon them, that the jury might presume a deed to the grandson from the original proprietor, or from his devisee, to quiet the possession of the defendants claiming under such grandson; and that in making such presumption the jury were not to be restricted to consideration of

Argument for Plaintiff in Error.

what they fairly supposed actually occurred, but to what may have occurred, and seems requisite to quiet title in the possessors. It is sufficient that the evidence leads to the conclusion, that the deed might have been executed, and that its execution would be a solution of difficulties arising from its non-execution.

Though a presumption of a deed may be rebutted by proof of facts inconsistent with its supposed existence, yet, where no such facts are shown, and the things done and the things omitted, with regard to the property in controversy, by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, the jury may be instructed that it is their duty to presume such a conveyance, and thus quiet the possession.

Though as a general rule, it is only where the possession has been actual, open, and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land, that the presumption of a deed can be invoked; yet that presumption may properly be invoked where a proprietary right has been exercised beyond such statutory period, although the exclusive possession of the whole property, to which the right is asserted, may have been occasionally interrupted during such period if, in addition to the actual possession, there have been other open acts of ownership.

The assessment of taxes on an entire parcel of real estate to the person in possession under claim of title, and to his ancestors and privies in estate, for over a hundred years, is powerful evidence of a claim of right to the whole lot: and, taken in connection with the exclusive working of a quarry on the estate for more than twenty years under claim of title to the whole tract, by virtue of conveyances in which it was described, may authorize a jury to infer continuous possession of the whole, notwithstanding a temporary and occasional intrusion by others upon a different part of the tract, which did not interfere with the work.

EJECTMENT for a tract of land in Rhode Island. Verdict for plaintiff, and judgment on the verdict. Defendants sued out this writ of error. The case is stated in the opinion of the court.

Mr. William H. Greene and *Mr. James Tillinghast* (*Mr. Charles Hart* was with them on the brief) for plaintiffs in error cited: *Lehigh Valley Railroad* v. *McFarlan*, 43 N. J. Law, 605; *Hillary* v. *Waller*, 12 Ves. 239, 252; *Casey's Lessee* v. *Inloes*, 1 Gill 430, 503 [*S. C.* 39 Am. Dec. 658]; *Sumner* v. *Child*, 2 Conn. 607; *Williams* v. *Donell*, 2 Head, 695; *Coolidge* v. *Learned*, 8 Pick. 504; *Durant* v. *Ritchie*, 4 Mason, 45; *Clarke* v. *Cross*, 2 R. I. 440; *Beckford* v. *Wade*, 17 Ves.

87; *Union Savings Bank* v. *Taber*, 13 R. I. 683; *United States* v. *Dickson*, 15 Pet. 141; *Mowry* v. *Providence*, 10 R. I. 52; *Ewing* v. *Burnet*, 11 Pet. 41; *Sailor* v. *Hertzogg*, 10 Penn. St. 296; *Farrar* v. *Fessenden*, 39 N. H. 268; *Little* v. *Downing*, 37 N. H. 355; *Webb* v. *Richardson*, 42 Vt. 465, 474; *Paine* v. *Hutchins*, 49 Vt. 314; *St. Louis Public Schools* v. *Risley's Heirs*, 40 Missouri, 356, 370; *Davis* v. *Easley*, 13 Ill. 192; *Elwell* v. *Hinckley*, 138 Mass. 225; *Glascock* v. *Hughes*, 55 Texas, 461; *Ricard* v. *Williams*, 7 Wheat. 59, 105; *Cheney* v. *Watkins*, 1 Harr. & Johns. 527 [*S. C.* 2 Am. Dec. 530]; *Draper* v. *Shoot*, 25 Missouri, 197 [*S. C.* 69 Am. Dec. 462]; *Tingley* v. *Providence*, 8 R. I. 493; *McClung* v. *Ross*, 5 Wheat. 116; *Campbell* v. *Point Street Iron Works*, 12 R. I. 452; *Burdick* v. *Burdick*, 15 R. I. 574.

Mr. Livingston Scott and *Mr. Elisha C. Mowry* (*Mr. James C. Collins* was with them on the brief) for defendant in error cited, to the points decided by the court: *Dwyer* v. *Dunbar*, 5 Wall. 318; *Burrell* v. *State*, 18 Texas, 713–733; *Rivière* v. *McCormick*, 14 La. Ann. 139; *Laber* v. *Cooper*, 7 Wall. 565; *Jackson* v. *Haviland*, 13 Johns. 229; *Hamet* v. *Dundass*, 4 Penn. St. 178; *Taylor's Devisees* v. *Burnside*, 1 Gratt. 165, 211; *Jackson* v. *Myers*, 3 Johns. 383, 392, 393 [*S. C.* 3 Am. Dec. 504]; *Ewing* v. *Burnet*, 1 McLean, 266; *Sorber* v. *Willing*, 10 Watts, 141; *Hockenbury* v. *Snyder*, 2 W. & S. 240; *Cornelius* v. *Giberson*, 1 Dutcher, 1; *Reed* v. *Field*, 15 Vt. 672; *Little* v. *Megquier*, 2 Greenl. 176; *Clarke* v. *Cross*, 2 R. I. 440; *Hurst* v. *McNeil*, 1 Wash. C. C. 70; *Ricard* v. *Williams*, 7 Wheat. 59, 108; *Anonymous*, 1 Salk. 246; *Barr* v. *Gratz*, 1 Wheat. 213; *Smith* v. *Burtis*, 6 Johns. 197 [*S. C.* 5 Am. Dec. 218]; *Codman* v. *Winslow*, 10 Mass. 146; *Brimmer* v. *Proprietors of Long Wharf*, 5 Pick. 131; *Henderson* v. *Griffin*, 5 Pet. 151; *Holtzapple* v. *Phillburn*, 4 Wash. C. C. 356; *O'Hara* v. *Richardson*, 46 Penn. St. 385; *Altemas* v. *Campbell*, 9 Watts, 28; [*S. C.* 34 Am. Dec. 494]; *Burrows* v. *Gallup*, 32 Conn. 493; *Peabody* v. *Hewitt*, 52 Maine, 33 [*S. C.* 83 Am. Dec. 486]; *Means* v. *Welles*, 12 Met. (Mass.) 356; *Brickett* v. *Spofford*, 14 Gray, 514; *Rogers* v. *Benlow*, 10 S. & R. 306; *Robison* v. *Swett*, 3 Greenl. 316.

Opinion of the Court.

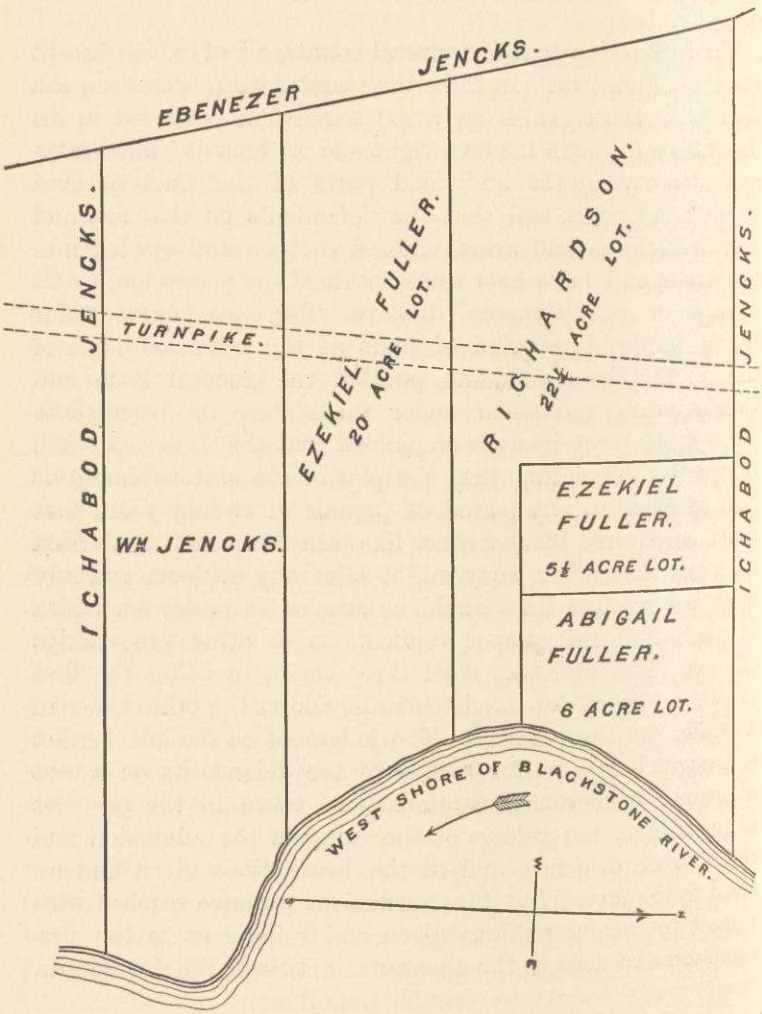
MR. JUSTICE FIELD delivered the opinion of the court.

This is an action of ejectment to recover possession of twenty-seven twenty-eighths undivided parts of a tract of land, containing about fourteen acres, situated in the town of Lincoln, formerly Smithfield, in the state of Rhode Island. The plaintiff, a citizen of Connecticut, sues the defendants, citizens of Rhode Island, in his own right and as trustee for others.

The declaration contains several counts, all of which except two are withdrawn. In these the plaintiff alleges that on the 25th of October, 1874, he was "seized and possessed in his demense as of fee in his own right and as trustee" of twenty-seven twenty-eighths undivided parts of the tract of land which is described, and that the defendants on that day and year, with force and arms, entered thereon and ejected him therefrom, and have ever since withheld the possession, to his damage of one thousand dollars. The two counts differ merely in the description of some of the boundary lines of the tract. The defendants pleaded the general issue and twenty years' possession under the statute of possessions. Upon these pleas issues were joined and the case was tried, the parties stipulating that the plea of the statute should be held to apply to any period or periods of twenty years that could be covered by any other like plea that might have been filed, and that either party might offer any evidence and rely upon any matters that would be admissible under such plea or pleas, and any proper replications or other proceedings thereon. The case was tried three times, resulting the first time in a verdict for the defendants, and at the other times in a verdict for the plaintiff. The judgment on the last verdict is brought before us for review by the defendants on a writ of error. Numerous exceptions were taken in the progress of the trial to the rulings of the court in the admission and rejection of evidence, and to the instructions given and refused to the jury. But the conclusions we have reached with respect to the instructions given and refused as to the presumption of a deed to the ancestors in title of the defendants, render it unnecessary to consider the others.

Opinion of the Court.

It appears from the evidence at the trial that the land in controversy was the westerly part of a tract of $33\frac{3}{4}$ acres, belonging, in 1750, to one James Reed, and which, by early conveyances, became divided into three parcels, one containing $22\frac{1}{4}$ acres, one $5\frac{1}{2}$ acres, and the third 6 acres, as shown by a diagram submitted, by consent of parties, to the jury, of which the following is a reduced copy:



Opinion of the Court.

A turnpike, running through the tract northerly and southerly, was opened in 1816. The 22¼-acre parcel was conveyed to Francis Richardson, of Attleboro, Massachusetts, by deed dated April 10, 1750. The land in controversy is a portion of this parcel lying west of the turnpike. The 5½-acre parcel was conveyed to Ezekiel Fuller by deed dated November 17, 1750. The 6-acre parcel was conveyed to Abigail Fuller, wife of Ezekiel, and daughter of Francis Richardson, by deed dated January 21, 1756.

The plaintiff claims to derive title under the will of Francis Richardson dated May 26, 1749, and the codicil thereof dated August 10, 1750, which were admitted to probate in Massachusetts, January 19, 1756. A copy of the will and codicil, and of the Massachusetts probate, was produced and given in evidence, together with a certificate of their having been filed and recorded in the probate office in Lincoln on the 27th of August, 1881.

It does not appear that there was any direct evidence that Francis Richardson was seized of the 22¼-acre parcel at the time of his death. The presumption, in the absence of any opposing circumstances, is undoubtedly that, being the owner at the date of the codicil, August 10, 1750, he continued such owner up to the time of his death, which occurred some years afterwards. Whether sufficient opposing circumstances to rebut this presumption are found in the absence of all claim to the land for three quarters of a century by the devisee or her husband, or her heirs, and the continued claim of ownership by the ancestors in title of the defendants during that period, is a question to be hereafter considered.

It is stated in the record that there was evidence tending to show that Abigail Fuller, the devisee, and her husband entered into possession of the property devised under the will and codicil, but what that evidence was does not appear. Abigail died prior to 1766, leaving her husband surviving her. He left Smithfield sometime in 1761 "for parts unknown." It appears also that in a deed executed by him on the 11th of April, 1761, of the 20-acre lot designated on the diagram, he recited that such lot was bounded on the north by "his former land."

With the exception of the evidence tending to show that the devisee and her husband entered into possession of the property devised, and the reference by the husband in his deed to the tract as his former land, there was nothing to show that any claim of right or title to the land had been made by them, or by their heirs, for nearly three quarters of a century, either by the exercise of acts of ownership over it, such as its occupation or the use of its products, or by leasing or selling it, or by the payment of taxes or in any other way. And for over forty years after the lapse of the three quarters of a century, the only claim of title made by the heirs of the devisee to any portion of the 22¼-acre lot consisted in the fact that in 1835 they brought an action against certain persons with whom the defendants were not in privity of title or ancestry, for the recovery of another portion of the 22¼-acre parcel, which action was discontinued in 1838 on account of the poverty and pecuniary inability of the heirs to carry it on; and in the fact that, at varying intervals between 1826 and 1857 (not 1858, as stated in one part of the record) they had been in the habit, under such claim, of cutting wood thereon openly for family use, and the manufacture of baskets, in which business some of them were engaged, and carrying it to their homes; and that on three occasions, once in 1840, once in 1845, and once in 1852, some of them, in contemplation of taking legal proceedings to establish their title, had gone around and upon the land and pointed out its boundaries.

When Ezekiel Fuller departed from Smithfield in 1761, he left two children, Francis and Abigail, without means of support, and at a meeting of the town council in September following, proceedings were taken to provide for them. In a resolution reciting that "Ezekiel is gone, we know not where;" that his children were then and likely to be chargeable to the town, that little or nothing of Ezekiel's estate was to be found to support them, but that it was assumed there was some estate belonging to him, a person was appointed to make proper inquiry and search for it, "to know what land there is belonging to the family of said Ezekiel and secure the same for the support of the children." It would seem that the person, thus

appointed, reported that there was a piece of land — a six-acre parcel — which was possessed by Ezekiel in right of his wife, for the town council, at a meeting in March, 1776, after reciting that there was nothing of said Fuller's estate left behind to maintain his children but a small piece of land, and that no provision for their support could be had without the favor and authority of the General Assembly to sell and give a deed of it, appointed one Edward Mowry to lay the matter before the Assembly and request that it would pass an act to enable some proper person to dispose of the parcel, and clothe him with authority to give a deed thereof. Mowry presented a proper petition to the Assembly, which granted the prayer, and empowered the town treasurer, with the consent and advice of the town council, to sell the land and apply the money received for the purpose stated, that is, the support of the children. A sale of the six-acre lot for thirty pounds was accordingly made by the town treasurer under the authority thus conferred.

Abigail, the wife of Ezekiel, left five children surviving her, all of whom died before their father except Abigail, Jr., who was one of the two supported by the town. The father, who disappeared from Smithfield in 1761, died in the poor-house in Attleboro, Massachusetts, in 1800. Abigail, the daughter, was born December 29, 1757, became of age December 29, 1778, and was married to Benjamin Fuller December 1, 1779. He died in 1832, and she died in 1835, intestate. The plaintiff is the grandson of this Abigail, and the parties for whom he is trustee are her other descendants. They all derive whatever title they have from her.

On the 24th of May, 1874, a century and eighteen years after the probate of the will of Francis Richardson, all the heirs of Abigail Fuller, except one, executed a power of attorney to Theodore C. Fuller, also one of said heirs, authorizing him to sell to Nathan Fuller, the plaintiff in this action, all their title and interest in the tract conveyed by James Reed to Francis Richardson by deed dated April 10, 1750, and devised to Elizabeth Fuller, wife of Ezekiel, by his last will and testament probated January 19, 1756, to hold the same upon trust to

prosecute to final conclusion legal proceedings necessary to recover possession of the premises, to employ counsel for that purpose, to conduct the proceedings, and to make such compromises of the grantors' claims as to him and his counsel might seem best.

The same grantors, by their attorney, on the same day, executed a deed of the same tract of land to Nathan Fuller, reciting a consideration of ten dollars, upon trusts similar to those contained in the power of attorney. Both documents were duly acknowledged by the grantors. The delivery of the deed was made by the attorney in this way. He and the grantee went upon the land with three other persons, and whilst upon it he delivered the deed to the grantee. He also took up some earth in his hands and passed it to the grantee. This he had been instructed to do by his counsel as the form of delivering possession. The parties were about fifteen minutes on the land. There was no evidence of any notice to or knowledge by the defendants of these acts, and they testified that they had neither. This is the case of the plaintiff briefly stated.

The defendants trace their title to the land in question by continuous claim of title from a deed of the 22¼-acre parcel made by one Jeremiah Richardson, a grandson of the testator, Francis Richardson, to Stephen Jencks, dated April 8, 1768, containing full covenants of title and warranty, and recorded in the records of Smithfield on July 10, following. Jeremiah Richardson was the son of Francis Richardson, who was a son of the testator, and is named in the will as having died. Jeremiah had a brother, also called Francis Richardson, who died prior to March, 1766. Stephen Jencks, by deed dated August 12, 1796, containing full covenants of warranty, to secure several notes, amounting to $3000, mortgaged the land in controversy, with adjoining lands to which he had acquired title, making in all 50 acres; of which the 20-acre lot, designated on the diagram, was one parcel, which he had purchased in 1763 for £640, and the six-acre lot, also designated on the diagram, was another parcel, which he had purchased in 1768 for £45. He died in 1800, leaving a will, by which he devised his real estate in Smithfield and elsewhere to his children.

Stephen Jencks, Jr., his son, acquired the interests of the other heirs, and by deed dated May 18, 1804, conveyed the whole, including by specific description the land in controversy, to his brother, Jerahmael Jencks, who was the grandfather and ancestor in title of the defendants. Other portions of the 22¼-acre parcel were conveyed by ancestors in title of the defendants, by deeds to different parties, containing full covenants of title and warranty, dated respectively April 12, 1841, December 3, 1845, and May 21, 1860, and they entered into possession of the respective parcels, and enclosed and improved them. In May, 1864, the father of the defendants, from whom they derive their title, surveyed and plotted into town lots the remaining portion of that parcel, being the land in controversy. In the partition of the estate of the grandfather, Jerahmael Jencks, between his heirs-at-law, in 1824, this land had been taken by him as part of his estate, and plotted as such in the partition plot. He died in 1866.

The land was not enclosed on the line of the turnpike. In 1838 a fence was put up on the westerly side by an adjoining owner. On the southerly side there was at one time a fence running from the turnpike westerly to the other side of the ledge hereafter mentioned, but it disappeared in 1835. On the northerly line there was only a brush fence until 1867, when a purchaser of adjoining land erected one. The land has never been put under cultivation. Prior to 1858 it was covered with wood; and every year from 1829 to 1857 the ancestors of the defendants cut wood upon it for family use. In 1857 the father of the defendants cut and applied to his use all the wood of value then remaining. The land had an extensive ledge of rock running across its centre from north to south, which was opened by defendants' ancestors as early as 1835. In 1845 or 1846 large quantities of stone were quarried and sold by them to railroad companies; and from that time down to the trial, with longer or shorter intervals, never of more than a year or two, the ledge was worked more or less extensively by the defendants or their ancestors in title, or their lessees and tenants, and the stone removed. There is no evidence that any other person had ever worked the ledge or

taken stone off the land, or attempted to do so. The father of the defendants put up a sign on the land, stating that all persons were forbidden from taking wood or stone from it. In 1860 or 1861 his lessee built a barn and tool-shed on the land near the ledge for his use in quarrying, these structures being in full view from Broad Street, formerly the turnpike. He also dug a well, from which he obtained water for his business. The barn, with lofts for hay, was of sufficient capacity "to accommodate, and did accommodate, six or eight horses, or more." It remained on the land, with some additions, until some time in 1869, when it was removed by the lessee. The land was assessed for taxes to the ancestors in title of the defendants, and paid by them, for twenty years, between 1770 and 1805. The tax lists for the other years up to 1805 could not be found. From 1805 to the time of the trial, a period of seventy-seven years, the land was assessed to them, and the taxes were paid by them. The statute of Rhode Island respecting the assessment of taxes, in force between 1798 and 1825, required the assessors to assess taxes on real estate to persons who held and occupied it, and the one in force between 1825 and 1855 required them to assess the taxes to those who held and occupied it or to the owners thereof, and the one in force after 1855, to the owners thereof. No taxes were ever assessed to the Fullers or paid by them. Neither plaintiff nor defendants, nor their ancestors, ever resided on the premises, and the land was occupied and possessed by the ancestors in title of the defendants only in the way mentioned.

Upon the case thus presented, and we have not omitted, we think, any material circumstance in the statement, the defendants asked an instruction to the jury as to the presumption they might make of a lost grant to their ancestor in title, which the court refused. Its charge was thus:

"Of course, gentlemen, if you find that you can presume a grant, if you find from the testimony that there was a lost deed which passed from Abigail Fuller to Jeremiah Richardson, or to Francis Richardson, and the property was inherited by Jeremiah, so that Jeremiah had a good title to convey to Stephen Jencks, that makes the title of the defendants here

complete. . . . But, gentlemen, you are to look into the evidence upon this question of a grant, and if the evidence in favor of the presumption is overcome by the evidence against such a grant, then, of course, you will not presume one. It is a question of testimony."

The defendants requested the court to instruct the jury "that the presumption they were authorized to make of a lost deed was not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor."

This instruction the court refused to give, or to modify its charge in conformity with it. The defendants now contend that the court thus erred, its charge being in effect that in order to presume a lost deed the jury must be satisfied that such a deed had in fact actually existed. Such seems to us to be the purport of the charge, and therein there was error.

In such cases "presumptions," as said by Sir William Grant, "do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says, *Eldridge* v. *Knott*, Cowp. 215, merely for the purpose, and from a principle of quieting the possession. There is as much occasion for presuming conveyances of legal estates; as otherwise titles must forever remain imperfect, and in many respects unavailable; when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested." *Hillary* v. *Waller*, 12 Ves. 239, 252.

The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin, that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected

to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance, to which the occupant of land is entitled, or may lead to its loss after being executed. It is a matter of almost daily experience that reconveyances of property, transferred by the owners upon conditions or trusts, are often delayed after the conditions are performed or the trusts discharged, simply because of the pressure of other engagements, and a conviction that they can be readily obtained at any time.

The death of parties may leave in the hands of executors or heirs papers constituting muniments of title, of the value of which the latter may have no knowledge, and therefore for the preservation and record of which may take no action; and thus the documents may be deposited in places exposed to decay and destruction. Should they be lost, witnesses of their execution, or of contracts for their execution, may not be readily found, or if found, time may have so impaired their recollection of the transactions, that they can only be imperfectly recalled, and of course imperfectly stated. The law, in tenderness to the infirmities of human nature, steps in and by reasonable presumptions, that acts to protect one's rights, which might have been done, and in the ordinary course of things generally would be done, have been done in the particular case under consideration, affords the necessary protection against possible failure to obtain or to preserve the proper muniments of title, and avoids the necessity of relying upon the fallible memory of witnesses, when time may have dimmed their recollection of past transactions; and thus gives peace and quiet to long and uninterrupted possessions.

The rule of presumption, in such cases, as has been well said, is one of policy, as well as of convenience, and necessary for the peace and security of society. "Where one uses an easement whenever he sees fit, without asking leave and without objection," says the Supreme Court of Pennsylvania, "it is adverse and an interrupted adverse enjoyment for twenty-one years is a title which cannot afterward be disputed. Such

enjoyment, without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant." *Garrett* v. *Jackson*, 20 Penn. St. 331, 335. The same presumption will arise whether the grant relate to corporeal or incorporeal hereditaments. As said by this court in *Ricard* v. *Williams*, 7 Wheat. 59, 119, speaking by Mr. Justice Story: "A grant of land may as well be presumed as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession."

It is not necessary, therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its non-execution. In *Edson* v. *Munsell*, 10 Allen, 557, 568, which was an action for obstructing the enjoyment of an easement, the doctrine of acquiring such rights by prescription or adverse possession is elaborately considered; and it is there said, that "the fiction of presuming a grant from twenty years' possession or use was invented by the English courts in the eighteenth century to avoid the absurdities of their rule of legal memory, and was derived by analogy from the limitation prescribed by the St. of 21 Jac. 1, c. 21, for actions of ejectment. It is not founded on a belief that the grant has actually been made in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long continued possessions."

In *Casey's Lessee* v. *Inloes*, 1 Gill, 430, 503 [*S. C.* 39 Am. Dec. 658], which was an action of ejectment, the Court of Appeals of Maryland held that where there had been a con-

tinuous possession of land for twenty years or upwards by a party or persons claiming under him, the court was authorized to instruct the jury, in the absence of a deed to such party, to presume that one had been executed to him. It also approved the refusal of the court below to instruct the jury that before they could find a title in the defendants, or any one of them, by presumption of a grant by the plaintiff or those under whom he claims, they must believe on their consciences and find as a fact that such grant was actually made. "The granting of such a prayer," said the court, "would have had a tendency to mislead the jury, by inducing them to believe that the presumption of a grant could not be made, unless the jury, in point of fact, believed in the execution of the grant; whereas it is frequently the duty of the jury to find such presumption, as an inference of law, although in their consciences they may disbelieve the actual execution of any such grant."

In *Williams* v. *Donell*, 2 Head, 695, 697, which was also an action of ejectment, the Supreme Court of Tennessee, speaking on the same point, said: "It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that in reality a grant ever issued. It will be a sufficient ground for the presumption to show that, by legal possibility, a grant might have issued. And this appearing, it may be assumed in the absence of circumstances repelling such conclusion that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law."

In accordance with the doctrine thus explicitly declared, there can be no doubt that the court below should have instructed the jury as requested. It would seem from the instruction given that the deed which the defendants insisted might be presumed was one from Ezekiel and Abigail Fuller, or from Abigail Fuller to Jeremiah Richardson. We think, however, that the facts point with equal directness to a conveyance from his grandfather. The codicil to his will, by which he devised the property to his married daughter, was dated several years before his death, and there was no evidence that he was seized of it at that time, except the presumption

arising from his having once possessed it. It does not appear that either the devisee or her husband ever exercised any acts of ownership in any way, or ever claimed to own it. After he left Smithfield, two of his children were supported by the the town, and the agent of the town, appointed to search for any property belonging to the father, from the sale of which the children might be supported, reported that there was only the six-acre parcel, which was held by him in the right of his wife. He afterwards went to the poor-house, where he died in 1800. During the thirty-nine years after he left Smithfield, and notwithstanding his having been part of that time in the poor-house, no word appears to have come from him asserting that he had any interest in the property. It is difficult to reconcile his conduct or that of his wife, the devisee, if in truth the testator continued the owner of the property until his death, and it passed under the codicil to his will. While Ezekiel Fuller was still living, and for several years after he had left Smithfield, Jeremiah Richardson, the testator's grandson, asserted ownership of the tract by its sale to Stephen Jencks by a deed with covenants of title and warranty, which was recorded in the town records. No word of opposition to this sale or to the subsequent mortgage of the property by the grantee was ever made, so far as the record discloses. The fact that Jeremiah Richardson was a minor when his grandfather died does not militate against the presumption of a deed to him. Nothing would be more natural than a deed of gift from the grandfather to the grandson. It would also seem from the charge of the court, that in the deed of Jeremiah to Jencks he recited that the property had come from his honored grandfather, or words to that effect.

If, however, the evidence which, as the record says, tended to show that the devisee and her husband entered into the possession of the property devised, and the recital in his deed of April 11, 1761, of the 20-acre parcel, that it was bounded on the north by his *former* land, can be considered as rebutting the presumption of such a deed by the testator, then the defendants may fall back on the presumption of a deed to Jeremiah Richardson by Ezekiel and Abigail Fuller, the de-

visee, and her husband. There is nothing in the conduct or language of either of these parties which in any way repels such a presumption. Their silence and non-claim of the property would rather indicate that they had parted with their interest. The minority of Jeremiah at the time only shows his inability to purchase the property, but those, under whose charge he was, could have purchased it for him, and had the deed executed to him. His orphanage may have induced such a proceeding. We do not, therefore, think that his minority at the time can be urged against the presumption of a deed to him.

For the refusal of the court below to give the instruction requested, the case must go back for a new trial. We will add, moreover, that though a presumption of a deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done, and the things omitted, with regard to the property in controversy, by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, then the jury may be instructed that it is their duty to presume such a conveyance, and thus quiet the possession.

How long a period must elapse after the date of the supposed conveyance before it may be presumed to have existed has not always been a matter of easy determination. "In general," said this court, speaking by Mr. Justice Story, "it is the policy of courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations in cases where the statute does not apply. But where the statute applies, it constitutes, ordinarily, a sufficient title or defence, independently of any presumption of a grant, and, therefore, it is not generally resorted to. But if the circumstances of the case justify it, a presumption of a grant may as well be made in the one case as in the other; and where the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant, within a period short of the statute of limitations." *Ricard* v. *Williams*, 7 Wheat. 59, 110.

Opinion of the Court.

The general statement of the doctrine, as we have seen from the authorities cited, is that the presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect. And hence, as a general rule, it is only where the possession has been actual, open and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land, that the presumption of a deed can be invoked. But the reason for attaching such weight to a possession of this character is the notoriety it gives to the claim of the occupant; and, in countries where land is generally occupied or cultivated, it is the most effective mode of asserting ownership. But, as Mr. Justice Story observes, in delivering the opinion of this court in *Green* v. *Liter*, 8 Cranch, 249, "In the simplicity of ancient times there were no means of ascertaining titles but by the visible seizin; and, indeed, there was no other mode, between subjects, of passing title, but livery of the land itself by the symbolical delivery of turf and twig. The moment that a tenant was thus seized he had a perfect investiture; and, if ousted, could maintain his action for the realty, although he had not been long enough in possession even to touch the esplees. The very object of the rule, therefore, was notoriety; to prevent frauds upon the lord and upon the other tenants." There may be acts equally notorious, and therefore equally evincive of ownership, which, taken in connection with a long possession, even if that possession has been subject to occasional intrusion, are as fully suggestive of rightful origin as an uninterrupted possession. Where any proprietary right is exercised for a long period, which, if not founded upon a lawful origin, would in the usual course of things be resisted by parties interested, and no such resistance is made, a presumption may be indulged that the proprietary right had

a lawful origin. The principle is thus stated by Mr. Justice Stephen of the High Court of Justice of England, in his Digest of the Law of Evidence, using the term grant in a general sense, as indicating a conveyance of real property, whether corporeal or incorporeal: "When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or license from the Crown or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested, if it had not had a lawful origin, there is a presumption that such right had a lawful origin and that it was created by a proper instrument which has been lost." Art. 100.

This presumption may, therefore, in some instances, be properly invoked where a proprietary right has long been exercised, although the exclusive possession of the whole property, to which the right is asserted, may have been occasionally interrupted during the period necessary to create a title by adverse possession, if in addition to the actual possession there were other open acts of ownership. If the interruptions did not impair the uses to which the possessor subjected the property, and for which it was chiefly valuable, they should not necessarily be held to defeat the presumption of the rightful origin of his claim to which the facts would otherwise lead. It is a matter which, under proper instructions, may be left to the jury.

In the present case, acts of ownership over the property in controversy by the ancestors in title of the defendants, so far as they could be manifested by written transfers of it, either as conveyances of title or by way of security, were exercised from 1768 for more than a century. The first conveyance, from which the defendants trace their title, was duly recorded in the land records of the town soon after its execution in that year. The assessment of taxes on the property to those ancestors, and their payment of the taxes for twenty years between 1770 and 1805, and the assessment of taxes to them or to the defendants for seventy-seven years after 1805, and the payment of the taxes by them, such assessment being required to be made, under the laws of the state, to occupants or owners

of the land, are circumstances of great significance, taken in connection with their constantly asserted ownership. In *Ewing* v. *Burnet*, this court speaks of the uninterrupted payment of taxes on a lot for twenty-four consecutive years as "powerful evidence of claim of right to the whole lot." 11 Peters, 41, 54. Here, as seen, the taxes were uninterruptedly paid by the defendants or their ancestors in title for a much longer period.

In *St. Louis Public Schools* v. *Risley's Heirs*, the Supreme Court of Missouri said: "Payment of taxes has been admitted in questions of adverse possession, and may have an important bearing, as it is not usual for one owning realty to neglect paying taxes for a period which would be sufficient to constitute a bar under the statute of limitations, or for one to pay taxes having no claim or color of title." 40 Missouri, 356, 370. In *Davis* v. *Easley*, which was an action of ejectment, the Supreme Court of Illinois held that receipts for taxes paid by the plaintiff were admissible, and said: "The payment of taxes indicated that the plaintiff claimed title to the whole tract. It likewise tended to explain the character and extent of his possession." 13 Ill. 192, 201.

In this case, the ancestors of the defendants entered upon the land under claim of title, and opened and worked the ledge of rock running through it as early as 1835, and from 1846 they or their tenants or lessees continued, with occasional intervals, to work that ledge to the time of trial in 1882, a period of thirty-six years, and it does not appear that during that time any one ever interfered with their work or complained of it. To constitute an adverse possession it was not necessary that they should have actually occupied or enclosed the land. It was sufficient that they subjected it to such uses as it was susceptible of to the exclusion of others. *Ellicott* v. *Pearl*, 10 Pet. 412, 442. That subjection might be shown by the quarrying of the ledge and the removal of the stone, without disturbance or complaint from any quarter. The exclusive working of the quarry, under claim of title to the whole tract by virtue of conveyances in which it was described, might operate in law to carry the possession over the whole; and the payment of taxes thereon might authorize the jury to infer

a continuous possession of the whole, notwithstanding any temporary and occasional intrusion by others upon a different part of the tract, which did not interfere with the work.

The entry of the plaintiff with the attorney of his co-heirs in 1874, and the delivery of the deed to him with a handful of earth, if weight and consideration are to be given to that proceeding under the circumstances in which it was made, would only reduce the period of undisturbed possession to twenty-eight years. The cutting of wood on a different portion of the land by the Fullers for family use, or the manufacture of baskets, at occasional intervals during a portion of this period, though competent for the consideration of the jury, was not necessarily an interruption to the peaceable occupation of the land, so far as quarrying of the ledge and the removal of the stone were concerned, to which uses the defendants and their ancestors in title subjected it, and which appear to have constituted its principal value. Nor did it necessarily change the legal effect of the possession for quarrying the ledge with the attendant claim to the whole tract.

In *Webb* v. *Richardson*, the Supreme Court of Vermont, in speaking of interruptions in the actual occupancy of real property as affecting the claim of continuous possession, said: "To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually. The mere fact that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of the possession. The kind and frequency of the acts of occupancy necessary to constitute a continuous possession depend somewhat on the condition of the property, and the uses to which it is adapted in reference to the circumstances and situation of the possessor, and partly on his intention. If, in the intermediate time between the different acts of occupancy, there is no existing intention to continue the possession, or to return to the enjoyment of the premises, the possession, if it has not ripened into a title, terminates, and cannot afterwards be connected with a subsequent occupation so as to be made available toward gaining title; while such continual intention might, and generally would, preserve the possession unbro-

ken." 42 Vt. 465, 473. That was an action of trespass for cutting timber on the land of the plaintiff, who was in possession at the time, and offered testimony to prove that his possession was earlier than the defendant's, and also that he had acquired the land by fifteen years' adverse possession. The defendant did not show a chain of title back to the original proprietor of the land, but showed that his grantors entered into possession in 1835, and cut timber and claimed to own the land, and it was held that the question whether this entry interrupted the plaintiff's possession should have been submitted to the jury under proper instructions, in connection with the plaintiff's evidence of continuous possession under those through whom he claimed, and that it was error to refuse to submit it.

Our conclusion is, that the claim to the land in controversy by the defendants and their ancestors in title for over a century, with the payment of taxes thereon, and acts of ownership suited to the condition of the property, and its actual use for thirty-six or twenty-eight years, it matters not which, would justify a presumption of a deed to the original ancestor, Jeremiah Richardson, to quiet the possession of the defendants claiming under him, and the jury should have been permitted to presume such a deed without finding from the testimony that there was in point of fact a deed which was lost. If the execution of a deed was established, nothing further would be required than proof of its contents; there would be no occasion for the exercise of any presumption on the subject. It is only where there is uncertainty on this point that the presumption is indulged to quiet the possession.

The judgment of the court below must be reversed, and the cause remanded for a new trial.

PEOPLE'S SAVINGS BANK *v.* BATES.

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

Argued November 16, 17, 1886. — Decided March 7, 1887.

In Michigan, when a chattel mortgage is attacked as fraudulent against subsequent creditors or mortgagees in good faith, by reason of the mortgagor being permitted to remain in possession and to prosecute his business in the ordinary way, it is the province of the jury to determine whether such fraud is proved; but when the evidence is overwhelming, and leaves no room for doubt as to what the fact is, the court may give the jury a peremptory instruction covering the issue.

In Michigan a creditor at large cannot attack a chattel mortgage made by the debtor, except through some judicial process, whereby he acquires an interest in the property; as by levy of attachment or execution.

In Michigan the mortgagee in a chattel mortgage, given to secure a preëxisting debt, is not a "mortgagee in good faith," within the intent of the statute of that state which provides that every such mortgage "which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed" in the place or places indicated in the act.

The doctrine that the *bona fide* holder for value of negotiable paper, transferred as security for an antecedent debt merely, and without other circumstances, is unaffected by equities or defences between prior parties of which he had no notice, does not apply to instruments conveying real or personal property as security, in consideration only of preëxisting indebtedness.

This was an action of replevin involving conflicting claims under certain chattel mortgages executed by Freedman Bros. & Co., formerly merchants in the city of Detroit. The firm was composed of Herman Freedman, who managed its business in Detroit; Benjamin Freedman, who resided in New York, and had entire charge of the buying and of the firm's financial affairs in that city; and Rosa Freedman. At the beginning of the action the mortgaged property was in the custody of Leopold Freud as agent of the People's Savings Bank, plaintiff in error.

Statement of Facts.

Bates, Reed & Cooley, the defendants in error, who were the plaintiffs below, claimed priority under a mortgage given by Freedman Bros. & Co., February 7, 1881, to secure both the past indebtedness of the latter amounting to forty-five thousand dollars and upwards, for goods, wares, and merchandise sold, and money loaned, to them, and any future liabilities which might be incurred by the mortgagors for other goods purchased, or other moneys borrowed, from the mortgagees; the mortgage, covering not only the goods, wares, merchandise, and other personal property then in the mortgagors' stores in Detroit, but also their notes, book accounts, and securities, and all future additions to, or substitutions for, such goods and merchandise. No part of said indebtedness was created at the time of the execution of the mortgage.

The People's Savings Bank claimed under a mortgage made by Freedman Bros. & Co., on the 11th of February, 1881, to secure certain demand notes, aggregating forty-nine thousand dollars, which were executed by that firm on the 7th day of February, 1881, and also "all other paper indorsed" by it and held by the bank; that mortgage covering all the goods and merchandise then in the mortgagors' stores and all thereafter put into them. This last mortgage provided that Leopold Freud, the bank's agent, should take immediate possession and sell the goods in the ordinary course of business, applying the proceeds to said indebtedness until the same was paid. The said demand notes represented past indebtedness; for they were given in place of other paper of the mortgagors then outstanding, and which had not then matured. Each demand note was accompanied by a cognovit or "confession of judgment," under which, however, no action was taken. The mortgage to the bank was the first one filed in the proper office in Detroit, though it was not lodged until after the bank had notice, through its agent, that Bates, Reed & Cooley claimed to be in possession of or to have rights in the mortgaged property. Whether the bank, before the mortgage to it was given, had actual notice of the prior mortgage to Bates, Reed & Cooley does not clearly appear.

By the statutes of Michigan relating to chattel mortgages

it was provided that "every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the mortgagor resides, except when the mortgagor is a non-resident of the state, when the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the property is." 2 Howell's Annotated Statutes, pp. 1607, 1610, § 6193.

Mr. John Atkinson (*Mr. James T. Keena*, *Mr. Ashley Pond*, and *Mr. George V. N. Lothrop* were with him on the brief) for plaintiffs in error cited: *Robinson* v. *Elliott*, 22 Wall. 513; *Fearey* v. *Cummings*, 41 Mich. 376; *Putnam* v. *Reynolds*, 44 Mich. 113; *Talcott* v. *Crippen*, 52 Mich. 633; *Oliver* v. *Eaton*, 7 Mich. 108; *Gay* v. *Bidwell*, 7 Mich. 519; *Lucking* v. *Wesson*, 25 Mich. 443; *Gardner* v. *Matteson*, 38 Mich. 200; *Kohl* v. *Lynn*, 34 Mich. 360; *Gill* v. *Griffith*, 2 Maryland Ch. 270; *Farrington* v. *Sexton*, 43 Mich. 454; *Lee* v. *Brown*, 7 Geo. 275; *Frost* v. *Goddard*, 25 Maine, 414; *Shaw* v. *Levy*, 17 S. & R. 99; *Winslow* v. *Leonard*, 24 Penn. St. 14;[1] *Lanfear* v. *Sumner*, 17 Mass. 110 [*S. C.* 9 Am. Dec. 119]; *Ricker* v. *Cross*, 5 N. H. 570 [*S. C.* 22 Am. Dec. 480]; *Lamb* v. *Durant*, 12 Mass. 54 [*S. C.* 7 Am. Dec. 31]; *Frank* v. *Miner*, 50 Ill. 444; *Constant* v. *Matteson*, 22 Ill. 546; *Atkyns* v. *Byrnes*, 71 Ill. 326; *Judson* v. *Corcoran*, 17 How. 612; *Smith* v. *Algar*, 1 B. & Ad. 603; *Longridge* v. *Dorville*, 5 B. & Ald. 117; *Burchard* v. *Frazer*, 23 Mich. 224; *Jones* v. *Graham*, 77 N. Y. 628; *Frisbey* v. *Thayer*, 25

[1] *S. C.* 72 Am. Dec. 354.

Argument for Defendants in Error.

Wend. 396; *Dickerson* v. *Tillinghast*, 4 Paige, 215 [*S. C.* 25 Am. Dec. 528]; *Van Heusen* v. *Radcliff*, 17 N. Y. 580 [*S. C.* 72 Am. Dec. 480]; *Thompson* v. *Van Vechten*, 27 N. Y. 568; *Gafford* v. *Stearn*, 51 Ala. 434; *Short* v. *Battle*, 52 Ala. 456; *Zorn* v. *Railroad Co.*, 5 S. C. 90; *Pancoast* v. *Duval*, 26 N. J. Eq. (11 C. E. Greene) 445; *Mingus* v. *Condit*, 23 N. J. Eq. (8 C. E. Greene) 313; *Wells* v. *Morrow*, 38 Ala. 125; *Gilchrist* v. *Goff*, 63 Ind. 576; *Strangham* v. *Fairchild*, 80 Ind. 598; *Manning* v. *McClure*, 36 Ill. 490; *Butters* v. *Haughwout*, 42 Ill. 18; *Kranert* v. *Simon*, 65 Ill. 344; *Cook* v. *Helms*, 5 Wis. 107; *Jenkins* v. *Schaub*, 14 Wis. 1; *Paine* v. *Benton*, 32 Wis. 491; *Roxborough* v. *Messick*, 6 Ohio St. 448 [*S. C.* 67 Am. Dec. 346]; *Cleveland* v. *State Bank*, 16 Ohio St. 236; *Copeland* v. *Manton*, 22 Ohio St. 398; *Atkinson* v. *Brooks*, 26 Vt. 569 [*S. C.* 62 Am. Dec. 592]; *Quinn* v. *Hard*, 43 Vt. 375; *Russell* v. *Spalter*, 47 Vt. 273; *Stoddard* v. *Kimball*, 6 Cush. (Mass.) 469; *Fisher* v. *Fisher*, 98 Mass. 303; *Bank* v. *Carrington*, 5 R. I. 515 [*S. C.* 73 Am. Dec. 83]; *Brush* v. *Scribner*, 11 Conn. 388 [*S. C.* 29 Am. Dec. 303]; *Bridgeport City Bank* v. *Welch*, 29 Conn. 475; *Stone* v. *Welling*, 14 Mich. 514, and cases cited; *Railroad Co.* v. *Nat. Bank*, 102 U. S. 14; *Swift* v. *Tyson*, 16 Pet. 1; *Bayley* v. *Greenleaf*, 7 Wheat. 46; *Payne* v. *Bensley*, 8 Cal. 260 [*S C.* 68 Am. Dec. 318].

Mr. D. M. Dickinson for defendants in error cited: *Railroad Co.* v. *Bank*, 102 U. S. 14; *Allan* v. *Massey*, 17 Wall. 351; *Sumner* v. *Hicks*, 2 Black. 532; *Swift* v. *Tyson*, 16 Pet. 1, 15; *Outhaite* v. *Porter*, 13 Mich. 533; *Boxheimer* v. *Gunn*, 24 Mich. 372; *Stone* v. *Welling*, 14 Mich. 514; *Kohl* v. *Lynn*, 34 Mich. 360; *Maury* v. *Woods*, 33 Iowa, 265; *Thomas* v. *Stone*, Walker (Mich.), 117; *Dixon* v. *Hill*, 5 Mich. 404; *Warner* v. *Whittaker*, 6 Mich. 133 [*S. C.* 72 Am. Dec. 65]; *Blanchard* v. *Tyler*, 12 Mich. 339; *Johnson* v. *Peck*, 1 Woodb. & Min. 334; *Morse* v. *Godfrey*, 3 Story, 364; *Rison* v. *Knapp*, 1 Dillon, 186; *Atkinson* v. *Brooks*, 26 Vt. 569 [*S. C.* 62 Am. Dec. 592]; *Bay* v. *Coddington*, 5 Johns. Ch. 54 [*S. C.* 9 Am. Dec. 268], affirmed 20 Johns. 636; *Weaver* v. *Barden*, 49 N. Y.

286; *Thompson* v. *Van Vechten*, 27 N. Y. 568; *Cary* v. *White*, 52 N. Y. 138; *Jones* v. *Graham*, 77 N. Y. 628; *Jenness* v. *Bean*, 10 N. H. 266 [*S. C.* 34 Am. Dec. 152]; *Ashton's Appeal*, 73 Penn. St. 153; *Boyd* v. *Beck*, 29 Ala. 703; *Spurlock* v. *Sullivan*, 36 Texas, 511; *Johnson* v. *Graves*, 27 Ark. 557; *Busenbrake* v. *Ramey*, 53 Ind. 499; *Gilchrist* v. *Gough*, 63 Ind. 576; *Ryan* v. *Chew*, 13 Iowa, 589; *Prentice* v. *Zane*, 2 Gratt. 262; *Butters* v. *Haughwout*, 42 Ill. 18; *Kranert* v. *Simon*, 65 Ill. 344; *Knox* v. *Hunt*, 18 Missouri, 174; *Bramhall* v. *Beckett*, 31 Maine, 205; *Brush* v. *Scribner*, 11 Conn. 388 [*S. C.* 29 Am. Dec. 303]; *Leland* v. *Collver*, 34 Mich. 418; *American Cigar Co.* v. *Foster*, 36 Mich. 368; *People* v. *Bristol*, 35 Mich. 28; *Wingler* v. *Sibley*, 35 Mich. 231; *Robson* v. *Mich. Cent. Railroad*, 37 Mich. 70; *Cadwell* v. *Pray*, 41 Mich. 307.

Mr. Justice Harlan, after stating the facts as above reported, delivered the opinion of the court.

The mortgagees, respectively, insist that there was, within the meaning of the statute, an immediate delivery to them, followed by an actual and continued change of possession of the things mortgaged; the bank claiming to have taken possession under its mortgage on the 11th of February, 1881, while Bates, Reed & Cooley, denying that the bank ever had such possession as the law requires, contend that they took possession on the 15th of February, 1881. But the claim of neither party in that respect is satisfactorily sustained by the proof. The evidence does not show such open, visible, and substantial change of possession as the law required in order to give notice to the public of a change of ownership. *Doyle* v. *Stevens*, 4 Mich. 87, 93. In a sense, both parties were in possession by agents early on the morning of the 15th of February, each claiming the exclusive right to manage and control the property under the terms of the respective mortgages. As the contest for such management and control was likely to result in an unseemly display of force, the parties, on that day, entered into an agreement, which recited their respective claims of priority both of possession and of right, and provided — "neither

party waiving or surrendering any right or advantage" — that the possession of each should remain as it then was, and that the business should continue as it was then being conducted, all the proceeds of sale being deposited in bank and remaining there intact until these conflicting claims should be settled by judicial decision or by agreement. The claims were not settled by agreement; and the defendants in error, having insisted that this arrangement was not being carried out in good faith, and having been refused exclusive possession, brought this action — as they might do consistently with the agreement — to obtain a judicial determination of their rights. In adopting that course they surrendered no right they had in the premises.

In behalf of the bank it is contended that the mortgage to Bates, Reed & Cooley was fraudulent as against subsequent creditors and mortgagees in good faith, in that the mortgagees contemplated that the mortgagors should remain in possession and prosecute the business in the ordinary mode. The mortgage of February 7, 1881, certainly contains no provision of that kind. But if the extrinsic evidence establishes that such a course upon the part of Freedman Bros. & Co. was, in fact, contemplated by Bates, Reed & Cooley, it would only show that the mortgagees were willing to give the mortgagors an opportunity to avoid a suspension of their business and bankruptcy — the additions to the stock in trade being brought under the mortgage, so as to compensate the mortgagees for any diminution in value by reason of goods disposed of in the usual course of business. If the mortgage had, in terms, made provision for such a course upon the part of the mortgagors, as the bank contends was in the contemplation of the mortgagees, it would not be held, as a matter of law, to be absolutely void or fraudulent as to other creditors. *Oliver* v. *Eaton*, 7 Mich. 108, 112; *Gay* v. *Bidwell*, 7 Mich. 519, 523; *People* v. *Bristol*, 35 Mich. 28, 32; *Wingler* v. *Sibley*, 35 Mich. 231; *Robinson* v. *Elliott*, 22 Wall. 513, 523. The good faith of such transactions, where they are not void upon their face, is, under the statutes of Michigan, a question of fact for the determination of the jury. *Oliver* v. *Eaton* and *Gay* v. *Bidwell*. That rule

does not, however, restrict the power of the court to give to the jury a peremptory instruction, covering such an issue, when the evidence is all on one side, or so overwhelmingly on one side, as to leave no room to doubt what the fact is. In this case there is an entire absence of any evidence impeaching the good faith of Bates, Reed & Cooley in procuring the mortgage of February 7, 1881. There is nothing whatever to show that they had any purpose to commit a fraud or to put their mortgagors in such a position that the latter could more readily deceive or defraud other creditors.

Besides, as the court below held, upon this branch of the case, the bank, in its capacity as a creditor at large, is not entitled to attack the prior mortgage as fraudulent upon the grounds just stated. This general proposition is conceded by counsel, the usual way, he admits, being for the creditor, who has no particular claim in the property, to acquire a specific interest therein through the levy of an attachment or execution. Hence, he says, that while it is often stated that conveyances of this sort are void as to creditors generally, they must put their claims in the form of a judgment or attachment before they are in a position to attack them — the object of the attachment or execution being to bring the attacking party into privity with the property. And such seems to be the rule recognized by the Supreme Court of Michigan. In *Fearey* v. *Cummings*, 41 Mich. 376, 383, the court, construing a somewhat similar statute, said: "If the mortgage was made with the intent to hinder, delay, or defraud creditors (Comp. L. § 4713), or, inasmuch as the possession was not altered, if it was not put on file prior to plaintiffs becoming creditors, it was invalid as against them; the law being that those who become creditors whilst the mortgage is not filed are protected, and not merely those who obtain judgments or levy attachments before the filing. Still no one, as creditor at large, can question the mortgage. He can only do that by means of some process or proceeding against the property. Sec. 4706." In that case the court cites *Thompson* v. *Van Vechten*, 27 N. Y. 568, 582, in which it was held, in reference to a somewhat similar statute, that "the mortgage cannot be legally

questioned until the creditor clothes himself with a judgment and execution, or with some legal process against his property; for creditors cannot interfere with the property of their debtor without process."

But it is argued that this rule does not apply in the case of a creditor who is a second mortgagee in possession. Such possession, it is claimed, gives him the right, by way of defence, and without resorting to attachment and before obtaining judgment, to assert the invalidity of the prior mortgage. There is some apparent support to this position in *Putnam* v. *Reynolds*, 44 Mich. 113, 115. That was a suit in equity brought to foreclose a chattel mortgage not filed until after the mortgagor had become insolvent, and while his estate was being disposed of by an assignee for the benefit of creditors. The court said that there was reason to believe that the mortgagor acted in bad faith; that the mortgage was left off the record for the purpose of giving the mortgagor a credit to which he was not entitled; in which case, the mortgage was void in fact, irrespective of the statute. Upon this ground alone the court declined to give the relief asked, remitting the mortgagee to his remedy, if any he had, at law. It expressly declined to decide whether the rule that creditors cannot attack a mortgage except indirectly, through a seizure of the property by attachment or other suitable process, applies where the mortgage was originally valid, but is made void by the subsequent neglect of the mortgagee. The case in hand cannot be brought within the principle announced in *Putnam* v. *Reynolds*, for the reason, if there were no other, that there was no fraud in fact upon the part of Bates, Reed & Cooley, nor any unreasonable delay in filing the mortgage of February 7, 1881. It was filed shortly after the mortgage to the bank was lodged for record.

This disposes of all the material questions in the case preliminary to the main inquiry whether the bank — the mortgage to it having been really given to secure past indebtedness of the mortgagors — is, in the meaning of the statute, a subsequent "mortgagee in good faith." If not, the mere filing of the mortgage of February 11, 1881, before that of February 7,

1881, did not give it priority of right over Bates, Reed & Cooley; and the mortgage that was in fact first executed and delivered, must be held to give priority of right.

In *Kohl* v. *Lynn*, 34 Mich. 360, 361, the Supreme Court of Michigan said that, "the statute which makes a mortgage of chattels, which has not been recorded, void 'against subsequent purchasers or mortgages in good faith,' uses those terms in the sense which has always been attached to them by judicial decisions." Guided by this rule, which we deem a sound one, we concur with the court below in holding that the words "mortgagee in good faith," mean the same thing as "mortgagee for a valuable consideration without notice."

It is insisted that the principles announced in *Swift* v. *Tyson*, 16 Pet. 1, and *Railroad Co.* v. *National Bank*, 102 U. S. 14, sustain the proposition that the bank was a mortgagee in good faith, although the mortgage to it may be held to have been given merely as security for past indebtedness. The general doctrine announced in *Swift* v. *Tyson* was, that one who becomes the holder of negotiable paper, before its maturity, in the usual course of business and in payment of an existing debt, is to be deemed to have received it for a valuable consideration, and is, therefore, unaffected by any equities existing between antecedent parties. In that case, Mr. Justice Story said that the rule was applicable as well as when the negotiable instrument was received as security for, as when received in payment of, a preëxisting debt. In *Railroad Co.* v. *National Bank*, it was held, conformably to the recognized usages of the commercial world, that "the transfer before maturity of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the *bona fide* holder is unaffected by equities or defences between prior parties, of which he had no notice." p. 28.

Do these principles apply to the case of a chattel mortgage

given merely as security for a preëxisting debt, and in obtaining which the mortgagee has neither parted with any right or thing of substance nor come under a binding agreement to postpone or delay the collection of his demand? Upon principle, and according to the weight of authority, this question must be answered in the negative.

The rules established in the interests of commerce to facilitate the negotiation of mercantile paper, which, for all practical purposes, passes by delivery as money, and is the representative of money, ought not, in reason, to embrace instruments conveying or transferring real or personal property as security for the payment of money. At any rate, there is nothing in the usages of merchants, as shown in this record, or so far as disclosed in the adjudged cases, indicating that the necessities of commerce require that chattel mortgages be placed upon the same footing in all respects as negotiable securities which have come to the hands of a *bona fide* holder for value before their maturity. Such a result, if desirable, must be attained by legislation, rather than by judicial decisions.

One of the earliest cases in the Federal courts upon this subject is that of *Morse* v. *Godfrey*, 3 Story, 364, 389. It there appeared that one Reed mortgaged to Godfrey all stock in trade and nearly all his real estate. The latter subsequently mortgaged the same property to a bank. In a contest between the bank and the assignee in bankruptcy of Reed, the former claimed to be a *bona fide* purchaser for value without notice of the invalidity, under the bankrupt law, of the mortgages to Godfrey. Mr. Justice Story said:

"This leads me to remark that the bank does not stand within the predicament of being a *bona fide* purchaser, for a valuable consideration, without notice, in the sense of the rule upon this subject. The bank did not pay any consideration therefor, nor did it surrender any securities, or release any debt due, either from Reed or Godfrey, to it. The transfer from Godfrey was a simple collateral security, taken as additional security, for the old indebtment and liability of the parties to the notes described in the instrument of transfer. It is true that, as between Godfrey and Reed and the bank,

the latter was a debtor for value, and the transfer was valid. But the protection is not given by the rules of law to a party in such a predicament merely. He must not only have had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities held for the debts and liabilities.

"But here the bank has merely possessed itself of the property transferred as auxiliary security for the old debts and liabilities. It has paid or given no new consideration upon the faith of it. It is, therefore, in truth, no purchaser for value in the sense of the rule. . . ."

After referring to *Dickerson* v. *Tillinghast*, 4 Paige, 215,[1] in which it was held by Chancellor Walworth that the transfer of an estate upon which there was a prior unrecorded mortgage, in payment of a preëxisting debt, without the transferee giving up any security or divesting himself of any right, or placing himself in a worse situation than he was in before, did not make the latter, who was without notice of the prior mortgage, a grantee or purchaser for a valuable consideration, Mr. Justice Story proceeded: "I do not say that I am prepared to go quite to that length, seeing, that by securing the estate as payment, the preëxisting debt is surrendered and extinguished thereby. But here there was no such surrender or extinguishment or payment; and the general principle adopted by the learned Chancellor is certainly correct, that there must be some new consideration moving between the parties, and not merely a new security given for the old debts or liabilities without any surrender or extinguishment of the old debts and liabilities or the old securities therefor. So that upon this ground alone the title of the bank would fail. The case of *Swift* v. *Tyson*, 16 Pet. 1, does not apply. In the first place, there the bill was taken in payment or discharge of a pre-existing debt. In the next place, it was a case arising upon negotiable paper, and who was to be deemed a *bona fide* holder thereof, to whom equities between other parties should not apply. Such a case is not necessarily governed by the same

[1] *S. C.* 25 Am. Dec. 528.

considerations as those applicable to purchasers of real or personal property under the rule adopted by courts of equity for their protection." See also *Rison* v. *Knapp*, 1 Dillon, 186, 200, 201.

In *Johnson* v. *Peck*, 1 Woodb. & Min. 334, 336, which was a case of a mortgage given to secure a preëxisting debt due from a mortgagor who had previously purchased the goods under such representations as entitled his vendor to sue to recover them back, Mr. Justice Woodbury said: "When rights of third persons intervene in this class of cases they are to be upheld, if those persons purchased the property absolutely and parted with a new and valuable consideration for it without notice of any fraud. . . . But if they have notice of the fraud or give no new valuable consideration, or are mere mortgagees, pawnees, or assignees in trust for the debtor, or for him and others, such third persons are to be regarded as holding the goods open to the same equities and exceptions as to title as they were open to in the hands of the mortgagor, pawner, or assignor."

And so in 2 American Leading Cases, 5th Amer. ed., p. 233, it is stated, and we think properly, as the doctrine established by a preponderance of authority, that "whatever the rule may be in the case of negotiable instruments, it is well settled that the conveyance of lands or chattels as security for an antecedent debt will not operate as a purchase for value, or defeat existing equities." See 2 Leading Cases in Equity, 104, 3d Am. ed.; *Strangham* v. *Fairchild*, 80 Ind. 598.

Such, we think, is also the doctrine of the Supreme Court of Michigan. In *Kohl* v. *Lynn*, 34 Mich. 360, the court, after observing that the object of the statute is to protect those who have acquired rights under the circumstances which would render them liable to be defrauded unless protected against instruments of which they knew nothing when acquiring their rights, said: "It has always been held that a purchaser who had paid nothing could not be thus defrauded, and that no one could be protected as a *bona fide* purchaser, except to the extent of his payments made before he received such notice as should have prevented him from making further payments.

This doctrine has been too uniformly recognized to require discussion or citation of authorities. As Kohl had made no payments at all before the property was replevied from him, he was not a *bona fide* purchaser, and his rights are subject to the mortgage."

In *Stone* v. *Welling*, 14 Mich. 514, 525, where the issue was between the holder of an unrecorded mortgage and a subsequent grantee, who agreed to surrender indebtedness of the grantor to him and others, and put the deed on record without notice of the mortgage, the court said:

"Welling claims that the agreement which was given for the deed was amply sufficient to support it, and to entitle him to the rights of a *bona fide* purchaser under the recording laws. It was satisfactory, it is said, to Hart; and as to the indebtedness held by Welling and Root against him, it would have the effect of a present discharge. That it was satisfactory to Hart can be of no consequence on this question, since, to constitute Welling a *bona fide* purchaser he must have parted with something of value, and not merely given a contract which he could avoid, if his title under the deed proved defective. *Thomas* v. *Stone*, Walker's Ch. 117; *Dixon* v. *Hill*, 5 Mich. 404; *Warner* v. *Whittaker*, 6 Mich. 133;[1] *Blanchard* v. *Tyler*, 12 Mich. 339. Nor do we think the agreement had the effect to discharge any indebtedness. It was executory in its character, covering not only the claims of Welling and Root, but also other claims to be procured by them, and upon which it cannot be claimed that the agreement itself would have any effect whatever."

In *Boxheimer* v. *Gwin*, 24 Mich. 372, 379, the defendant in a suit brought to foreclose a recorded mortgage, relied upon a subsequent deed of the mortgagor, which he was induced to take under the representation of the latter, that the mortgage debt had been paid. After sustaining the claim of the plaintiff upon certain grounds, the court said that the defendant must fail in the suit upon the further ground that, although he acted with good faith, he was not a *bona fide* purchaser or

[1] *S. C.* 72 Am. Dec. 65.

Statement of Facts.

encumbrancer for value, with equities superior to those of the plaintiff, because it appeared that the conveyance to him was "merely as a security for a precedent debt," without his paying or agreeing to pay any other consideration or relinquishing any remedy or right he may have had.

Without further discussion of the authorities cited by counsel, all of which have been carefully examined, we are of opinion that the claim of the bank to be a subsequent mortgagee in good faith cannot be sustained, because the mortgage of February 11, 1881, although first filed, was not given in consideration of its having surrendered, or agreed to surrender, or to postpone the exercise, of any substantial right it had against the mortgagors, but merely as collateral security for past indebtedness. Under such circumstances, the mortgage which was prior in time confers a superior right.

Other questions of a minor character are discussed by counsel, but it is not deemed necessary to consider them.

We perceive no error in the record, and the judgment is

Affirmed.

CHICAGO, BURLINGTON, AND KANSAS CITY RAILROAD *v.* GUFFEY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Argued January 3, 1887. — Decided March 7, 1887.

The provision in the state constitution of Missouri of 1865, that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within the state" applies to stock issued for constructing branches of the St. Joseph and Iowa Railroad in that state under the provisions of the statute of March 21, 1868, "to aid in the building of branch railroads in the state of Missouri"; and the provision in the charter of that railroad company, enacted in 1857, that its stock should be exempt from taxation for state and county purposes, does not apply to the stock issued for branches constructed under the act of 1868.

Immunity from taxation by the state will not be recognized, unless granted in terms too plain to be mistaken.

Opinion of the Court.

THIS action was instituted in conformity with a local statute of Missouri, to recover certain state and county taxes alleged to be due upon the property of the plaintiff in error, situate in Putnam County in that state. The Federal question is stated in the opinion of the court.

Mr. Jeff. Chandler for plaintiff in error. *Mr. L. T. Hatfield* and *Mr. A. W. Mullins* were with him on the brief.

Mr. John P. Butler for defendant in error. *Mr. B. G. Boone*, Attorney General of Missouri, and *Mr. S. P. Huston* filed a brief for same.

MR. JUSTICE HARLAN delivered the opinion of the court.

The judgment which this writ of error brings up for review affirms the liability to taxation, in Missouri, for state and county purposes, of what was formerly known as the Central North Missouri Branch of the St. Joseph and Iowa Railroad, more recently named the Linneus Branch of the Burlington and Southwestern Railway Company, and now owned by the Chicago, Burlington, and Kansas City Railroad Company, a corporation organized under the laws of Missouri. The latter company claims to have succeeded to all the rights, privileges, and immunities granted to the St. Joseph and Iowa Railroad Company in its charter of 1857, among which was an exemption of its stock from taxation for "state and county" purposes. As the construction which the Supreme Court of Missouri places upon certain legislation, enacted after the charter of the St. Joseph and Iowa Railroad Company was granted, is inconsistent with the exemption claimed, the controlling question, on this writ of error, is whether the local statutes, as interpreted and applied by that court, impair the obligation of any contract which the company had with the state and thereby deprive its successor, the plaintiff in error, of any rights secured by the Constitution of the United States.

That question mainly depends upon the construction of an act of the General Assembly of Missouri, entitled "An act to aid in the building of branch railroads in the state of Missouri," approved March 21, 1868.

That act took effect from its passage, and is as follows:

"SECTION 1. Any railroad company in this state authorized by law to build branches, and wishing to avail themselves of the provisions of this act, shall, by its board of directors, pass, and cause to be entered upon its records, a resolution setting forth such desire, and designating the name under which such branch shall be built, its point of intersection with its main line and general course, a certified copy of which resolution shall be filed with the secretary of state, after which they shall be governed by the provisions of this act.

"SEC. 2. Whenever any such railroad company shall undertake the construction of a branch designated, as provided in the first section of this act, they shall receive donations or subscriptions to stock to aid its construction in the name of such branch, which shall be expressed in the certificate of stock issued; the cost and expenses of constructing and operating such branch shall be kept separate and distinct from expenses on the main line. They may borrow money and issue bonds secured by mortgage on such branch road to aid in its construction, and, in general, may operate, lease, sell, or consolidate with any connecting road, distinct and separate from their main line, and in any other way, may manage or dispose of such branch, as by law they may be authorized with reference to their main line, and separate therefrom.

"SEC. 3. Any branch road so constructed shall not be holden for any debt, lien, or liability of the main line, nor shall the main line be holden for any debt, lien, or liability of such branch. Any dividends of profits arising out of the business of such branch road shall be divided among the stockholders in said branch, and in all respects the interest of the stockholders in the branch shall be kept separate and distinct from the interests of the stockholders in the main line

"SEC. 4. The holders of stock in any railroad company which was subscribed in aid of the construction of a branch road, according to the provisions of this act, shall have the same rights as other stockholders in the company in the choice of officers; but, in all matters directly and specially affecting the interests of such branch road, the stockholders in such branch

shall control, and, for such purpose, the directors, under their by-laws, may, or on the petition of parties representing one-tenth of such stock shall, call a meeting of the stockholders in such branch, setting forth the object of such meeting; and at any such meeting such stockholders may instruct the board of directors in all matters relating especially to their interests, and they shall be governed by such instructions, if not inconsistent with the laws of the state and the powers of such company." Laws Missouri, 1868, p. 90.

The branch road in question was constructed under the provisions of that statute. That fact distinctly appears from the preamble and resolutions adopted by the board of directors of the St. Joseph and Iowa Railroad Company, March 25, 1871 (a certified copy thereof being filed April 19, 1871, in the office of the secretary of state of Missouri,) and expressly stating the purpose of the company to avail itself of the provisions of the act of 1868 in building this branch road.

The statute, it will be observed, does not exempt from taxation stock subscribed in aid of the construction of the branch roads for which it makes provision. But as it applies to railroad companies, "authorized by law to build branches," and as the St. Joseph and Iowa Railroad Company was authorized by its charter of 1857 to build such branch roads as it deemed proper, *State ex. rel., &c.*, v. *County Court of Sullivan County*, 51 Missouri, 522, 531, it is contended that the exemption, by the company's original charter, of its stock from taxation for state and county purposes, extends to stock subscribed in the name and exclusively for the benefit of the branch road constructed under the act of 1868.

When that statute was passed, the constitution of Missouri of 1865 declared that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state." Art. 12, § 16.

As, perhaps, every railroad company, organized under the laws of the state prior to the adoption of the constitution of 1865, had general authority to construct branch roads, it is

clear that the construction of the act of 1868, for which the appellant contends, cannot be accepted, except upon the theory that the legislature intended to evade the constitutional inhibition upon exemptions of property from taxation; for it is plain, from the provisions of the act of 1868, that the roads which it authorized to be built, although called branch roads, are, for all purposes of separate ownership and management, independent lines, quite as distinct from the main lines as if constructed and operated by other and different corporations. Such provisions as are to be found in that statute are rarely ever found in legislative enactments. An analysis of them shows that any "branch" road constructed under it must be designated by the name under which it is built; donations and subscriptions in aid of it must be received in that name; the cost of construction and management must be kept separate and distinct from expenses incurred on the main line; money may be borrowed and bonds issued secured by mortgage on the branch only; the branch road may be sold, operated, leased, or consolidated with any connecting road of another corporation, or disposed of separately from the main line; it is liable only for its own debts, and not for those of the main line; profits arising out of the business of such branch road can be divided only among its stockholders, and their interests are to be kept distinct from those of the stockholders of the main line; and the board of directors of the company owning the main line are required in all matters relating especially to the interests of the stockholders of the branch road, to follow all instructions given by the latter, without regard to their effect upon the main line. In other words, the stockholders of a branch road constructed under the act of 1868 constitute, in effect, a separate organization, having no connection whatever with the stockholders of the main line, except that the main line and the branch road are, for purposes of convenience, managed by the same board of directors. It may be conceded, for all the purposes of this case, that if the St. Joseph and Iowa Railroad Company, or the company which succeeded to its rights, privileges, and immunities, had built a branch road under the charter of 1857, it could, in respect to that branch, have

stood upon the exemption contained in its charter. Any stock issued by it, and sold to aid in the construction of such a branch road, would, in that case, have been on the same footing in all respects as other stock it may have issued; and its main and branch lines would have been parts of the same system, controlled by the board of directors as they deemed proper. But the company elected not to adopt that course, for the reason, perhaps, that it could not, in that mode, have raised the money necessary to build a branch road. In the condition in which all the railroads of Missouri were left by the civil war, it would have been difficult to raise money to build branch roads, if their future was to be endangered by connection with main lines which needed repairs, and the corporations owning which were without credit. It was, doubtless, for that reason, the St. Joseph and Iowa Railroad Company, instead of constructing a branch road, under the charter of 1857, determined to avail itself of the provisions of the statute of 1868, which permitted it to construct and maintain what is called a branch road, but what, in fact, would be a road having only nominal connection with the main line of the company.

The branch roads to which the charter of the St. Joseph and Iowa Railroad Company referred were, in our judgment, such as would be subject to the same control and management as its main line, and not roads that were branch roads only in name, but were distinct lines, operated solely with reference to the interests and pursuant to the directions of those holding stock therein, irrespective of the necessities of the main line.

To avoid the conclusion that there was a purpose to devise a plan whereby railroad property should be exempt from taxation, which the constitution of 1865 intended should be taxed, we must assume that the legislature intended to invite railroad corporations having general power under their charters to construct branch roads, to waive the exercise of such power, and construct roads under the provisions of the act of 1868 which, although not granting an immunity from taxation, yet afforded peculiar protection to those whose money might be used in such construction.

To say the least, it is not clear that the legislature intended

that the exemption from taxation, given by such charters as that granted to the St. Joseph and Iowa Railroad Company, should be extended to branch roads constructed under the act of 1868. As that statute does not grant immunity from taxation to roads constructed under its provisions, and as the system established by it is complete in itself without reference to other legislative enactments, the present claim to exemption must be denied; for it is the settled doctrine of this court that an immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken. *Providence Bank* v. *Billings*, 4 Pet. 514; *Philadelphia, Wilmington & Baltimore Railroad* v. *Maryland*, 10 How. 376; *Memphis & Little Rock Railroad* v. *Commissioners*, 112 U. S. 609, 617; *Southwestern Railroad* v. *Wright*, 116 U. S. 231, 236; *Vicksburg, &c., Railroad* v. *Dennis*, 116 U. S. 665, 667.

As our conclusion upon this point accords with that of the state court, and is sufficient to dispose of the whole case, we omit any consideration of other questions presented in argument.

Judgment affirmed.

SCHLEY *v.* PULLMAN CAR COMPANY.

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

Submitted January 6, 1887. — Decided March 7, 1887.

An irregular act of practice by an attorney of record rebuked.

A deed, dated May 26, 1856, by C. L., grantor, described as "sister and heir-at-law of H. M.," and as "of the county of St. Clair and state of Michigan," which conveyed to the grantee a tract of land in Illinois, and was signed and sealed by C. L. and by W. L., the name of W. L. not appearing in the granting clause of the deed, and which was acknowledged May 27, 1856, by said "C. L. and W. L. her husband," *held* sufficient to pass said title of husband and wife, under the statute of Illinois of February 22, 1847, then in force, respecting the conveyance of lands or real estate situate in Illinois by a *feme covert* not residing within the state, and respecting her joining with her husband in the execution of the deed.

A magistrate's certificate, attached to a deed of land in Illinois, that on the 27th of May, 1856, personally came C. L. and W. L., her husband, "known

to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed," is equivalent to stating that they came before the officer, and were personally known to him to be the real persons who subscribed the deed, and in this respect complied with the requirements of the statutes of Illinois then in force.

An officer's certificate of the acknowledgment on the 27th May, 1856, of a deed of land in Illinois by a married woman, showing her privy examination separate and apart from her husband, and which shows that she, "fully understanding the contents of the foregoing instrument, acknowledged," &c., is a sufficient compliance with the statutes of the state in force at that time respecting the communicating the contents of such a deed to her.

EJECTMENT. Plea, general issue. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. S. Corning Judd, *Mr. Albert Ritchie*, *Mr. W. Ritchie*, *Mr. E. B. Esher*, and *Mr. E. S. Judd*, for plaintiff in error.

Mr. Alfred Ennis for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action of ejectment, in which the plaintiff in error claims title to certain real estate in Cook County, Illinois, of which Pullman's Palace Car Company is in possession. A jury having been waived, the case was tried by the court, pursuant to a stipulation between the parties, that judgment should be entered for the defendant if the court was of opinion that a certain deed was valid and binding as a conveyance by husband and wife of the real estate therein described.

The deed and the certificate of acknowledgment annexed thereto, referred to in the stipulation, is as follows:

"THIS INDENTURE, made this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and fifty-six, witnesseth: That I, Christina Lynn, sister and heir-at-law of Henry Millspaugh, deceased, who was a recruit of Lieutenant T. W. Denton, of Thirteenth Regiment, United States Infantry, war of 1812, with Great Britain, of the county of St. Clair, and State of Michigan, party of the first part, in con-

sideration of the sum of forty-three dollars in hand paid by Milton & Thomas C. McEwen, of the county of Orange and State of New York, party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain, and quit-claim unto the said party of the second part, their heirs and assigns, forever, all her right, title, claim and interest in that certain tract of land granted by the United States unto David Millspaugh and Christina Lynn, the brother and sister and only heirs-at-law of Henry Millspaugh, deceased, as follows, to wit: [Here follows a description of the land] . . .; to have and to hold the said premises, with all the appurtenances thereunto belonging or in anywise appertaining, to their only proper use, benefit and behoof of said parties of the second part, their heirs and assigns, forever.

"In witness whereof the said grantor– have hereunto set our hands and seals the day and year first above written.

"CHRISTINA LYNN. [SEAL.]

"WILLIAM LYNN. [SEAL.]

"Signed, sealed and acknowledged in presence of—

"MARY A. LYNN,

"OBED SMITH.

"STATE OF MICHIGAN, COUNTY OF ST. CLAIR, SS:

"On this twenty-seventh day of May, A.D. 1856, before me, a justice of the peace in and for said county of St. Clair, personally came Christina Lynn and William Lynn, her husband, known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed; and the said Christina Lynn, having been by me privately examined separate and apart from the said husband, and fully understanding the contents of the foregoing instrument, acknowledged that she executed said deed freely and without any force or compulsion from her said husband or from any one.

"OBED SMITH,

Justice of the Peace."

The court being of opinion that the deed was valid to pass to the grantees all the right, title, and interest of Christina

Lynn and William Lynn, her husband, in the real estate therein described, entered judgment for the defendant on its plea of not guilty.

Before entering upon the consideration of the case it is proper to notice the motion made in behalf of the plaintiff in error, to strike out certain parts of the printed argument filed by the counsel for the defendant in error. Notwithstanding the agreement, that the case should be heard in the court below upon the single question referred to in the stipulation, the counsel for the defendant in error states many things, which he declares to be "incontrovertible facts," and within the knowledge of opposing counsel, but which are wholly unsustained by anything in the record. The motion to strike out relates to those matters. The excuse given for this breach of professional propriety is "the extreme brevity of the record." But it is the same record upon which counsel for the company succeeded for his client, and which, by agreement, contained all that was to be submitted to the court. The excuse given furnishes no apology whatever for his violation of the terms of the stipulation, much less does it palliate his attempt to influence the decision here, by reference to matters not in the record, and which, he must have known, could not be taken into consideration. It is only necessary to say that the facts, *dehors* the record, which have been improperly introduced into the brief of the counsel for the defendant in error, have not in any degree influenced our determination of the case.

The plaintiff insists that the deed was void under the laws of Illinois, upon two grounds: 1. That the husband is not a party to the deed; 2. That the acknowledgment is defective.

In *Lane* v. *Soulard*, 15 Ill. 123, it was held that the Revised Statutes of Illinois of 1845 repealed all former laws on the subject of conveyances of real estate, and authorized married women within that state to convey land by joining with their husbands and acknowledging the deeds in a specified way; but that no provision was made for the conveyance by non-resident married women of their lands in Illinois until the passage of the act of February 22, 1847. See also *Higgins* v. *Crosby*, 40 Ill. 260; *Rogers* v. *Higgins*, 48 Ill. 211.

Opinion of the Court.

This case depends mainly upon the construction to be placed upon the second section of the latter act, which was in force when the deed of May 26, 1856, was executed. That section is as follows:

"When any *feme covert*, not residing in this state, being above the age of eighteen years, shall join with her husband in the execution of any deed, mortgage, conveyance, or other writing of, or relating to, any lands or real estate, situate within this state, she should thereby be barred of and from all estate, right, title, interest, and claims of dower therein, in like manner as if she was sole and of full age. And any such *feme covert* joining with her husband in the execution of a power of attorney or other writing, authorizing the sale, conveyance, or other disposition of lands or real estate as aforesaid, shall be bound and concluded by the same, in respect to the right, title, claim, or interest in such estate, as if she were sole and of full age as aforesaid; and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writing may be the same as if she were sole, and shall entitle such deed, mortgage, conveyance, power of attorney, or other writing to be recorded as is authorized by this act; and the provisions of this section shall apply to deeds, mortgages, conveyances, powers of attorney, and other writings heretofore, as well as those which may hereafter be executed." 2 Scates, Treat & Blackwell's Stat. Ill. 965; 1 Gross' Stat. Ill. c. 24, § 24; 1 Adams & Durham's Real Estate Stat. & Decisions of Ill. 175.

Did Christina Lynn, within the meaning of that statute, "join with her husband in the execution" of the deed of 1856? The plaintiff contends that she did not, because the name of the husband is not expressly designated in the body of the deed as a grantor. It is argued that as William Lynn, the husband, had during coverture a freehold interest jointly with his wife in her estate of inheritance, with absolute ownership of the rents and profits of the wife, the requirement in the act of 1847, that she should join him in the execution of any deed for real estate, was a recognition of his supremacy and right of control, and necessarily implied that he, as grantor, so

named in the granting or operating clauses, must pass whatever interest he had, and thereby, also, express his willingness that the wife should convey her title or estate. While this position is sustained by some adjudications, it is necessary to inquire as to the state of the local law; for the rights of the parties must be governed by the requirements of that law in respect to the mode in which real property situated within the limits of that state may be conveyed or transferred. *United States* v. *Crosby*, 7 Cranch, 115; *Clark* v. *Graham*, 6 Wheat. 577; *McCormick* v. *Sullivant*, 10 Wheat. 192, 202; *Suydam* v. *Williamson*, 24 How. 427, 433; *Brine* v. *Ins. Co.*, 97 U. S. 627.

In *Johnson* v. *Montgomery*, 51 Ill. 185, the question was whether dower was barred by a deed executed in 1853, in Ohio, conveying lands in Illinois belonging to the husband, the wife signing the deed and duly acknowledging it before a proper officer. But the wife was not named in the body of the deed, nor was her right of dower referred to therein in any way. It is true, as suggested by counsel for the plaintiff in error, that an inchoate right of dower is not a present estate in lands, and that the court in that case expressly waived any decision of the question whether the deed then before it would have been good under the act of 1847, and placed its decision entirely upon the 21st section of the statute of conveyances of 1845. That section provides that it shall be lawful "for any married woman to release her right of dower of, in, and to any lands and tenements whereof her husband may be possessed or seized, by any legal or equitable title during her coverture, by joining such husband in the deed or conveyance for the conveying of such lands and tenements, and appearing and acknowledging the same, &c., . . . which [certificate of privy examination] being recorded, together with the deed, duly executed and acknowledged by the husband according to law, shall be sufficient to discharge and bar the claim of such woman to dower in the lands and tenements conveyed by such deed or conveyance." 1 Adams & Durham, 133; Rev. Stat. Ill., 1845, 107. The court, after observing that the deed merely extinguished the wife's con-

tingent right of dower, and did not pass any estate she had in the land, said: "This precise question has not hitherto been presented, but we entertain no doubt it has always been supposed by both the people and the profession in this state that a married woman, signing her husband's deed, and being properly examined before an officer, and causing his certificate of that fact to be placed upon the deed, would bar her dower in the premises conveyed, although her name nowhere appeared in the body of the deed. By signing the deed she 'joins' in it, and having done this, her dower is barred if she takes the other steps pointed out by the statute," p. 191. This decision bears somewhat on the question as to what the local statutes mean when they require the wife to join with the husband in a conveyance of real estate.

In *Miller* v. *Shaw*, 103 Ill. 277, 291, one of the questions was whether a certain conveyance by a married woman, living in Illinois with her husband, passed the title to her separate real property situated in that state, the husband not joining with her in the granting clause of the deed. The statute in force when the deed was made prescribed the mode in which the husband and wife, residing in Illinois, could convey the real estate of the wife. Act of 1845, § 17, p. 106; 1 Adams & Durham, 127, 128. It made it lawful for the husband and wife to "execute" any grant, lease, deed, or conveyance of such estate. The court said: "That which this statute requires to be done to enable the wife to convey her separate property is, that she and her husband shall execute the deed, and after that she shall appear before a proper officer and acknowledge the same in the mode pointed out in the statute; and such deed being acknowledged or proved according to law by the husband, it will be as effectual to pass the title to the wife's separate property as the deed of an unmarried woman would be to convey her property. All this was done in this case. Both Mrs. Sheldon and her husband executed the deed to Ward, and afterwards she appeared before a proper officer and acknowledged it in conformity with the statute; and the acknowledgment of her husband to the deed being according to law, that seems to be all the law requires to be done to

make the deed effectual to pass the title to the wife's separate estate."

The latest case to which our attention has been called is *Yocum* v. *Lovell*, 111 Ill. 212. By a statute of Illinois every householder is declared to be entitled "to an estate of homestead," to a specified amount, in the farm or lot of land, and buildings thereon, owned or rightly possessed, by lease or otherwise, and acquired by him or her as a residence; such homestead and all right and title therein being exempted from attachment, judgment, levy, execution, or sale for the payment of his debts or other purposes, and from the laws of conveyance, descent and devise, as provided in that statute. The exemption continues after the death of the householder for the benefit of the surviving husband or wife, so long as he or she occupies such homestead, and of the children until the youngest child become twenty-one years of age. The statute, also, provides, that "no release, waiver or conveyance of the estate so exempted shall be valid, unless the same is in writing, subscribed by said householder and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned or given pursuant to the conveyance; or, if the exemption is continued to child or children, without the order of the court directing a release thereof." Rev. Stat. Ill., 1874, p. 497. In the case last cited, the question was whether a trust deed expressly relinquishing the homestead right, was effectual for that purpose, the name of the wife not appearing in the granting clause of the deed, though it was signed and duly acknowledged by herself and husband in conformity with the statute. The court held the deed to be sufficient to pass the interest of both husband and wife in the estate of the homestead — observing, that the statute did not require the name of the husband or wife to appear in the body of the deed. Referring to *Miller* v. *Shaw*, as presenting an analogous question, the court said: "In the case now being considered the wife joins with her husband in the release of homestead in precisely the same manner as the husband did with the wife in the case cited," p. 218.

Opinion of the Court.

While those cases do not cover the precise question under consideration, we are of opinion that under the principles announced in them, the deed of May 26, 1856, must be upheld as a valid transfer under the law of Illinois of the interest of Christina Lynn and her husband. If, as adjudged by the Supreme Court of the state, the wife, whose name did not appear in the operative clause of the husband's conveyance of his lands, is to be held as having joined him therein and surrendered her right of dower, by simply signing the deed and acknowledging it in conformity with the statute, and upon privy examination duly certified; if, under a statute making it lawful for husband and wife "to execute" a conveyance of her real estate, they will both be held to have executed a conveyance of her separate property where her name appears, but that of the husband does not appear, in the granting clause of the deed, but they both sign and acknowledge it in the mode required by law; and if the wife's "estate of homestead" can be conveyed by a deed, signed and duly acknowledged by herself and husband, her name, however, not appearing in the body of the deed; it would seem to follow that, within the meaning of the act of 1847, and according to the tendency of the decisions of the Supreme Court of the state, the wife joins with her husband in the execution of a conveyance of her estate of inheritance where her name alone appears in the granting clause, but the deed is signed by both herself and husband, is acknowledged by both, and is certified as required by law. Such conveyance, so signed, acknowledged, and certified, of the wife's land, seems to be as effectual, under the local law, to invest the grantee with the title and interest of both husband and wife as if his name had also appeared in the granting clause.

If, as suggested, the purpose of the act of 1847 in requiring the wife to join the husband in the execution of conveyances of her real estate was to protect her against strangers and secure his coöperation and counsel, that object was as fully accomplished by his signing and acknowledging the deed with her as it would have been by designating him in the body of the deed as co-grantor with the wife.

It is proper to say that the question under consideration is not free from difficulty, and we should have been glad to be guided in our determination of it by an express decision of the highest court of the state. The conclusion reached by us is more in harmony with what that court has held in cases somewhat analogous than would be a decision adjudging the deed of 1856 to be void.

One other question remains to be considered. It is contended that the certificate of acknowledgment is fatally defective for two reasons: 1st. It does not appear that Mrs. Lynn was personally known to the magistrate, or that she was proved by a credible witness to be the same person as the one who subscribed to the deed; 2d. It does not appear that she was informed of the contents of the deed.

In support of these objections, the counsel for the plaintiff in error relies upon the 20th section of the chapter on "Conveyances" in the Revised Statutes of 1845, p. 107. That section provides: "No judge or other officer shall take the acknowledgment of any person to any deed or instrument of writing as aforesaid, unless the person offering to make such acknowledgment shall be personally known to him to be the real person who, and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness, and the judge or officer taking such acknowledgment shall, in his certificate thereof, state that such person was personally known to him to be the person whose name is subscribed to such deed or writing, as having executed the same, or that he was proved to be such by a credible witness (naming him)," &c. That chapter was amended by the act of February 11, 1853, the first section of which provides: "That no deed, mortgage, or other instrument of writing, heretofore executed, or hereafter to be executed, by husband and wife, in good faith, for the purpose of conveying or incumbering the estate of the husband, or the estate of the wife, or the right of dower in any lands situate in this state, and acknowledged by them before any officer authorized by the laws of this state to take acknowledgments, shall be deemed, held, or adjudged invalid, or defective or insufficient in law, by reason

of any informality or omission in setting forth the particulars of the acknowledgment, before such officer as aforesaid, in the certificate thereof: *Provided, however*, That it appears in substance, from such certificate, that the parties executing said deed, mortgage, or other instrument of writing, executed the same freely and voluntarily; and that in case of married women executing the same, it appear in substance, that they knew the contents of said deeds, mortgages, or other instruments of writing, and that they were examined by the officer aforesaid, separate and apart from their husbands." 1 Adams & Durham, 185.

It was said in *Lindley* v. *Smith*, 46 Ill. 523, 527, that the requirement that the certificate should show that the person acknowledging it was personally known to the officer to be the person whose name is subscribed to the deed, or was proved to be such, by a credible witness, was one of substance and salutary in its operation, and was not dispensed with by the act of 1853; and that "it is the acknowledgment of the *feme covert* which is the operative act to pass her title." See also *Murphy* v. *Williamson*, 85 Ill. 149, 152. Assuming this to have been the settled law of Illinois when the deed in question was executed, and that the case, on this point, is governed by the Revised Statutes of 1845, the result claimed by the plaintiff in error does not follow. The cases cited do not sustain the objection to the certificate of acknowledgment. In *Lindley* v. *Smith* — one of the cases relied upon by the plaintiff in error — there was no language in the certificate of the wife's acknowledgment from which it could be inferred that she was either personally known to him, or was proved by a witness to be the person who had as wife signed the deed. To the same class belong the cases of *Heinrich* v. *Simpson*, 66 Ill. 57, and *Coburn* v. *Herrington*, 114 Ill. 104, 107. The officer's certificate in this case states that "personally came Christina Lynn and William Lynn, her husband, known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed." This is, in substance, a statement that they came before the officer and were personally known to him to be the real persons who in fact subscribed and acknowledged the deed.

Syllabus.

The objection that the officer's certificate does not state that she was informed of the contents of the deed — if it have any force whatever under the statute of 1847, permitting the non-resident *feme covert* to acknowledge her deeds as if she were unmarried — is not well taken. The certificate shows that she executed the deed freely and without force or compulsion from the husband or from any one else, "fully understanding the contents" thereof. Besides, this defect, if it be one, is of the kind that was cured by the act of 1853, which only required it to appear, in substance, as it does here, that the deed was executed freely and voluntarily, and, in the case of a married woman, that she knew its contents and was examined separately and apart from her husband. She must have known, if, as certified, she fully understood the contents of the deed.

The judgment below was right, and is

Affirmed.

GILMER *v.* STONE.

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

Submitted December 20, 1886. — Decided March 7, 1887.

A, a resident in Irish Grove, Illinois, died there, leaving a will by which, after bequeathing his library to the Presbyterian church of Irish Grove, and $500 for the erection of another Presbyterian church in Illinois, and $50 to be paid on the minister's salary of the Presbyterian church of Irish Grove for 1884, and some other bequests, he bequeathed and devised the remainder of his estate "to be equally divided between the board of foreign and the board of home missions." The Presbyterian Church in the United States of America has a corporate "Board of Foreign Missions" and a corporate "Board of Home Missions;" but it was agreed by counsel that several other religious bodies in the United States have similar organizations, for the same purposes. *Held*, that there was a latent ambiguity in the will respecting the object of the residuary gift, which ambiguity could be removed by extrinsic evidence; and that the evidence introduced on that point, taken in connection with the other bequests in the will for the benefit of Presbyterian churches, showed that the testator,

Argument for Appellee.

in making the residuary gift, had in his mind the Board of Foreign Missions and the Board of Home Missions of the Presbyterian Church of the United States of America, of which he was a member and an officer.

The restriction upon the right of a congregation, formed for religious purposes, to receive "land not exceeding in quantity . . . ten acres," which is imposed by § 42 of the act of the legislature of Illinois of April 18, 1872, applies to congregations incorporated for the object named in § 35 of that act, viz.: "the purpose of religious worship;" and does not affect foreign benevolent or missionary societies incorporated either with the objects named in the incorporation of the Board of Foreign Missions of the Presbyterian Church in the United States, or with the objects named in the incorporation of the Board of Home Missions of that church, although both organizations are important agencies in the general religious work of that church.

Christian Union v. *Yount*, 101 U. S. 352, commented upon, explained, and affirmed.

Bill in equity to set aside a will and its probate for uncertainty so far as they related to the residuary devise and bequest. Decree, dismissing the bill, from which plaintiff appealed. The case is stated in the opinion of the court.

Mr. D. T. Littler, *Mr. L. A. Whipp*, and *Mr. R. E. Lewis* for appellant cited: 1 Jarman on Wills, Randolph & Talcott ed. 403 n. 3, 404 n.; Story Eq. Jur. §§ 1158, 1183; Perry on Trusts, §§ 116, 713; *Bridges* v. *Pleasants*, 4 Iredell Eq. 26;[1] *Fontain* v. *Ravenel*, 17 How. 369; *Wheeler* v. *Smith*, 9 How. 55, 79; *Taylor* v. *Keep*, 2 Bradwell, 368; *Allen's Executors* v. *Allen*, 18 How. 385; *Runyan* v. *Coster*, 14 Pet. 122; *Lathrop* v. *Commercial Bank*, 8 Dana, 114; Laws of Illinois, 1859, p. 20, Gross. Rev. 124; Rev. Stat. Ill. 1845, c. 35, § 44; *St. Peter's Roman Catholic Congregation* v. *Germain*, 104 Ill. 440; Laws Illinois, 1872, c. 32, § 42; *Stevens* v. *Pratt*, 101 Ill. 206.

Mr. James McCartney for appellee cited: 2 Phill. Ev. 745–756; Wigram Extraneous Ev. 118, 138; 1 Jarman on Wills, c. 13 and note; *King* v. *Ackerman*, 2 Black, 408; *Bradley* v. *Rees*, 113 Ill. 327; *Heuser* v. *Harris*, 42 Ill. 425; *Hinckley* v. *Thatcher*, 139 Mass. 477; *Allen's Executors* v. *Allen*, 18 How. 385; *Christian Union* v. *Yount*, 101 U. S. 352; *St. Peter's Roman Catholic Congregation* v. *Germain*, 104 Ill. 440; *Vidal* v.

[1] *S. C.* 44 Am. Dec. 94.

Girard, 2 How. 127; *Hayward* v. *Davidson*, 41 Ind. 212; *De Camp* v. *Dobbins*, 29 N. J. Eq. (2 Stewart) 36; *Baker* v. *Neff*, 73 Ind. 68; *Alexander* v. *Tolleston Club*, 110 Ill. 65.

Mr. Justice Harlan delivered the opinion of the court.

Robert Gilmer, late of Irish Grove, Menard County, Illinois, died December 31, 1883, having made a last will by which he disposed of his entire estate, consisting of about four thousand dollars in personal property, and from three to four hundred acres of land in that state. The eleventh clause of the will is in these words: "I also, after paying all debts and claims against my estate, bequeath and devise the remainder of my estate to be equally divided between the board of foreign and the board of home missions." The object of the present suit is to obtain a decree declaring that clause to be void, and directing the estate of the testator, after meeting the debts and the bequests contained in other clauses to be paid to the complainant, the uncle and only heir-at-law of the decedent.

The "Board of Foreign Missions of the Presbyterian Church in the United States of America" and the "Board of Home Missions of the Presbyterian Church in the United States of America" — corporations created under the laws of New York — severally appeared, were made defendants, and filed answers, each claiming the right to share in the devise in the eleventh clause of the will. The executors admit the justice of these claims, but ask the direction of the court in the premises. To these answers a general replication was filed; and, the cause having been heard upon the pleadings and proofs, the bill was dismissed with costs.

It is agreed in the case that the Baptist, Methodist, Episcopal and other churches, like the Presbyterian Church in the United States of America, have boards of home and foreign missions; consequently, it is contended, the eleventh clause of the will is void for uncertainty as to the donee and the purposes of the gift. In this view we do not concur. It is undoubtedly the rule, in respect to the testamentary disposition of property, real and personal, that uncertainty either as to the subject or object of a devise will be fatal to its validity. But that rule has

no application here; for, if there were no other facts in the case than that there are numerous boards which may be generally described by the words, the "board of foreign missions," and "the board of home missions," the devise in the eleventh clause would not fail. With respect to charities, gifts may be good which, with respect to individuals, would be void; "and where there are two charities of the same name, the legacy will be divided between them, if it cannot be ascertained which was the intended object." 1 Jarman on Wills, 376. Can it be ascertained by competent evidence which of these various boards were the objects of the testator's bounty?

In the fourth clause of the will, the testator bequeathed his library to the Presbyterian church of Irish Grove; in the ninth, five hundred dollars toward the erection of a Presbyterian church in Greenview, Illinois, provided the same was built within two years from the date of the will; otherwise, the money should revert to his estate; and in the tenth, he bequeathed fifty dollars to be paid on the minister's salary of the Presbyterian church of Irish Grove for the year 1884.

And there was extrinsic evidence to the following effect: That the testator had been for many years a member and ruling elder of the Irish Grove Presbyterian Church, one of the local congregations of the Presbyterian Church in the United States of America; that collections were annually taken up in that congregation for the various boards of that church, including its Boards of Foreign and Home Missions; that while it was announced from the pulpit that collections would be taken for the Board of Foreign Missions or the Board of Home Missions, without, in words, naming the Presbyterian Church, all such collections, with the knowledge and assent of the church session, of which the testator was an active and zealous member, were, without exception, sent to the officers of the Presbyterian Boards of Foreign and Home Missions in New York City, and regular reports thereof made to the session; that the testator took especial interest in the work of those particular boards and uniformly contributed thereto; and that he did not, so far as his pastor or associates in the church session knew, make contributions to the societies of any other

church, except to the Bible Society, which was sustained by several religious organizations.

Of the competency of this evidence there can be no doubt. The purpose of it was to place the court, as far as possible, in the situation in which the testator stood, and thus bring the words employed by him into contact with the circumstances attending the execution of the will. Such proof does not contradict the terms of that instrument, nor tend to wrest the words of the testator from their natural operation. It serves only to identify the institutions described by him as "the board of foreign and the board of home missions;" and thus the court is enabled to avail itself of the light which the circumstances, in which the testator was placed at the time he made the will, would throw upon his intention. "The law is not so unreasonable," says Mr. Wigram, "as to deny to the reader of an instrument the same light which the writer enjoyed." Wigram on Wills, 2d Amer. ed. 161. The proof made a case of latent ambiguity. Such an ambiguity may arise, "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." *Patch* v. *White*, 117 U. S. 210, 217. In the same case it was observed that, "as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence." See, also, *Allen's Executors* v. *Allen*, 18 How. 385, 393; *Hinckley* v. *Thatcher*, 139 Mass. 477; *Breckenridge* v. *Duncan*, 2 A. K. Marsh. (Ky.) 50, 51;[1] *Morgan* v. *Burrows*, 45 Wis. 211, 217; *Brewster* v. *McCall*, 15 Conn. 273; *Tilton* v. *Society*, 60 N. H. 377, 382; 1 Jarman on Wills, 423, 431; 1 Greenl. Ev. § 290.

Construing, then, the will with reference to the extrinsic evidence of the uniform relations of the testator to the subject of foreign and home missions, and to certain societies engaged in that kind of work, it is not to be doubted that, in the eleventh clause, he had in mind the Boards of Foreign and Home Missions

[1] *S. C.* 12 Am. Dec. 359.

of the general religious society or organization of which he was a member and officer. The words of the will very well apply to such an object, and, therefore, in so interpreting its provisions, no violence is done to the language employed by the testator.

It is, also, contended that the Boards of Foreign and Home Missions of the Presbyterian Church in the United States of America are foreign religious societies, or foreign societies organized for religious purposes, and, as such, cannot, under the laws of Illinois, take exceeding ten acres of land each, and that the devise in the eleventh cause, being of more than three hundred acres of land jointly, is void and must fail.

In the case of *Christian Union* v. *Yount*, 101 U. S. 352, 360, decided in 1879, we considered the question whether a conveyance made in 1870, by a citizen of Illinois, of real estate there situated, of the value of $10,000, to the American and Foreign Christian Union, a New York corporation, was void under the laws of Illinois — the object of that corporation being, "by missions, colportage, the press, and other appropriate agencies, to diffuse and promote the principles of religious liberty and a pure evangelical Christianity, both at home and abroad, wherever a corrupt Christianity exists." The validity of the conveyance was sustained upon the ground that the law of Illinois, as it existed in 1870, did not preclude a benevolent or missionary corporation of another state, being thereunto authorized by its own charter, from taking title to real estate within her limits, by purchase, gift, devise, or in any other manner.

It is, however, insisted that the force of that decision is weakened, if not destroyed, by the failure of the court to refer to § 44 of c. 24 of the Revised Statutes of 1845, making it lawful for "the members of any society or congregation," theretofore formed or thereafter to be formed, "for purposes of religious worship," to "receive by gift, devise or purchase, a quantity of land not exceeding ten acres, and to erect or build thereon such houses and buildings as they may deem necessary for the purposes aforesaid, and to make such other use of the land and make such other improvements thereon as

may be deemed necessary for the comfort and convenience of such society or congregation." Rev. Stat. Ill. 1845, p. 120. Counsel overlook the fact that the court, in *Christian Union* v. *Yount*, referred incidentally, and as indicating the general course of legislation in Illinois, to the like provision in the act of 1872. No comment was made upon that provision, for the reason that it had no application to the case; there being no claim, as there could not well have been, that the American and Foreign Christian Union was, within the meaning of the statute, a society or congregation "for purposes of religious worship."

In *St. Peter's Roman Catholic Congregation* v. *Germain*, 104 Ill. 440, the Supreme Court of the state held that the foregoing section of the act of 1845 was not repealed by the act of March 8, 1869, providing "for the holding of Roman Catholic churches, cemeteries and other property," but was displaced by the 42d section of the act of April 18, 1872, (c. 32 of the Revision of 1874,) which last section, however, the court said, was substantially the same as the 44th section of the act of 1845, and to be regarded as, in effect, merely continuing the latter in force.

We have, therefore, to inquire whether the devise in question is void under the act of April 18, 1872. That act makes provision for the formation of corporations for any lawful purpose, except banking, insurance, real estate brokerage, the business of loaning money, and the operation of railroads other than horse and dummy railroads. It also makes provision for the incorporation of societies, corporations, and associations for any lawful purpose, not for pecuniary profit, "capable of taking, purchasing, holding and disposing of real and personal estate for purposes of their organization." Secs. 29, 31.

The act proceeds:

"Sec. 35. The foregoing provisions shall not apply to any religious corporation; but any church, congregation or society formed for the purpose of religious worship, may become incorporated in the manner following, to wit: . . .

"Sec. 41. Upon the incorporation of any congregation, church or society, all real and personal property held by any

person or trustees for the use of the members thereof, shall immediately vest in such corporation and be subject to its control, and may be used, mortgaged, sold and conveyed the same as if it had been conveyed to such corporation by deed; but no such conveyance or mortgage shall be made so as to affect or destroy the intent or effect of any grant, devise or donation that may be made to such person or trustee for the use of such congregation, church or society.

"SEC. 42. Any corporation that may be formed for religious purposes under this act or under any law of this state for the incorporation of religious societies, may receive by gift, devise or purchase, land not exceeding in quantity (including that already held by such corporation) ten acres, and may erect or build thereon such houses, buildings or other improvements as it may deem necessary for the convenience and comfort of such congregation, church or society, and may lay out and maintain thereon a burying ground; but no such property shall be used except in the manner expressed in the gift, grant or devise, or, if no use or trust is so expressed, except for the benefit of the congregation, church or society for which it was intended."

The 45th section permits any congregation, church, or society incorporated under the act, to receive by grant, devise or bequest, real estate, not exceeding forty acres, for the purpose of holding camp-meetings. Rev. Stat. 1874, pp. 292, 293.

Assuming for the purposes of this case only, that a church, congregation, or society formed under the laws of another state, for purposes of religious worship in that state, could not lawfully receive by gift, devise or purchase, land in Illinois, in excess of the quantity which may be received in either of those modes by a similar corporation formed under the laws of Illinois, we are satisfied that the sections last quoted from the act of 1872 do not embrace corporations of the class to which these Boards of Foreign and Home Missions belong. The Board of Foreign Missions of the Presbyterian Church in the United States of America was formed "for the purpose of establishing and conducting Christian missions among the unevangelized or pagan nations and the general diffusion

of Christianity." Its power to hold real or personal estate in New York is restricted to such quantity as will produce an annual income not exceeding $20,000. The object of the Board of Home Missions of that church is "to assist in sustaining the preaching of the Gospel in feeble churches and congregations in connection with the Presbyterian Church in the United States, and generally to superintend the whole of home missions in the behalf of such church as the General Assembly shall, from time to time, direct; and also to receive, take charge of, and disburse all property and funds which, at any time, and from time to time, may be intrusted to said church or said board for home missionary purposes." It cannot take and hold real or personal property, the annual income of which shall exceed $200,000.

While these boards are important agencies in aid of the general religious work of the Presbyterian Church in the United States of America, neither of them is, in any proper sense, or in the meaning of the 35th section of the act of 1872, a church, congregation, or society formed for the purpose of *religious worship*. The counsel for the plaintiff in error seem to lay stress upon the more general words, "formed for religious purposes," in the 42d section of the act; but manifestly the other parts of the same section, and previous sections, show that the only corporations intended to be restricted in the ownership of land to ten acres, were those formed for the purpose of "religious worship," and not to organizations commonly called benevolent or missionary societies. The reasons of public policy which restrict societies, formed for the purpose of religious worship, in their ownership of real estate, do not apply at all, or, if at all, only with diminished force, to corporations which have no ecclesiastical control of those engaged in religious worship, and cannot prescribe the forms of such worship, nor subject to ecclesiastical discipline those who fail to conform to the rules, usages, or orders of the religious society of which they are members.

This conclusion does not, in the slightest degree, conflict with the decision in *St. Peter's Roman Catholic Congregation* v. *Germain*. That was the case of a conveyance of about eighty

Statement of Facts.

acres of land directly to a congregation or society "formed for the purpose of religious worship," as distinguished from a benevolent or missionary organization. The court held that, under the legislation of Illinois, "a religious corporation is authorized to receive or acquire lands to the extent of ten acres and no more. Any amount in excess of that is expressly forbidden by statute, and it follows that all conveyances, deeds, or other contracts made in violation of this prohibition, are absolutely void."

As the eleventh clause was intended to pass, and was valid for the purpose of passing, to the Boards of Foreign and Home Missions of the Presbyterian Church in the United States of America the estate thereby devised, the decree must be affirmed; and it is so ordered.

Affirmed.

MARSH *v.* SHEPARD.

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

Submitted March 7, 1887. — Decided March 14, 1887.

If the other appellants oppose a motion, made by one of several appellants, to dismiss an appeal on the ground that since it was taken the Supreme Court of a state has enjoined all the appellants from enforcing the claims which form the subject matter of the appeal, it will be denied.

This was a motion to dismiss an appeal from a decree of the Circuit Court dismissing a bill in equity brought to procure a perpetual injunction against alleged infringements of letters-patent. The motion was made by James Scott, one of the appellants. The following affidavit and appearance were filed in support of the motion.

"State of Michigan, *Calhoun County*, ss.

"James Scott, being first duly sworn, doth on oath depose and say: I am one of the appellants named in the above entitled cause; that said appeal was taken without my knowledge and consent, and that I gave no authority to R. A.

Parker, Esq., of Detroit, Michigan, to enter my appearance in this cause in this court, but that I have authorized and directed Mr. Edward J. Hill, of Chicago, Illinois, one of the attorneys of this court, to appear for me and move to dismiss this appeal.

"JAMES SCOTT.

"Subscribed and sworn to before me, this 10th day of February, A.D. 1887.

"[SEAL.] FRANK W. DUNNING,
"*Notary Public.*"

"I hereby enter my appearance in the above entitled cause pursuant to the above authority and direction as the attorney for James Scott, for the purpose only of making a motion to dismiss this appeal because the cause of action or grounds of relief have been taken away by the decree of the Circuit Court of Calhoun County, Michigan, as shown in and by the documents, copies of which are to be found in the annexed transcript of record.

"Dated February 28, A.D. 1887.

"EDWARD J. HILL."

The documents referred to in the entry of appearance contain the transcript of the record in a suit in chancery between the same parties with reference to alleged infringements of the same letters-patent, decided in the Supreme Court of Michigan after this appeal was taken, in which suit a perpetual injunction was granted as prayed for; and also a copy of a writ of error in the same cause to this court, sued out on the petition of Marsh and Le Fever only, in the petition for which the following grounds were set out:

"1. That it appears therein that the exclusive jurisdiction of the Supreme Court of the United States, on the appeal by these defendants over the same question, and the same parties was drawn in question, and was denied.

"2. That full faith and credit, at the request of these defendants was not given to the proceedings, record and appeal appearing in the Circuit Court of the United States for

the Eastern District of Michigan, concerning the same issues and between the same parties.

"3. That the right and authority under the Constitution and laws of the United States of the said defendants to prosecute their said appeal from the said Circuit Court of the United States was drawn in question and denied.

"4. That the right and authority under the Constitution and laws of the United States, authorizing the issue of letters-patent to inventors, and especially the right and authority exercised by said defendants under letters-patent No. 236,052 issued in pursuance of said laws, was drawn in question and denied."

The motion to dismiss was opposed by Marsh and Le Fever, the other appellants.

Mr. Edward J. Hill for the motion.

Mr. R. A. Parker and *Mr. Don M. Dickinson* opposing.

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

This motion is denied. The sole ground of the application is, that since the appeal the Supreme Court of Michigan has, in a suit between the same parties, enjoined these appellants from making any claim against the appellee for the use of the patented invention which is the subject matter of the suit, and has required them to release all the claims and demands which they have been prosecuting.

Marsh and Le Fever oppose this motion, and Scott has no right to dismiss for them.

Motion denied.

MARSH *v.* NICHOLS.

ERROR TO THE SUPREME COURT OF MICHIGAN.

Submitted March 7, 1887. — Decided March 14, 1887.

A respondent to a bill in equity in a state court, who allows a decree *pro confesso* to be taken against him in the lower state court, and is not a party to the appeal to the Supreme Court of the state, nor to the petition for a writ of error to this court, cannot make himself a party here against the objections of other respondents, who appeared and contested the cause in the state courts, and sued out the writ of error to this court.

THIS cause is the one referred to in *Marsh* v. *Shepard*, *ante*, 595, as "the suit in chancery between the same parties, with reference to alleged infringements of the same letters-patent, decided in the Supreme Court of Michigan." Scott, one of the defendants below, allowed the bill in the lower state court to be taken *pro confesso* against him, and was no party to the appeal to the Supreme Court of the State, where the decree of the court below granting an injunction was affirmed, nor to the writ of error. The following motion was filed on his behalf:

"And now comes James Scott, by Edward J. Hill, his attorney, and brings here a transcript of the record to which the said plaintiffs in error above named have caused the writ of error issued from this court herein to be directed, together with a copy of the writ, and thereby shows that he is a material and necessary party of record to this cause, and therefore asks that he have leave to file said transcript of record, and be made a party plaintiff in error herein, and that said cause be docketed, and that his appearance may be entered herein, and that the said writ of error be dismissed for want of jurisdiction apparent on the face of the record, or for such other or further order in the premises as may be just and proper.

"Dated February 28, 1887.

"JAMES SCOTT,

"*By Edward J. Hill, his Attorney.*"

This motion was accompanied by the following statement:

"The answer of Marsh and Le Fever, and that of James Scott, show that Scott is the assignee of an undivided one third interest in the valve gear, of which Marsh claims to be the original and first inventor, but that because of the license to use the same, to Nichols, Shepard & Co., and the decision of Judge Brown in their case against Nichols, Shepard & Co., at Detroit, (see record in No. 641, October Term, 1886,) he has instituted suit against Marsh and Le Fever, to rescind his contract of purchase of said interest with them. Scott was satisfied with the decree of Judge Hooker, therefore he did not unite in the appeal to the Supreme Court of Michigan, which affirmed the decree establishing the license, rendering the same *res judicata*. The main object of this writ of error is evidently to delay Scott in his suit with Marsh and Le Fever over this question thus forever settled.

"Scott's name was left out of the writ of error; why? Scott's position is plainly antagonistic to that of Marsh and Le Fever. In his suit to rescind, he wants the decision of Judge Brown upheld, and the license established according to the decrees of the Michigan courts. In these respects he occupies ground almost the same as do Nichols, Shepard & Co. The decrees are, however, against him; until properly rescinded by a court of competent jurisdiction, his interest is subsisting. His election to rescind and his disclaimer therein did not annul his contract of purchase, so as to release him from a decree. But it warrants him in severing himself from Marsh and Le Fever in *Marsh* v. *Shepard*, *ante*, 595, and in coming here to look after his interests, and to show these facts by an attorney of this court other than *Mr. Parker*, who has, up to the time of Scott's election to rescind, acted for Scott as well as for Marsh and Le Fever."

Mr. Edward J. Hill for the motion.

Mr. R. A. Parker and *Mr. Don M. Dickinson* opposing.

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

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This motion is denied. Although the suit was brought against Marsh, Le Fever, and Scott, Marsh and Le Fever alone answered the bill, and the decree was taken *pro confesso* against Scott. Marsh and Le Fever alone appealed from the Circuit Court of the county to the Supreme Court of the state, and from the decree in that court they alone obtained the allowance of a writ of error to this court. To such a writ Scott cannot make himself a party against the objection of Marsh and Le Fever, so as to control the case in this court.

Motion denied.

EAST ST. LOUIS *v.* AMY.

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

Submitted January 7, 1887. — Decided March 14, 1887.

The charter of East St. Louis in Illinois, which went into effect March 26, 1869, authorized it to borrow money not exceeding $100,000, and limited its power of special taxation to pay interest and provide a sinking fund to three mills on the dollar of the assessment. The constitution of Illinois which took effect August 8, 1870, forbade municipal corporations in the state from incurring indebtedness to an amount exceeding five per cent. on the value of the taxable property, including existing debt, and required them to provide for the collection of an annual tax sufficient to pay the interest on the debt as it falls due and to pay and discharge the principal within twenty years from the time of its contraction. The city of East St. Louis was in debt when this constitution took effect, and contracted other obligations after that time, but not in excess of the amount named in the charter, and imposed a tax of three mills to meet the debt as required by the charter, but failed for a series of years to collect a tax as directed by the constitution. On an application for mandamus to compel the collection of the latter tax, *Held:* that the constitution removed from the charter the limitation upon the power of the council to tax for the payment of any bonded indebtedness which might thereafter be incurred, and imposed upon the corporation the duty of collecting sufficient to pay the interest as it fell due, and the principal within twenty years, and that it was within the discretion of the court whether to order a single levy to meet all past due obligations under this head, or more than one levy if only one appeared to be oppressive.

Opinion of the Court.

MANDAMUS to enforce the collection of a tax upon a municipal corporation. Judgment for the relator. The corporation sued out this writ of error. The case is stated in the opinion of the court.

Mr. Charles Wait Thomas for plaintiff in error.

Mr. George A. Sanders for defendants in error.

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

This is a proceeding by mandamus to require the mayor and council of the city of East St. Louis to levy a tax to pay a judgment against the city for $36,495.28 rendered by the Circuit Court of the United States for the Southern District of Illinois, in favor of H. Amy & Co. on the 22d of August, 1885. The facts are as follows:

By the charter of the city, which went into effect March 26, 1869, the city council was given authority to borrow money on the credit of the city to an amount not exceeding $100,000, and to issue bonds therefor, but the power of special taxation to pay interest and provide a sinking fund was limited to "three mills on the dollar, upon each annual assessment made for general purposes."

The constitution of Illinois which took effect August 8, 1870, contains this provision:

Art. IX, section 12. "No county, city, township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such a debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. . . ."

With this in force the city council of East St. Louis passed three ordinances to borrow money and issue bonds therefor. In each ordinance provision was made for the levy and collection of a special annual tax sufficient to meet the interest and the principal as they respectively fell due. The judgment in favor of Amy & Co. was for interest on these issues of bonds, and the principal of one bond which had become due. The controversy in this proceeding is as to the amount of tax the council is authorized to levy for the payment of this judgment. The three mills tax provided for in the charter has been regularly levied and collected, and the city claims this to be the extent of its corporate power in that behalf. The court, however, was of opinion that, for all bonded indebtedness incurred after the constitution of 1870 went into effect, it was the duty of the city to levy and collect a direct annual tax sufficient to pay both the interest and the principal as it fell due, and as this had not been done, an order was made requiring the levy and collection of "a special tax upon all the taxable property of said city for the year 1886 sufficient in amount to pay" the judgment in full. To reverse that order this writ of error was brought.

The points presented for decision are, 1, whether the constitution of 1870 abrogated that part of the charter which limited the power of the city to tax for the payment of its bonded debt incurred after that constitution went into effect; and, 2, if it did, whether the court could "compel a levy *en masse* to pay the whole debt and interest, when the constitution only required the council to provide for the collection of an *annual* tax to pay the interest as it falls due, and the principal within twenty years."

In our opinion the constitution removed from the charter the limitation upon the power of the council to tax for the payment of any bonded indebtedness which might thereafter be incurred, and gave authority to levy and collect enough to meet the interest as it fell due, and the principal within twenty years. It gave no new power to incur a debt. That had been given by the charter itself to the extent of $100,000. There is here no question as to a limitation of this power by the

provision that the bonded debt shall not exceed in the aggregate five per centum on the value of the taxable property, for no excess of issue has been suggested.

The principle on which this decision rests is the same as that acted on in *Neal* v. *Delaware*, 103 U. S. 370, where this court held that the Fifteenth Amendment of the Constitution of the United States, of itself, and without any action by the state, rendered inoperative a provision of the constitution of Delaware which limited the right of suffrage to the white race, and this accorded with the opinion of the Supreme Court of the state in the same case.

Undoubtedly a state constitution is in a sense a limitation on the powers of the state government. It is the act of the people establishing the fundamental law for their own government as members of a political community known as a state of the United States, and it fixes the powers of that government. But this does not imply that the people cannot in such a fundamental law regulate as they please the powers of the political subdivisions or municipal corporations of the state. Such a regulation, if made, would operate as a limitation on the legislative power of the state government over the subject, but it would form part of the fundamental law of the locality to which it applied.

In this case the constitution limited the power of the legislature of Illinois in respect to the grant of authority to municipal corporations to incur debts, but it declared in express terms that, if a debt was incurred under such authority, the corporation should provide for its payment by the levy and collection of a direct annual tax sufficient for that purpose. Under this provision of the constitution, no municipal corporation could incur a debt without legislative authority, express or implied, but the grant of authority carried with it the constitutional obligation to levy and collect a sufficient annual tax to pay the interest as it matured and the principal within twenty years. This provision for the tax was written by the constitution into every law passed thereafter by the legislature allowing a debt to be incurred; and, in our opinion, it took the place in existing laws of all provisions for taxation to pay

debts thereafter incurred under old authority which were inconsistent with its requirements. It was made by the people a part of the fundamental law of the state that every debt incurred thereafter by a municipal corporation, under the authority of law, should carry with it the constitutional obligation of the municipality to levy and collect all the necessary taxes required for its payment.

It only remains to consider the objection that a tax cannot now be levied sufficient in amount to pay the entire judgment at once. The judgment is for interest in arrear and a small amount of principal. The law required a tax to be levied annually sufficient to pay all interest as it accrued, and the principal when due. This was neglected, and consequently there is now a large accumulation of a debt which ought to have been paid in instalments. Thus far the inhabitants have been allowed to escape taxation at the times it ought to have been laid, and to which they were under constitutional obligations to submit. The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation. Such being the case, we see no reason why it was not in the power of the court to order a single levy to meet the entire judgment which was all for past due obligations. Whether such a tax would be so oppressive as to make it proper not to have it all collected at one time was a question resting in the sound discretion of the court in ordering the collection. There is nothing here to show that there ought to have been a division.

The constitutional obligation of the city was not fully met by providing, when the debt was incurred, for the levy and collection of the necessary tax. It required as well the actual levy and collection when needed to pay the debt. This is an obligation that can be enforced by mandamus after judgment caused by a neglect to meet its requirements.

We see nothing in *Weber* v. *Traubel*, 95 Ill. 427, to the contrary of what is here decided. In that case there was no question of power to levy a tax beyond the one per cent. allowed by the charter to pay debts incurred under the authority of law after the constitution of 1870, and for the payment

of which by means of taxation provision had been made as specially required by that constitution. The precise point there determined was that the three mills tax provided by the charter for the payment of the bonded debt, and the one mill tax for the "Library Fund," under the act of 1874, were parts of the one per cent. allowed by the charter, and not additions to it. Here, however, the tax is in accordance with the special provision made to pay a new debt lawfully incurred, and to meet the requirements of the constitution in its regulation of the conduct of municipal corporations in such matters. This is a tax which the corporation, under the operation of the constitution, contracted with the bondholders to levy and collect to meet its liabilities on the bonds, and it is not necessarily limited to the three mills or the one per cent. of the charter.

Neither does the claim of the city find support in the case of *East St. Louis* v. *Zebley*, 110 U. S. 321. There the question was whether the court could compel the city to set apart any more than three out of the ten-mills charter tax to pay the bonded debt, and we held that it could not. No point was made as to the power of the city to levy more than a ten-mills tax, and it did not appear that the debt then in question was incurred after the constitution of 1870.

Judgment affirmed.

GONZALES *v.* ROSS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Submitted November 2, 1886. — Decided March 14, 1887.

The Congress of Coahuila and Texas on the 28th April, 1832, passed a law respecting the grant of public lands. One Gonzales applied for a grant under this law, and, on the 16th October, 1832, the governor made the grant of the land in dispute under which the plaintiffs claim in the customary form for such grants. A commissioner was appointed to give possessory title to the tract, and on the 18th April, 1834, he delivered to the grantee at Dolores formal possession of the tract, and executed and

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delivered a formal "testimonio" thereof. On the 26th March, 1834, the Congress of Coahuila and Texas at Monclova repealed the act of April 28, 1832. The laws of the Mexican states did not then take effect in any part of the country until promulgated there. There was no evidence of the promulgation of the repealing act at Dolores, but there was presumptive evidence tending to show that on the 3d May, 1834, it had not been promulgated there. *Held:* that under all the circumstances, and in view of the distances of Dolores from Monclova, the presumption was that the repealing act had not been promulgated when the commissioner extended the title to Gonzales.

The act of the Congress of Coahuila and Texas of March 26, 1834, creating a new system of disposing of the public lands, did not abrogate the grants and sales which had been made under the act of April 28, 1832, nor abolish the office and function of commissioners necessary for extending such grants.

From the notorious public history of the colony of Beales and Grant, and from other notorious facts which are stated in the opinion of the court, it is *Held*, that the governor in the grant to Gonzales, which is the subject matter of this suit, intended to designate and did designate the commissioner of the neighboring enterprise as the officer to locate the grant and deliver possession to the grantee, and that his official acts therein, having been accepted and acquiesced in by the government, must be considered as valid, even if done by him only as commissioner *de facto*.

The public officer who extended the lands in dispute must be presumed to have extended them in the proper department, and this presumptive conclusion of law is made certain in fact by examining the laws referred to in the opinion of the court.

In 1834 the state of Coahuila and the department of Monclova extended eastwardly at least as far as the river Nueces.

As all favorable presumptions will be made against the forfeiture of a grant, and as it will be presumed, unless the contrary be shown, that a public officer acted in accordance with law and his instructions, and as the government acquiesed in the commissioner's acts in extending the grant in dispute and no attempt had been made to revoke them or to assert a forfeiture; *Held*, that he had authority to extend the title, and his acts must be considered valid.

The testimonio in this case sufficiently connects itself with the original grant and subsequent steps taken under it: it is not necessary that it should be attached to it by a physical connection.

The grant in this case gave power and authority to the commissioner to extend it, and no further order was necessary.

The extension of the title of the grantee by the commissioner in a Mexican grant completed the title, without patent or other act of the government, and notwithstanding the imposition of conditions subsequent; and the non-performance of such conditions subsequent constituted no objection to the admission of plaintiff's evidence to show such extension.

If a forfeiture of a Mexican land grant from non-payment or condition sub-

sequent can be availed of by a private person at all, it can only be after he has shown some right to the land in himself by virtue of a subsequent purchase or grant from the sovereignty of the soil.

Prior to the adoption of the constitution of 1876 the laws of Texas did not require that a title under a Mexican grant should be registered in the county or deposited among the archives of the land office, in order to give it vitality; and it was only void as against third persons acquiring title from the sovereignty of the soil, not having notice of it.

Defences against Spanish and Mexican titles in Texas under Art. XIII of the constitution of Texas of 1876 constitute no objection to the admission of evidence in support of such titles. *Quære*, as to the effect of the provisions in that article prohibiting the future registration of titles, or the depositing of them in the land office.

TRESPASS. Plea, not guilty. Judgment for defendants. Plaintiffs sued out this writ of error. The case is stated in the opinion of the court.

Mr. H. E. Barnard for plaintiffs in error.

Mr. C. W. Ogden and *Mr. Bethel Coopwood* for defendants in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action of trespass to try title, brought by the heirs of Juan Gonzales against The International and Great Northern Railroad Company and their tenant in possession (Ross), to recover eleven leagues of land situate in Kinney County, Texas, adjoining the Rio Grande. The defendants pleaded not guilty, and title from the sovereignty of the soil. At the trial a jury was waived, and the court found the facts specially (which are set out in a bill of exceptions), and rendered judgment for the defendants. The judgment is based upon the failure of the plaintiffs to make out their title; and their failure to make title arose from the court's overruling and rejecting the testimony offered by the plaintiffs as evidence of the extension of title to their ancestor, Juan Gonzales.

The court found and decided that the plaintiff had shown an application for, and concession of, eleven leagues of land in the name of Juan Gonzales, in the state of Coahuila and Texas,

and gave the purport of the documents showing the same, being an exemplification of the original in the archives of the government of Coahuila, at Saltillo. These documents were in Spanish, accompanied by a verified translation. They were exemplified under date of August 20, 1874, and had been duly recorded in the clerk's office in the records of Kinney County on the 8th of February, 1878, as appeared by the clerk's certificate thereon.

The application of Gonzales, as translated, was as follows, to wit:

"To his Excellency: The citizen Juan Gonzales, before your Excellency, with greatest respect, states:

"That in accordance with the provisions of the law of colonization of the state your Excellency will please grant me the sale of eleven sitios of land of those vacant lands of the department of Monclova and places by me designated, promising to introduce in them the number of stock required by the same law and paying the value, delivering at once the fourth part of the same and binding myself to fulfil all requirements of the same law. Praying your Excellency will grant this petition as requested, will receive grace and justice.

"JUAN GONZALES."

The grant, bearing date, Leona Vicario, October 16, 1832, was attached to the application, and was in the name of the Governor in the usual form, and, as translated, was as follows:

"In accordance to article 13 of the new law of colonization enacted by the honorable Congress of the state April 28, 1832, I grant the sale to petitioner of the eleven sitios of land prayed for at the place designated by him, provided that they shall be all in one tract and not under any title belonging to any corporation or person whatsoever.

"The commissioner for the division of lands in the enterprise to which corresponds the one which petitioner solicits, and in his default, or in case there is none, or not being engaged in any other enterprise, the alcalde 1st, or the only one acting of the respective municipality or the nearest one, complying with [the] order given in the matter, will place him in

possession of the said sitios, and will extend the corresponding title to the same, first classifying the quality of said lands, so as to be able to state the amount to be paid the state, which payment must first be paid by the interested party in the manner and terms specified in the last part of said article 13, making the payment at once as provided by this article, in the treasury of the state, receipt of which he will present to the secretary, so that the secretary, upon sight of it, will proceed to give [the] interested party copy of his petition, with which he will go to the commissioner and have its requirements complied with.

"Eca y Musquiz. (One rubric.)

"Santiago Del Valle, *Secretary.* (One rubric.)"

The court next found as follows:

"Second. That Fortunato Soto was duly appointed by the proper authority of the state of Coahuila and Texas, as commissioner to extend titles in the colony contracted for by Juan Carlos Beales and Diego Grant. That his commission of authority was dated March 13th, 1834, and was signed by Francisco Vidann y Vallasteñor, the then governor of the state of Coahuila and Texas and by J. Mijuel Falcon, the then secretary of state of Coahuila and Texas.

"Third. The plaintiffs are the legal heirs of Juan Gonzales, the beneficiary and grantee of the concession referred to in decision number one, above set forth.

"Fourth. That defendants are in possession of the land described in plaintiff's petition.

"Fifth. That the boundaries of the colony contracted for by Juan Carlos Beales and Diego Grant are shown by the following . . . contract of colonization entered into with the citizen Diego Grant and Don Juan Carlos Beales as empresarios to introduce 800 families in the vacant lands of the state."

The contract referred to, between the government of Coahuila and Texas and Juan Carlos Beales and Diego Grant, is then set out in full, the application bearing date October 5, 1832, and the concession October 9, 1832. It included, first

a grant for the whole territory lying between the Rio Grande and Nueces rivers, and bounded south by the state of Tamaulipas, and north by the 29th parallel of latitude; secondly, a grant of a tract formerly granted to Woodbury and Vehlein, and subject to their right to colonize 200 families, embracing a territory over 200 miles in length, bounded north by the 32d parallel of latitude, south by the old road leading from Rio Grande to Bexar, west by the 100th degree of west longitude, and east by other grants in the interior of Texas. The first tract adjoins the southwest corner of the second; and Kinney County, in which the lands in question are situated, lies in the angle between the two tracts, but outside of both.

The 9th article of the concession to Beales and Grant has the following provision: "This colony shall be regulated and their lands divided by a commissioner of the government, who in proper time will be appointed, and will discharge his duties in accordance with the laws and instructions that for said officials have been approved by the honorable Congress."

The bill of exceptions then exhibits two maps given in evidence by the plaintiffs, certified by the Secretary of State of the United States, one being a copy taken from Disturnell's map of the united Mexican states, published in 1847, and deposited with the treaty of Guadalupe Hidalgo, 1848; the other showing the boundary line between the United States and Mexico, as laid down in Melish's map, published in 1818, and agreed to in the treaty of January 12, 1828. These maps show that the province of Texas did not then embrace any territory west of the river Nueces.

In view of this evidence and the findings of the court thereon, the plaintiffs then offered in evidence a paper purporting to be a testimonio, with formal and sufficient proof of its execution, by which testimonio it appeared that in April, 1834, the possessory title of the land in controversy was extended to Juan Gonzales, the ancestor of the plaintiffs, by Fortunato Soto, commissioner for the state in the colony of Rio Grande. This paper was in the Spanish language, and together with the authentications and translation thereof, had been recorded in the clerk's office of Kinney County on the 21st of June,

1878, as appears by the clerk's certificate thereon. The following is a copy of the said document as translated, to wit:

"In the village of Dolores, state of Coahuila, Texas, on the 18th day of the month of April, 1834, I, the citizen Fortunato Soto, as commissioner for the supr. government of the state in the colony of the Rio Grande, and in compliance with the contract celebrated (entered into) between said government and the citizen Juan Gonzales, and in accordance with the requirements and stipulations which the law provides in this matter, I extend the present title, in the name of the government and in accordance with the provision in its superior decree of the 16th of October, 1832, contained in the aforesaid contract, to the citizen Juan Carlo Beales, as attorney of the said citizen Juan Gonzales, which power of attorney he presented, of the eleven sitios of land to which said contract has reference, which said lands in their actual state I have classed as pasture lands, and which said boundaries are: Commencing from the place where the boundary line of the property of Doña Dolores Soto de Beales forms an angle between south and west, a line will be drawn to the south, prolonging in the same direction, which will there terminate the said section at a distance of thirteen thousand seven hundred and fifty varas; from whence another line will be drawn in a right angle, which, crossing the arroyo (creek) of Piedra Pinta, will have the length of twenty thousand varas; and from this point another line will be drawn towards the north parallel with the first, and of the same length, and ends with another line to the east that, crossing the same arroyo (creek), will extend up to the place of beginning; so that in all form and right he, the said citizen Juan Gonzales, may at all times prove his rights to the said eleven sitios of land, I went with his attorney, citizen Juan Carlos Beales, which, after being surveyed by the surveyor, C. Guillo Egerton, I put him in possession, and taking him by the right hand, and in the name of the supreme government of the state, walked him over the said eleven sitios of land and caused him to perform all the other ceremonies, as provided by the laws in this case of real possession, being witnesses the citizens Eduardo Little, Enrique

Brown and George Colwell, beside those of my assistance, all residents of the village, who for the validity of it signed with me, and the interested party said day, month and year, pledging himself to replace the proper paper with the seal that is required, not having at present any of the seal in this village nor its surroundings.

"Fortunato Soto.
"Thos. H. F. O'S. Addicks, *De Assistencia.*
"Thomas Plunckett, *De Assistencia.*
"Juan Carlos Beales.
"Enrique Brown.
"Eduardo Little.
"George Colwell."

"I, the citizen, Fortunato Soto, commissioner for the Supreme Government of the state of Coahuila and Texas in this colony, certify that the preceding testimonio is a literal copy legally taken from its original, which is of record in the proper book of these archives, and in compliance with article 8 of the instructions of the 25th of April, 1830, I give the present to the interested party as title, which is given on common paper, not having any of the proper seal, and for the validity of the same I signed it with the assisting witnesses in said village the 18th of April, 1834.

"Fortunato Soto.
"Thos. H. F. O'S. Addicks, *De Assistencia.*
"Thos. Sam. Plunckett, *De Assistencia.*"

To the introduction of this paper the defendants objected for the following reason:

1st. It has not been proved and recorded according to law, and its registration was not authorized by law when it pretends to have been recorded. No protocol or matrix of it has been shown ever to have been filed in the archives of the General Land Office, and no such is or ever was an archive of such office; no possession of the land claimed by any one holding under it has been shown; no payment of taxes thereon by plaintiffs, or any one for them, has been shown; no com-

pliance with or fulfilment of the conditions of the law under which it purports to have been issued has been or attempted to be proved; and if it ever had any validity, it appears from the face thereof that it is such a claim as was never perfected, but wholly abandoned, and the land remitted to the public domain, and that it is a stale demand and void.

2d. It does not contain and is not based upon any executive grant, concession, or primitive title, nor does it contain any petition or application of the pretended grantee for a concession or for a survey of the land or the execution of final title of possession, nor any order referring it to the empresario order of survey, surveyor's field notes, or other constituent element of an expediente of final title, nor apt words to express a grant of land from the state by way of sale as required by law at its date; but it purports to be a kind of grant unknown to and not authorized by such law, and it appears therefrom that the same issued without authority of and against law.

3d. It purports to have been issued by one unknown to the law, claiming to exercise the powers and perform the functions of an office not then existing, but the existence, powers, and jurisdiction whereof had already been repealed, styling himself commissioner of a colony not shown to have existed, and which, it is well known, never did exist; and it is claimed to be title embracing and relating to land situated in Kinney County, as averred in the petition, which is well known to have been embraced within the Woodbury colony district at the date it bears, for which colony the person purporting to have issued it was not, and does not by the terms of the instrument pretend to have been, a commissioner or officer.

4th. It appears therefrom that its matrix or protocol, if it is in fact a testimonio of such, contained no executive concession or petition for such; no petition or application for a survey of the land, nor for the execution of final title; no reference to the empresario order of survey nor surveyor's field notes, and no one of the requisite antecedent steps, papers, documents, or acts entering into and forming the expediente of a valid final title or grant under the law in force when and where it purports to have been issued; none of which can be established by parol.

5th. It does not express any consideration paid, or to be paid, or conditions to be performed or required by law.

6th. It purports to have been executed pursuant to a contract stated to have been ratified with the executive, while the only one so to be ratified was that of an empresario.

7th. It pretends to be an absolute grant in fee, which was not authorized or contemplated by the law.

8th. If the contract it refers to was an executive concession by way of sale, this instrument shows it to have been forfeited under the law, and constituting no authority for the execution of this paper on the 18th of April, 1834.

9th. It has vices before the law, and is defective in manner and form, using bad grammar, awkward construction, and a form and style diverse from the usual general practice, and contains unaccustomed clauses without any reason therefor.

10th. It is not written upon sealed or stamped paper, as required by law, nor upon paper validated by the proper officers of the municipality or any other; and its execution has not been proved, and no attempt has been made to show that the persons purporting to have signed it did so when and where it bears date or in the capacity therein stated.

11th. It was never registered, as required by law, under the former government of Coahuila and Texas, nor under the republic or state of Texas; it was never presented nor any payment on it made to the collector of the former government, nor to any officer of the republic or state of Texas; it was never presented to either of the commissions established by law to investigate titles to land in the section of the state where the demanded premises are situate, nor was it ever brought forward or set up as a claim to land till more than forty years after its date, and now only with the greatest want of verisimilitude in the matters it contains and expresses.

12th. It attempts to conceal the fact that the land, if it relates to the demanded premises, was, at its date, embraced within a colony for which the one purporting to have executed it did not by its terms pretend to be a commissioner or officer, and falsely claims to have been issued in and by the commissioner of a colony which never existed.

13th. It has no receipt for any instalment of the purchase money written out at the bottom of it, as required by law, nor has any attempt been made to prove such payment.

14th. It is incompetent and irrelevant, and shows upon its face that it is not a subject of judicial cognizance, and it does not describe or identify the demanded premises, but is void for want of certainty.

15th. It is prohibited from being used in evidence by the thirteenth article of the constitution of Texas, and if it ever had any validity, it is stale and forfeited, and the land to which it relates was reunited to the public domain by legislative equivalent for reunion by office found.

The bill of exceptions states that the court sustained the said objections, and refused to admit the said document in evidence, mainly on the ground that the same was issued without authority of law, the law and instructions under which the commissioner pretended to act having been repealed prior to the execution thereof; to which ruling rejecting said documents plaintiffs, by counsel, excepted.

The court thereupon rendered judgment for the defendants.

We will first consider the main reason assigned by the court below for rejecting the evidence offered, namely, that the law and instructions under which the commissioner pretended to act had been repealed prior to the execution thereof. The law under which the grant was made to Juan Gonzales, and under which the commissioner acted in extending the title, was that passed by the Congress of Coahuila and Texas, April 28, 1832. This law, it is true, was repealed and supplied by an act of the Congress passed at the city of Monclova, March 26, 1834, and the testimonio offered in evidence is dated at the village of Dolores, April 18, 1834, some three weeks afterwards. But the laws of the Mexican states did not take effect in any part of the country until they were promulgated there; and as Dolores was situated in the present county of Kinney, about 200 miles from Monclova, and probably much more than that as the roads there ran, and as the means of communication in that region at that time were difficult and dilatory, it is not probable that the act of March 26 was promulgated at Do-

lores prior to the 18th of April. Besides, the commissioner was a public officer, having a public duty to perform, and in the absence of evidence to the contrary, the presumption would be, that he acted in accordance with the law as known at the time. This presumption is strengthened by the language of another act passed in the same session of the Congress, on the 3d day of May, 1834, which declared that certain favorable terms as to the price of lands, proffered by a law of 1830, should "be understood only in respect to the price of lands acquired until (*hasta*) the publication of the decree of 26th of March of this year," implying, it would seem, that the law of the 26th of March had not yet been published. Looking at the matter in every point of view, we think the presumption is, that this act, which was the repealing act referred to, had not been promulgated at Dolores, or in that vicinity, when the commissioner extended the title of possession to Gonzales.

In the case of *Houston* v. *Robertson*, 2 Texas, 1, 28, Chief Justice Hemphill, delivering the opinion of the court, said: "The question arises, then, as to the time at which the contract with Robertson ceased to exist. The annulling decree was enacted in May, 1835, and by its terms no date was fixed for its operative force and effect. The date of the publication of the law not being proven, the period of taking effect is a matter of presumption. . . . Under the former governments it was an undoubted principle that laws were of no binding obligation until after they were duly promulgated. (L. 1, Tit. 2, Book 3, Recop. Novisima.) The form of publishing decrees by the executive, is prescribed in Decree No. 3 of the constituent Congress of the state of Coahuila and Texas, p. 6. These decrees were transmitted to the inferior authorities, and by them published in their respective jurisdictions. . . . There was no specified period for the promulgation of the laws, nor for their going into operation, in proportion to the distance from the seat of government. The presumption would generally be in favor of the publication after the lapse of a reasonable time for its transmission from the capital; but from the peculiar circumstances of this case, we do not think that the decree ought to be enforced against the petitioner

until the period of closing the land office." In that case the decree or act referred to was passed 18th May, 1835, and the land offices were not closed until the 1st of November — more than five months afterwards. It is true, the country was in an unsettled state at that time; and this may have been one reason why the court held that there was no presumption that the law had been promulgated. The principle enunciated, however, is applicable to the present case, and leaves little room for hesitation as to the non-promulgation of the law under consideration at Dolores within three weeks or thereabouts after its passage.

Besides this, although the act of 26th March, 1834, created a new system of disposing of the public lands, and repealed the act of 1832, it did not abrogate the grants and sales which had been made under it; nor did it abolish the office and functions of commissioners, necessary for extending such grants.

But another objection raised to the authority of the commissioner was, that he was only constituted such for the colony of Beales and Grant. This is true. But the grant for that colony comprised a territory of 20,000 square miles, and embraced in its southwest angle (though it did not include) the present county of Kinney; and we know from cotemporary history that a large addition was made to it on the west, including portions of Kinney County, by means of large grants made to individuals and transferred to the Rio Grande and Texas Land Company, which became the proprietors of the entire colony. Indeed, this very grant of Gonzales was published as one of their accessions. The fact that Juan Carlos Beales himself was the attorney who received the possession of the Gonzales tract is corroborative of this fact. But, be this as it may, it was a matter of public notoriety that Beales and Grant, or the association which they formed, made large additions to their original grant in the country lying immediately west of the Woodbury and Vehlein tract, so that it must have nearly encompassed the premises in question. In Yoakum's History of Texas, vol. 1, page 317, we find the following notice of the colony: "During the latter part of

the year 1833 began the settlement of the colony of Beales and Grant. They had obtained a concession for 800 families, to be located between the Rio Grande and the Nueces. In the last days of December, about sixty colonists, under Mr. Beales, reached the new settlement, and laid off the town of Dolores, on Las Moras, a small stream about ten feet wide and two feet deep. They remained there about a year, when they dispersed." The affidavits annexed to the original testimonio offered in evidence, state that the town was destroyed by fire in 1836. Now Dolores was situated in the southern part of the present county of Kinney, several miles west of the Woodbury and Vehlein grant, and north of the first tract described in the concession to Beales and Grant, thus showing that the colony was extended beyond the limits of those grants prior to 1834. In the certificate of the United States Consul at Matamoras, dated October 16, 1835, and annexed to the original testimonio, it is called the colony of Dolores. In cotemporary documents it was sometimes called the colony of Rio Grande, and sometimes the Beales "River grant." It it is called the Rio Grande grant in Beales's Diary, inserted in Kennedy's History of Texas, vol. 2, page 47. It will be observed that the grant to Gonzales was made directly after that to Beales and Grant, the latter being dated the 9th and the former the 16th of October, 1832. It is also evident that Gonzales indicated to the governor the region in which he intended to locate his grant, namely, in the immediate neighborhood of the territory ceded to Beales and Grant. His application says: "Your excellency will please grant me the sale of eleven sitios of land of those vacant lands of the department of Monclova, and *places by me designated.*" The words of the grant are: "I grant the sale to the petitioner of the eleven sitios of land prayed for *at the place designated by him*, provided that they shall be all in one tract and not under any title belonging to any corporation or person whatsoever." So that it was undoubtedly understood where, in general terms, the land was to be located. The grant then proceeds to designate the commissioner who should locate the land and extend the title, as follows: "The commissioner for

the division of lands in the enterprise to which corresponds the one which petitioner solicits, and in his default, or in case there is none, or not being engaged in any other enterprise, the alcalde 1st, [that is, the first alcalde,] or the only one acting, of the respective municipality." Now, what commissioner was meant, or could be meant, but the commissioner of the Beales and Grant colony? — probably the only colony within a hundred miles. It is not said, "the commissioner for the enterprise *in which the lands lie*," but "the commissioner for the enterprise *to which corresponds the one which petitioner solicits*." From all the circumstances taken together, it is obvious to us that the commissioner of the Beales and Grant colony was the very one intended. We have only the translation of the grant before us, which is somewhat awkwardly expressed; but, according to that (which is our only guide), we think it was not the commissioner of the enterprise in which the lands were to be located, (for, as understood by the parties, they were not to be located in any existing enterprise,) but the commissioner of the neighboring enterprise, that was intended to be designated. There was no other enterprise in that region, at least so far as we know.

A strong circumstance in favor of this conclusion is the fact that Soto's official acts as commissioner, in this case, were never repudiated by the government; on the contrary, his protocol was received and deposited in the public archives, where it still remains. His official acts, accepted and acquiesced in by the government, must be considered as valid, even if done by him only as a commissioner *de facto*.

The pretence that Soto designates himself in the testimonio as commissioner in the colony of Rio Grande, and that no such colony is known to have existed, is too frivolous to deserve serious attention. It is well known, as already stated, that the colony was designated by various names, "Rio Grande," amongst the rest, and Soto was well and publicly known as the commissioner thereof. It was the first great colony attempted to be established in Coahuila and Texas on the Rio Grande, and nothing was more natural than to call it by that name. Besides, it was situated in the old district of Rio

Grande, which was afterwards annexed to the department of Monclova, as hereafter stated.

The criticism of the defendants in error, that it was not shown that the lands in question were in the department of Monclova, is not well founded. In the first place, it will be presumed that they were situated in that department if nothing is shown to the contrary. The public official who extended the lands must be presumed to have extended them in the proper department. But there cannot be any doubt that they were situated in the department of Monclova. Prior to the constitution of March 11, 1827, the state of Coahuila and Texas was divided into five districts or departments: Saltillo, Parras, Monclova, Texas, and Rio Grande: Article 7 of Laws and Decrees of Coahuila and Texas, Houston, 1839, page 47; but by that instrument (Art. 7), it was declared that "for the better administration thereof, the territory of the state shall for the present be divided into three departments, as follows; viz.: *Bexar*, embracing all the territory corresponding to what was called province of Texas, which shall form one sole district; *Monclova*, consisting of the district of the same name and that of Rio Grande; *Saltillo*, comprehending the district of the same name and that of Parras, Ib. page 314. Power was given to the Congress to alter and modify this division. We find only the following laws of the Congress on the subject: First, a law passed January 31, 1831, setting off a new district from the eastern part of Bexar, to be called the district of Nacogdoches, Ib. page 171. Secondly, a law passed in April, 1833, declaring that the district of Saltillo should constitute a sole department by itself; and that the district of Parras should constitute another separate department, Ib. page 210. Thirdly, a law passed 18th March, 1834, dividing the state into seven departments or districts, to wit: Bexar, Brazos, Guerrero, Monclova, Nacogdoches, Parras, and Saltillo. Article 2 declared that in the section denominated Coahuila the limits and capital towns of each shall be the same as heretofore. Article 3 created Brazos from the eastern part of Bexar. By Article 4 the limits of the department of Nacogdoches were continued as before. The boundaries of Guerrero

are not given, Ib. page 245. This shows that no alteration was made in the limits of the departments in Coahuila. Saltillo and Parras were in the southern part of Coahuila, and Monclova comprised the northern part, and joined the department of Bexar, which (as shown above) corresponded with the old province of Texas. This makes it certain that the department of Monclova included the lands in question; for the old boundary between Coahuila and Texas was situated over 100 miles east of the Rio Grande; and the northern boundary of Tamaulipas, which joined Coahuila on the southeast, and also separated the province of Texas from the Rio Grande, was some 70 or 80 miles southeast of the county of Kinney. Captain Pike, who traversed the country from Chihuahua to Texas in 1807, passing through Coahuila and the centre of the first tract described in Beales and Grant's purchase, and who was very minute and particular in his observations, locates the exact boundary between Coahuila and Texas at that time. After describing his passage of the Rio Grande near Presidio, and four days' travel from thence northeastwardly, a distance, in all, of 136 miles, he gives the following account of his fifth day's journey: "*7th June, Sunday.* — Came on 15 miles to the river Mariano [now *Medina*], *the line between Texas and Cogquilla* [Coahuila] — a pretty little stream, Rancho. From thence in the afternoon to Saint Antonio." Pike's Expedition, page 265. Other authorities also state that the Medina was the old boundary between Coahuila and Texas. At a later date, perhaps in virtue of some law not published in the general collection of laws, Texas seems to have been extended to the river Nueces. It is so laid down on several maps, (see map in Ward's "Mexico in 1827," and others of that period,) and Hon. David G. Burnet, a resident of Texas long before its independence, and afterwards first President of the Republic, in a letter written in November, 1830, and published at the time, after stating that Texas in its most extensive acceptation was bounded by the Rio Grande, says: "This definition, however, is not in strict accordance with the political organization of the country, as the state of Tamaulipas and the department of Coahuila both cross the Rio Grande, making the Nueces

strictly the western limit." (See also speech of Mr. Benton in the United States Senate, May 16, 1844.) There can be no doubt, therefore, that in 1834 the state of Coahuila and the department of Monclova extended eastwardly as far as the river Nueces, at least, and consequently included the premises in question.

Another objection to the authority of the commissioner to extend the title in controversy was, that the time limited by the act of 1832 for reducing the grant to possession had expired. The 16th article of the law declares that the purchasers shall enter into possession of the land acquired within eighteen months from the ratification of the contract, under penalty of forfeiture for the non-fulfilment thereof. In this case the concession was dated October 16, 1832, and the testimonio is dated April 18, 1834, two days more than eighteen months afterwards. This objection assumes that possession was given on the date of the testimonio. But that does not appear. The latter was executed at Dolores, ten or a dozen miles from the premises in question. The document had to be prepared after the parties returned to the village. They may not have returned the same day. All favorable presumptions will be made against the forfeiture of a grant. As before said, it will be presumed, unless the contrary be shown, that a public officer acted in accordance with the law and his instructions. The government accepted Soto's acts, and it does not appear that any attempt was ever made to revoke or annul his proceedings, or to assert a forfeiture for the cause now insisted on. We think that the mere date of the testimonio is not sufficient under the circumstances to make it invalid. Besides, it will be observed that the law does not say that the delivery of possession after the eighteen months shall be void, but only that it shall be a ground of forfeiture of the grant. And, of course, the forfeiture, if incurred, might be waived by the government, and we think it was waived by accepting and acquiescing in the commissioner's acts.

On the whole we think it clear that Fortunato Soto had authority to extend the title in question, or, at least, that his official acts were acquiesced in by the government, and are to be considered as valid.

But objections were made to the instrument itself; namely, to the testimonio which was offered in evidence for the purpose of proving and authenticating the commissioner's acts. One of these objections was, that it does not connect itself with any grant, concession or primitive title, nor contain any petition for a concession, or for a survey of the land, or execution of final title of possession, nor any order referring it to an empressario's order of survey. It is a sufficient answer to the first part of this objection to refer to the testimonio itself, which does in terms refer to the original contract between the government and Juan Gonzales, giving its date, and purporting to be executed in accordance with its provisions. We do not see how it could connect itself any more closely with the original concession, unless it were tied to it by a string, or fastened to it by a wafer, as is often done. But we do not remember to have seen it decided that a string or a wafer is a constituent or necessary part of the title. The objection is wholly without foundation. Gonzales had a grant which authorized a commissioner to extend it in possession. The proper commissioner did so extend it, and this was shown by the testimonio —the proper documentary evidence for that purpose. In the recent case of *Hanrick* v. *Jackson*, 55 Texas, 17, 27, the Supreme Court of Texas says: "We know of no authority for saying that the title is void because, he, [the officer] has not incorporated into it the evidence of the concession or sale. If there was, in fact, no concession, there could have been no legal grant by the alcalde. But whether there was a concession, and whether there was proper evidence of it presented to him by the interested party, was a matter for his official inquiry and determination. Whether he set forth in the title the evidence upon which he acted, or merely recited as a fact that a concession had been granted and authority given him by the government to extend the title, the presumption which is always indulged in favor of the validity of acts of officers of a former government, warrants the conclusion that the officer acted in conformity with law and not in violation of it."

As to the remainder of the objection, it is sufficient to say, that no petition or order was necessary to have the grant

extended in possession. The grant itself, as stated above, gave power and authority to the proper commissioner to extend it; and no further order for that purpose was required.

It was also objected that the testimonio was not written upon properly stamped paper. But this did not affect its validity. With a proper stamp, it would require no proof of its execution. Without a proper stamp, its execution must be proved. *Jones* v. *Montes*, 15 Texas, 351, 352; *Chambers* v. *Fisk*, 22 Texas, 504. The court finds that formal and sufficient proof of its execution was offered. We think that the testimonio was sufficient in point of form, and that it contained all the requisites necessary to invest Gonzales with title in the land delivered to him; and that the description of the land was sufficiently specific to identify it.

We are, therefore, of opinion that the court below should have admitted the testimonio in evidence, unless it was incompetent by reason of some matter or thing occurring after its execution and delivery to Gonzales.

Analyzing the various and somewhat confused and multifarious objections of the defendants, we find three such matters assigned as grounds for rejecting the evidence: First, the non-fulfilment of the conditions of the grant; secondly, that no protocol, or matrix of the concession or testimonio, was amongst the archives of the land office, nor on record in the proper county in proper time; thirdly, that, not being amongst the archives, and not being recorded in proper time, and never being followed by actual possession, the testimonio was an absolute nullity by force of the XIIIth Article of the Constitution of 1876.

These matters may constitute very good and substantial grounds of defence, and we are not disposed to intimate anything to the contrary in this opinion. But we think they can only be effectual by way of defence.

As to the supposed forfeiture for non-fulfilment of conditions of the grant, the only condition named therein is the payment of the purchase money. This was required by the 13th article of the law of the 28th of April, 1832, which, on this subject, declares as follows: "The purchaser shall deliver one-

fourth of the value of the land granted to the state treasury, or where the executive designates, at the time of the sale; and the remaining three-fourths shall be paid, the first on the second, the second on the third, and the last on the fourth year, under penalty of forfeiting the right acquired in the part wherein this provision is not fulfilled;" that is, as we understand it, the forfeiture was to be in proportion to the amount not paid. Now, it is clear that the first payment was made in advance; for the grantee could not have obtained possession of his document of concession without such payment; and that he did obtain it is manifest, for the testimonio shows that it was exhibited to the commissioner. The other payments were to be made afterwards, and after the lands were extended, and the condition of forfeiture for non-payment was a condition subsequent. Whether these payments were made, or not made, was not shown by proof at the trial. If not made, then there was a forfeiture which the government could enforce, either by judicial proceedings, or, perhaps, by granting the land to other parties. This forfeiture accrued, at the revolution, to the Republic of Texas, and to the State of Texas, when it became a state. By the constitution of the state, adopted in 1845, Art. XIII, it was declared that "all fines, penalties, forfeitures, and escheats, which have accrued to the Republic of Texas under the constitution and laws shall accrue to the State of Texas; and the legislature shall by law provide a method for determining what lands may have been forfeited or escheated." No such law was ever passed prior to the trial of this cause. We held in *Airhart* v. *Massieu*, 98 U. S. 491, 498, that, under this provision, the legislature must first act before any proceedings can be taken to annul the title of an alien, or any other escheatable titles; and this proposition would seem to apply with equal force to forfeitures. At all events, if a forfeiture for non-payment, or other condition subsequent, can be availed of by a private person, it can only be after he has shown some right to the land in himself, by virtue of a subsequent purchase or grant from the sovereignty of the soil; and, hence, it can only be set up by way of de-

fence after such purchase or grant is shown, and not as an objection to the admission of the plaintiff's evidence.

The importance of that evidence to the plaintiff's case is manifest. The extension of title by the commissioner, in these Mexican grants, completed the title without any patent or other act of the government, and notwithstanding the imposition of conditions subsequent. If the concession imposed conditions precedent, the case would be different. This subject is discussed in the case of *Hanrick* v. *McKinney*, 7 Texas, 384, 451, where the court, after examining some decisions of this court, says: "The conditions, in the cases cited by counsel, were conditions precedent; and not until after their performance, as we have seen, was the title to be delivered. Titles issued to colonists and purchasers under the colonization laws of Coahuila and Texas were of an entirely different character. Under those laws the title of possession was the final title, vesting the fee absolutely in the grantee. Conditions were annexed, . . . but they were conditions subsequent, upon the non-performance of which the titles were subject to forfeiture, but until which the fee or proprietorship was in the grantee. They conveyed all the estate and interest which the government had to convey, as absolutely and to the same extent as did the delivery of the final title, or the final act of confirmation by the Spanish government, after the performance of the conditions. No act of confirmation by the government was required or was contemplated by the colonization laws; but when the title of possession issued, the government had done the final act on her part." The testimonio in that case was substantially the same as in the present, and was sustained as conferring title upon the party.

As to the matter of registration, the laws of Texas prior to the adoption of the constitution of 1876, so far as we can discover, did not require that a title should be registered in the county, or deposited amongst the archives of the land office, in order to give it validity. It was only void as against third persons acquiring title from the sovereignty of the soil, not having notice of it. In this respect the laws of Texas were not dissimilar to those of most of the states of the Union.

Indeed, the original titles could not be deposited in the land office when, as was often the case, they belonged to the archives of the foreign government at Saltillo, or other place where they were originally deposited. Copies of them, amounting to second originals, or testimonios of the final title, might be so deposited, or might be registered in the proper county; but even that was not necessary to their validity, although it might be necessary to protect the owners against titles subsequently acquired without notice of their existence. It is manifest, however, that titles thus subsequently acquired, if relied on by a defendant, must be proved as matter of defence, and cannot be urged against the competency of the plaintiff's evidence of his title.

This, as we understand it, was the condition of things (except with regard to certain extensive and fraudulent grants, which were specially abrogated by constitutional or legislative enactment) until the adoption of the constitution of 1876. By the XIIIth Article of that instrument it was decreed as follows:

ARTICLE XIII. — Spanish and Mexican Land Titles.

"Section 1. All fines, penalties, forfeitures, and escheats, which have heretofore accrued to the Republic and State of Texas, under their constitutions and laws, shall accrue to the state under this constitution; and the legislature shall provide a method for determining what lands have been forfeited, and for giving effect to escheats; and all such right of forfeiture and escheat to the state shall, *ipso facto*, enure to the protection of the innocent holders of junior titles, as provided in sections 2, 3, and 4 of this article.

"Sec. 2. Any claim of title or right to land in Texas, issued prior to the 13th day of November, 1835, not duly recorded in the county where the land was situated, at the time of such record; or not duly archived in the General Land Office; or not in the actual possession of the grantee thereof, or some person claiming under him, prior to the accruing of junior title thereto, from the sovereignty of the soil, under circumstances reasonably calculated to give notice to said junior

grantee, has never had, and shall not have, standing or effect against such junior title, or color of title, acquired without such or actual notice of such prior claim of title or right; and no condition annexed to such grants, not archived, or recorded, or occupied as aforesaid, has been, or ever *shall* be released or waived, but actual performance of all such conditions shall be proved by the person or persons claiming under such title or claim of right in order to maintain action thereon, and the holder of such junior title, or color of title, shall have all the rights of the government which have heretofore existed, or now exist, arising from the non-performance of all such conditions.

"SEC. 3. Non-payment of taxes on any claim of title to land, dated prior to the 13th day of November, 1835, not recorded, or archived, as provided in § 2, by the person or persons so claiming, or those under whom he or they so claim, from that date up to the date of the adoption of this constitution, shall be held to be a presumption that the right thereto has reverted to the state, and that said claim is a stale demand, which presumption shall only be rebutted by payment of all taxes on said lands, state, county, and city or town, to be assessed on the fair value of such lands by the comptroller, and paid to him, without commutation or deduction for any part of the above period.

"SEC. 4. No claim of title or right to land, which issued prior to the 13th day of November, 1835, which has not been duly recorded in the county where the land was situated at the time of such record, or which has not been duly archived in the General Land Office, shall ever hereafter be deposited in the General Land Office, or recorded in this state, or delineated on the maps, or used as evidence in any of the courts of this state, and the same are stale claims; but this shall not affect such rights or presumptions as arise from actual possession. By the words 'duly recorded,' as used in sections 2 and 4 of this article, it is meant that such claim of title or right to land shall have been recorded in the proper office, and that mere errors in the certificate of registration, or informality, not affecting the fairness and good faith of the holder thereof, with which the record was made, shall not be held to vitiate such record."

We do not see that these sections alter the character of the objections as matters of defence. A man whose title was good in 1876, when the constitution was adopted, whether his muniments of title were on record or not, could not be deprived of it by a simple *ipse dixit* of the constitution, any more than by a legislative act. Some proof, at least, must be given in a judicial proceeding to show that his title was forfeited, if that be the fact; and that proof, in a private action, must be given by a party exhibiting a title acquired from the sovereignty of the soil or in some other legitimate way. When the testimonio in the present case was offered in evidence, no such proof had been given. So far as appeared up to that moment the defendants were mere trespassers, and surely trespassers cannot claim the benefit of the constitutional provisions. Besides, it cannot be assumed, as is assumed in the objection of the defendants, either that the plaintiffs' muniments of title were not on file amongst the archives of the land office, or that the taxes on the lands had not been paid, or that Gonzales and those claiming under him did not continue in possession of the land after possession was delivered to him by the commissioner in 1834. By the rules of law, possession will be presumed to accompany ownership until the contrary is proved; and constructive possession consequent upon legal ownership is sufficient as against mere trespassers, that is, as against those who do not show some right of possession. So, with regard to the archive of title, it was held in *Byrne* v. *Fagan*, 16 Tex. 391, 398, that where there is a testimonio there is a presumption that the original is among the archives of the land office, its proper place of deposit. At all events, it is for the defendants to show by proper proof that it was not there. As to the want of registration in the county where the lands lie, as before said, no registration was necessary to the validity of a title prior to the constitution of 1876. It is unnecessary, at this time, to decide upon the effect of the provision contained in that constitution prohibiting the future registration of titles, or the depositing of them in the land office. If its effect is to make titles void which were before good, a grave constitutional question may arise, with regard to its validity, which we would

prefer not to pass upon until it has received the consideration of a local court, state or federal. In our judgment, all the matters of objection to the plaintiffs' title, arising under the constitution, are matters of defence, and could not properly be urged to prevent the title of the plaintiffs from being received in evidence.

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

DUSHANE *v.* BENEDICT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued December 14, 15, 1886.— Decided March 14, 1887.

In an action to recover less than $5000, in which the defendant asks for judgment upon a counterclaim for more than that sum, and the Circuit Court renders a general judgment for the plaintiff, a writ of error sued out by the defendant is within the jurisdiction of this court, under the act of February 15, 1875, c. 77, § 3.

In an action for goods sold and delivered, tried in the Circuit Court of the United States in Pennsylvania, the defendant, under a plea of "payment with leave," and by way of recoupment, may prove damages resulting to him from a breach of warranty; or from a fraudulent representation of the seller that the goods were of a certain quality or fit for a certain purpose.

Under the statute of Pennsylvania of 1705, which allows the defendant, in an action upon a contract, to set off any matter of contract, and to recover judgment thereon against the plaintiff, upon proving that the plaintiff owes him more than he owes the plaintiff, the defendant, in an action for goods sold and delivered, may set off a claim in the nature of assumpsit upon a warranty; but not a claim for a fraudulent representation, or other claim sounding in tort only.

If rags sold as clean and free from infection, and fit to be manufactured into paper, are proved to have been infected with the small-pox, and to have caused it to break out in the buyer's paper-mill, whereby some of the workmen died, others were disabled from working, and the buyer paid certain sums to support those so disabled, and was obliged to run his mill short-handed, and lost a considerable part of a profitable trade; and the seller testifies that he bought the rags in a region where he knew

Statement of Facts.

the small-pox was epidemic, from any and all dealers, not knowing where they were collected, and that they were assorted and baled up under his instructions; and falsely testifies that the rags sold had been baled up in his warehouse for a year before, and had no disinfectants in them; this is sufficient evidence to be submitted to a jury of a breach of warranty or a fraudulent representation on the part of the seller, and of damages to the buyer. But the court may properly decline to permit the buyer to testify in general terms what he estimates the amount of his damages to be, without stating the items of damage, or any facts upon which his opinion is based.

The testimony of witnesses, not shown to be experts, that the infected condition of rags was the cause of a breaking out of the small-pox is incompetent.

This was an action of assumpsit, brought by Benedict, a citizen of Pennsylvania and rag-dealer at Pittsburgh, against Dushane and Stonebraker, citizens of Maryland and paper-makers at Hagerstown, to recover $813.03 for rags sold and delivered by him to them on February 7, 1882, as appeared by the plaintiff's affidavit to a copy of the bill from his book of original entry.

Plea: "Defendants plead payment, with leave, &c., and the special matter stated in affidavits of defence, and they claim damages upon the cause of action stated in said affidavits in the sum of seven thousand dollars in excess of the amount sued for by plaintiff."

The defendants had filed, before their plea, two affidavits of Stonebraker, the statements in the second of which included those in the first, and were as follows:

"The following facts are stated as a just defence to the whole of plaintiff's claim. Plaintiff is a rag-dealer, having his stock in trade in the city of Pittsburgh. In February, 1882, he came to see defendants at Hagerstown, Md., and solicited an order for rags and paper. On behalf of defendant firm, I gave him an order for substantially the quantities and kinds described in the exhibit attached to his affidavit. Nicely assorted print and book rags were designated as the subject matter of said contract, but no rags were accepted, inspected, or even seen by defendants or any one acting for them. The rags which the plaintiff shipped from Pittsburgh, professedly in fulfilment of said contract, were packed in bales, and their

character could not be discovered until the bales were unpacked. After some of them had been unpacked and used, nine of defendants' sorters were stricken with small-pox and varioloid, and the disease spread rapidly among the employees and those living near the mill, causing the death of five persons and preventing many others from working. Others became alarmed. When the reports of the epidemic spread, customers refused to buy defendants' paper. They were unable to hire workmen at the usual rates, and some refused to work on any terms. By reason of the premises and of the interruption of defendants' business occasioned thereby, money paid for the support of those disabled by said disease, injury to defendants' said business, &c., defendants suffered loss and were put to expense far exceeding the amount of plaintiff's bill. The said rags were infected with small-pox before plaintiff shipped them. I am informed and believe, and expect to prove, that he well knew them to be infected before he shipped them. If defendants had known them to be infected, they would have refused to receive them. The rags they contracted for and were to receive, according to the clear understanding between them and plaintiff, were good merchantable rags, free from infection. The infection conveyed in said rags was the sole cause of the breaking out of said disease in the manner above described; and they were shipped by plaintiff with intent to deceive, cheat and defraud the said defendants. As soon as practicable after the discovery of said infection, defendants wrote to plaintiff, stating the facts, and telling him that all the rags not consumed before said discovery was made were held subject to his order; and they were all still so held until defendants' foreman, being compelled to remove the said rags, and mistaking defendants' orders to the contrary, turned them into the rotary boiler without sorting them, for the purpose of getting rid of the risk of infection attendant upon their remaining in the mill.

"For the rags so used, it is submitted that defendants ought not to pay the price charged by plaintiff, but such amount only as they were reasonably worth, if they were worth anything. Defendants will ask for a certificate for the

amount of damages in excess of the true amount to which plaintiff may be entitled."

The plaintiff, by counter affidavit of claim, denied that the rags were infected, or that the contract provided that they should be free from infection, or that the alleged infection was the cause of the breaking out of the disease, or that he knew the rags to be infected before he shipped them, or that he shipped them with any intent of deceiving, cheating or defrauding the defendants, or that the defendants suffered any loss in consequence of the alleged infection.

At the trial, the plaintiff, having been called as a witness in his own behalf, testified on cross-examination that the rags in question were collected by him in Pittsburgh, Allegheny City, and the country round about, and were assorted in his establishment, and baled under his special instructions by his foreman; that he bought rags from any and all dealers who offered him merchantable rags, not knowing where they were collected; that he thought the word "clean" was not used in his offer to the defendants; that to the best of his knowledge and belief the rags shipped to the defendants were clean, and there was no sulphur, carbolic acid or other disinfectant in the bales; that he never used disinfectants in his establishment; that he knew that the small-pox was epidemic in those two cities at and before the time when the rags were shipped; but that these rags had been baled up and lain in his warehouse for a year or more before.

One of the defendants, being called as a witness in their behalf, produced a letter received from the plaintiff with the invoice of the rags, in which the plaintiff said that he had shipped some of them that day, and expected to ship the rest the next day, and that he might not have quite enough then, but would send them a few days after. And three of the workwomen in the mill testified that the rags, when opened, smelt strongly of sulphur and carbolic acid.

The defendants also introduced evidence tending to show that the contract was for clean, nicely assorted, print and book rags; that the rags, when delivered at the mill, were packed in bales, which were immediately opened; that the

rags were very filthy, emitted a sickening smell, and were infected with the small-pox; that twelve days afterwards the small-pox broke out in the mill, and caused the death of some of the work-people, disabled others, frightened away some, and prevented customers from coming to the mill; that the infected condition of the rags was the cause of the breaking out of the disease; that the defendants supplied the sick with provisions and other necessaries to the amount of $200, and were obliged to run their mill short-handed, made less paper, and lost a considerable part of a profitable country trade; but offered no other evidence of the particulars of the damage which they had suffered.

While one of the defendants was on the witness stand, their counsel asked him what he estimated the amount of his damage to be. The plaintiff's counsel objected to the question, on the ground "that it was not competent for the witness to give a lumping estimate of the defendants' damages, but that he should specify the items of damage, and testify to facts, his opinion being inadmissible." The court sustained the objection and excluded the evidence.

The court also excluded testimony of one of the persons who had taken the small-pox, that the breaking out of the disease was caused by these rags; and testimony of another workman, that two of his children had taken the small-pox by playing with infected rags.

In answer to an inquiry of the court, just before charging the jury, "what, under the proofs, the position of the defendants was," their counsel stated that "the defendants only insisted upon their counterclaim for damages on the cause of action growing out of the infected condition of the rags;" and thereupon the court charged the jury as follows:

"The sale at the price sued for and the delivery of the rags are admitted, and it is shown that the defendants used the whole of them in the manufacture of paper, which they disposed of. The defendants, however, allege, and this is the sole ground of defence insisted on, that the rags were infected with small-pox, and introduced the disease among the defendants' employees, a number of whom took small-pox, and

several of whom died of the disease; and the defendants maintain that, by reason of such introduction of the disease into their mill, they were injured in their business, and sustained damages in excess of the plaintiff's claim, and hence that they not only have a full defence to this claim, but are entitled to a certificate for the damages sustained by them in excess of his claim."

"*The defendants go to the length of charging that the plaintiff knew the rags were infected with small-pox when he shipped them to the defendants, and in so doing acted with positive bad faith to the defendants. But it seems to me that the evidence would not justify the jury in so finding, or the court in submitting to the jury the question of bad faith; nor can I now recall evidence sufficiently showing that the plaintiff was even guilty of culpable negligence in his purchase of these rags.*

"*However, the damages claimed by the defendants, if not in their nature too remote and speculative, are, it seems to me, altogether uncertain under the evidence. I am of opinion, and charge you, that the evidence in the case is not such as would enable the jury to ascertain the amount of damages, if any, which the defendants sustained.*

"*Upon the whole case, the court instructs the jury to find a verdict for the plaintiff for the amount of his claim.*"

The jury returned a verdict for the plaintiff accordingly, and the defendants excepted to the rulings excluding evidence, and to those portions of the charge above printed in italics, and sued out this writ of error.

Mr. W. Macrum for plaintiffs in error. *Mr. A. H. Clarke* was with him on the brief.

Mr. William F. Mattingly for defendant in error. *Mr. Simon Wolf* was with him on the brief.

Mr. Justice Gray delivered the opinion of the court.

This was an action of assumpsit by a rag-dealer against paper-makers to recover $813.03 for rags sold and delivered by him to them. The plea was in the peculiar form used in Pennsylvania, with a counterclaim. The plaintiff had a verdict and

judgment, and the case comes before us on a writ of error sued out by the defendants.

The plaintiff's motion to dismiss the writ of error, for want of a sufficient amount in dispute to give this court jurisdiction, cannot be sustained, since the record shows that the defendants sought to recover the sum of $7000 in excess of the plaintiff's claim, and this sum was therefore in dispute. *Ryan* v. *Bindley*, 1 Wall. 66; Act of February 16, 1875, c. 77, § 3, 18 Stat. 316. Whether the defendants could lawfully recover it against the plaintiff in this case was a matter affecting the merits, and not the jurisdiction.

Before proceeding to consider the rulings and instructions at the trial, as applied to the facts of the case, it will be convenient to refer to the general rules of law, and to the statute and decisions in Pennsylvania, which bear upon the subject.

When a dealer contracts to sell goods which he deals in, to be applied to a particular purpose, and the buyer has no opportunity to inspect them before delivery, there is an implied warranty that they shall be reasonably fit for that purpose. *Jones* v. *Just*, L. R. 3 Q. B. 197, 203; *S. C.* 9 B. & S. 141, 150; *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108. In such a case, in Pennsylvania, as at common law, the action upon the warranty may be either in contract or in tort. *Vanleer* v. *Earle*, 26 Penn. St. 277; *Schuchardt* v. *Allens*, 1 Wall. 359, 368. If the seller falsely represents to the buyer that the goods are of a certain quality, or fit for a certain purpose, he is liable to an action for the fraudulent representations, although they are not in a form to constitute a warranty; and in such a case the action must be in tort in the nature of an action of deceit, and must be supported by proof that he knew the representations to be false when he made them. *Kimmel* v. *Lichty*, 3 Yeates, 262; *McFarland* v. *Newman*, 9 Watts, 55;[1] *King* v. *Eagle Mills*, 10 Allen, 548.

The damages recoverable for a breach of warranty, or for a false representation, include all damages which, in the contemplation of the parties, or according to the natural or usual course

[1] *S. C.* 34 Am. Dec. 497.

of things, may result from the wrongful act. For instance, if a man sells hay or grain, for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury. *French* v. *Vining*, 102 Mass. 132; *Wilson* v. *Dunville*, 4 L. R. Ir. 249, and 6 L. R. Ir. 210. So, if one sells an animal, warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals; either in an action of tort for the false representation; *Mullett* v. *Mason*, L. R. 1 C. P. 559; *Jeffrey* v. *Bigelow*, 13 Wend. 518;[1] *Faris* v. *Lewis*, 2 B. Monroe, 375; *Sherrod* v. *Langdon*, 21 Iowa, 518; *Marsh* v. *Webber*, 16 Minn. 418; or in an action on the warranty, either in tort; *Packard* v. *Slack*, 32 Vt. 9; *Smith* v. *Green*, 1 C. P. D. 92; or even in contract. *Black* v. *Elliott*, 1 Fost. & Finl. 595. See also *Randall* v. *Newson*, 2 Q. B. D. 102.

In an action for the price of goods sold, or of work done, the defendant may set up a breach of warranty or a false representation as to the goods, or a defective performance of the work, by way of recoupment of the sum that the plaintiff may recover. In England, this is only allowed so far as it affects the value of the goods sold, or of the work done. *Davis* v. *Hedges*, L. R. 6 Q. B. 687, and cases there cited. But in this country the courts, in order to avoid circuity of action, have gone further, and have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty, or negligence, of the plaintiff, growing out of and relating to the transaction in question. It will be enough to cite a few cases in which the extent and the reason of the doctrine have been clearly brought out.

In a leading Massachusetts case, in which fraudulent representations as to the soundness of a horse sold were allowed to be set up in defence of an action on a promissory note given for the price, although the horse had not been returned to the seller, Mr. Justice Dewey, after reviewing the previous decisions

[1] *S. C.* 28 Am. Dec. 476.

in England and in New York, said: "The strong argument for the admission of such evidence in reduction of damages in cases like the present is, that it will avoid circuity of action. It is always desirable to prevent a cross action where full and complete justice can be done to the parties in a single suit, and it is upon this ground, that the courts have of late been disposed to extend to the greatest length, compatible with the legal rights of the parties, the principle allowing evidence in defence or in reduction of damages to be introduced, rather than to compel the defendant to resort to his cross action." *Harrington* v. *Stratton*, 22 Pick. 510, 517. And in a later case in that state, Chief Justice Bigelow observed, that the essential elements on which the application of the principle of recoupment depended were two only: "The first is, that the damages which the defendant seeks to set off shall have arisen from the same subject matter, or sprung out of the same contract or transaction, as that on which the plaintiff relies to maintain his action. The other is, that the claim for damages shall be against the plaintiff, so that their allowance by way of set-off or defence to the contract declared on shall operate to avoid circuity of action, and as a substitute for a distinct action against the plaintiff to recover the same damages as those relied on to defeat the action." *Sawyer* v. *Wiswell*, 9 Allen, 39, 42.

In *Bradley* v. *Rea*, 14 Allen, 20, in an action to recover the price of a number of pigs sold in one lot, it was held that the defendant might set up in defence that the pigs sold were warranted or fraudulently represented by the plaintiff to be sound and free from infectious or contagious diseases, and prove the existence of such a disease in some of the pigs at the time of the sale, which afterwards spread to the others, and of which they died. Mr. Justice Hoar, delivering judgment, after referring to *Mullett* v. *Mason*, L. R. 1 C. P. 559, above cited, in which it was held that in an action for fraudulently misrepresenting that a cow sold was free from infectious disease, the buyer, if he placed the cow with others which thereby caught the disease and died, could recover as damages the value of all the cows, said: "The nature of the subject matter of the warranty

or deceit is such, that when animals are sold in one lot together, the warranty or representation as to the whole being single, we can have no doubt that the same principle should apply to the extent of a recoupment; and that the right to recoup in damages should not be confined to the diminished value of those which are proved to have the disease at the time of the sale." 14 Allen, 23. A similar decision was made in *Rose* v. *Wallace*, 11 Indiana, 112.

The later decisions of this court, modifying the earlier decision in *Thornton* v. *Wynn*, 12 Wheat. 183, affirm the same doctrine. *Withers* v. *Greene*, 9 How. 213; *Van Buren* v. *Digges*, 11 How. 461; *Winder* v. *Caldwell*, 14 How. 434; *Lyon* v. *Bertram*, 20 How. 149, 154; *Railroad Co.* v. *Smith*, 21 Wall. 255; *Marsh* v. *McPherson*, 105 U. S. 709, 717.

In *Winder* v. *Caldwell*, Mr. Justice Grier, who was equally familiar with the common law and with the Pennsylvania practice said: "Although it is true, as a general rule, that unliquidated damages cannot be the subject of set-off, yet it is well settled that a total or partial failure of consideration, acts of nonfeasance or misfeasance, immediately connected with the cause of action, or any equitable defence arising out of the same transaction, may be given in evidence in mitigation of damages, or recouped; not strictly by way of defalcation or set-off, but for the purpose of defeating the plaintiff's action in whole or in part, and to avoid circuity of action." 14 How. 443.

In *Railroad Co.* v. *Smith*, which was an action against a railroad corporation by a contractor to recover the price of a drawbridge, it was held that the defendant might show that the construction of the bridge was so defective as to make it unfit for its purpose, and the draw worked so imperfectly as to hinder and delay the running of the cars over it; and might prove the number of hands required to work the bridge as it was built, and the number that would be necessary if it had been properly constructed. Mr. Justice Field, delivering judgment, said: "All damages directly arising from the imperfect character of the structure, which would have been avoided had the structure been made pursuant to the contract, and for which the defendant might have instituted a

separate action against the contractors, were provable against their demand in the present action. The law does not require a party to pay for imperfect and defective work the price stipulated for a perfect structure; and when the price is demanded, will allow him to deduct the difference between that price and the value of the inferior work, and also the amount of any direct damages flowing from existing defects, not exceeding the demand of the plaintiffs. This is a rule of strict justice, and the deduction is allowed in a suit upon the contract to prevent circuity of action." 21 Wall. 261.

The courts of Pennsylvania, having originally had no jurisdiction in equity, have always allowed equitable defences in actions at law, under what is there known as a "plea of payment with leave," that is to say, with leave to prove any special matter. *Swift* v. *Hawkins* (1768), 1 Dall. 17; *Lewis* v. *Morgan* (1824), 11 S. & R. 234; *Light* v. *Stoever* (1825), 12 S. & R. 431, 433; *Mackey* v. *Brownfield* (1825), 13 S. & R. 239; *Hawk* v. *Geddis* (1827), 16 S. & R. 23; *McConnell* v. *Hall* (1831), 3 Penrose & Watts, 53; *Uhler* v. *Sanderson* (1861), 38 Penn. St. 128. And the practice was long ago recognized and acted on by Mr. Justice Washington in the Circuit Court. *Latapee* v. *Pecholier*, 2 Wash. C. C. 180, 184; *Webster* v. *Warren*, 2 Wash. C. C. 456, 458.

In matters of contract, the defendant's right of set-off, with the additional right to recover judgment against the plaintiff for any sum proved in excess of his claim, is given and regulated by a statute which has been in force in Pennsylvania since 1705, and is there commonly known as the Defalcation Act, by which "if two or more dealing together be indebted to each other upon bonds, bills, bargains, promises, accounts, or the like, and one of them commence an action in any court of this province, if the defendant cannot gainsay the deed, bargain or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or part of the debt or sum demanded, and give any bond, bill, receipt, account or bargain in evidence; and if it shall appear that the defendant hath fully paid or satisfied the debt or sum demanded, the jury shall find for the defendant, and judgment shall be

entered that the plaintiff shall take nothing by his writ, and shall pay the costs. And if it shall appear that any part of the sum demanded be paid, then so much as is found to be paid shall be defalked, and the plaintiff shall have judgment for the residue only, with costs of suit. But if it appear to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much they find the plaintiff to be indebted or in arrear to the defendant, more than will answer the debt or sum demanded;" and the sum so certified shall be recorded with the verdict, and be deemed a debt of record, and may be recovered by *scire facias*, or, under an act of 1848, by judgment and execution therefor. 1 Dall. Laws of Penn. p. 65; 1 Purd. Dig. (11th Ed.) 603, 604.

This statute, in its very terms, embraces all matters of contract, and no matter of tort; and so it has always been construed. A breach of warranty is a breach of a contract, and may be sued on as such; and for that reason, and that only, has been allowed to be given in evidence by the defendant, under the statute, not only in an action on the same contract (in which it might be admissible by way of recoupment only, without the aid of the statute), but even in an action upon a distinct contract. *Steigleman* v. *Jeffries*, 1 S. & R. 477;[1] *Nickle* v. *Baldwin*, 4 W. & S. 290; *Phillips* v. *Lawrence*, 6 W. & S. 150; *Carman* v. *Franklin Ins. Co.*, 6 W. & S. 155; *Ellmaker* v. *Franklin Ins. Co.*, 6 W. & S. 439; *Hunt* v. *Gilmore*, 59 Penn. St. 450; *Seigworth* v. *Leffel*, 76 Penn. St. 476; *Halfpenny* v. *Bell*, 82 Penn. St. 128. But from the earliest to the latest times it has been uniformly held that a claim of damages for a mere tort is not within the statute. *Kachlin* v. *Mulhallon* (1795), 2 Dall. 237; *S. C. nom Kachlein* v. *Ralston*, 1 Yeates, 571; *Heck* v. *Shener* (1818), 4 S. & R. 249;[2] *Gogel* v. *Jacoby* (1819), 5 S. & R. 117;[3] *Cornell* v. *Green* (1823), 10 S. & R. 14; *Light* v. *Stoever* (1825), 12 S. & R. 431; *Hubler* v. *Tamney* (1836), 5 Watts, 51, 53; *Peterson* v. *Haight* (1838), 3 Wharton, 150; *Hunt* v. *Gilmore* (1868), 59 Penn. St. 450, 452; *Ahl* v. *Rhoads* (1877), 84 Penn. St. 319, 325.

[1] *S. C.* 7 Am. Dec. 626. [2] *S. C.* 8 Am. Dec. 700. [3] *S. C.* 9 Am. Dec. 339.

The distinction between the right of equitable defence or recoupment, independent of any statute, which may arise even out of a tortious act of the plaintiff, immediately connected with the contract sued on, and by which the defendant can do no more than defeat the plaintiff's claim, in whole or in part; and the right of counterclaim under this statute, which can be based only on contract, and by which the defendant may not only defeat the plaintiff's action, but recover an affirmative judgment against him; has been clearly brought out in the judgments of Chief Justice Tilghman.

In assumpsit to recover for services as a housekeeper, the defendant pleaded non assumpsit, and payment, with leave to give the special matters in evidence; and offered to prove that the plaintiff, while in his service, clandestinely took and sent away goods of his from the house. Chief Justice Tilghman, after observing that it was contended for the defendant "that the evidence was proper, either by way of set-off, or, under the plea of non assumpsit, as a defence to the action," expressed the opinion that it was not admissible by way of set-off, because it had been settled that the statute did not comprehend matters of a tortious nature; but that, considering the impolicy of multiplying suits, and the hardship of not permitting the defendant to avail himself of matters arising out of the very transaction on which the plaintiff founds his suit, the evidence offered was admissible under the plea of non assumpsit, to show that the plaintiff's services were ill performed, and thus to affect the amount which she could recover; and on this ground alone the judgment below, which excluded the evidence, was reversed. *Heck* v. *Shener*, 4 S. & R. 249.[1]

So in assumpsit for goods sold and delivered, it was held that the defendant could not give in evidence, by way of set-off, that the goods had been detained by the plaintiff and conveyed by him to third persons; and the same eminent judge said: "Without undertaking, at present, to draw the line which limits the right of defalcation, it may be safely affirmed, that defalcation is not permitted by reason of any demand against the plaintiff for an act done by him of a tortious nature."

[1] *S. C.* 8 Am. Dec. 700.

"But there are cases, in which the defendant is permitted to give evidence of acts of nonfeasance or misfeasance by the plaintiff, where these acts are immediately connected with the plaintiff's cause of action; although perhaps such evidence is not so properly a defalcation, as a defeating, in whole or in part, the plaintiff's action." *Gogel* v. *Jacoby*, 5 S. & R. 117, 122.[1]

Again: in debt against principal and surety on a bond given for the purchase money of a mill sold by the plaintiff to the principal defendant, the defendants proved that at the time of the sale the grantee supposed the dam was at its lawful height, whereas it was in fact, as the plaintiff knew, so high as to overflow and injure the land and mill of a neighbor without his consent; and that if the grantee should lower his dam to its lawful height, the value of his mill would be greatly reduced; and then offered to show how much the value of his mill would be diminished by so lowering the dam. It was held that the evidence, though going to prove unliquidated damages, was admissible, for reasons thus stated by Chief Justice Tilghman: "It is very true that these damages were not in the nature of a debt, which can be set off. But they were not offered as a set-off. It was an equitable defence, showing that the plaintiff ought not to be permitted to recover the whole purchase money; and if not, then it was necessary to show what would be a reasonable abatement. Such defences have always been admitted in our courts. Having no court of chancery, we could not get along without them. To permit the plaintiff to recover the whole purchase money, and leave the defendants to their remedy by an action for fraudulent concealment, would be most unjust. The purchase money and damages arise out of the same transaction, and the proper time for inquiry was before the money was taken from the pocket of the defendants. It might be too late afterwards. And certainly the plaintiff has no right to complain, if the whole business is settled at once. What he is not, in good conscience, entitled to receive, he should not be permitted to receive." *Light* v. *Stoever*, 12 S. & R. 431, 433.

The result of the Pennsylvania decisions may be summed

[1] *S. C.* 9 Am. Dec. 339.

up thus: First. Independently of the statute, any matter, either of contract or of tort, immediately connected with the plaintiff's cause of action, (which would seem to include everything that could be set up by way of recoupment, under the law as generally understood and administered in the American courts,) may be set up by way of defence to the action and in abatement of the plaintiff's damages only. Second. Any matter of contract may be set up by way of counterclaim, under the statute, not only to defeat the plaintiff's action, in whole or in part, but also, if the defendant proves that the plaintiff owes him more than he owes the plaintiff, for the purpose of recovering the excess against the plaintiff. Third. No mere matter of tort can be availed of by the defendant under the statute.

The defendants in the present case pleaded "payment, with leave, &c.," and the special matter stated in the affidavits of defence previously filed, with a counterclaim upon the cause of action stated in those affidavits. Their purpose in so pleading apparently was to give notice to the plaintiff, both of the special matter to defeat his claim, and also of a defalcation or set-off, on which the defendants would ask for a certificate and judgment against the plaintiff, under the statute, for any balance due from him. In the words of Chief Justice Black, "A notice of special matter must state the facts upon which the defendant relies, and not either the evidence by which they are to be established, or the inferences to be drawn from them." *Hartman* v. *Keystone Ins. Co.*, 21 Penn. St. 466, 475. The plaintiff might perhaps have objected to the admission of any other evidence than of payment, for want of any notice to him, independently of the affidavits, of the matters intended to be relied on by way of defence and of counterclaim. *Finlay* v. *Stewart*, 56 Penn. St. 183. But no such objection having been made at the trial, it could not be taken for the first time in this court. *Calvin* v. *McClure*, 17 S. & R. 385; *Rearick* v. *Swinehart*, 11 Penn. St. 233;[1] *Partridge* v. *Insurance Co.*, 15 Wall. 573, 580. Indeed, no objection to the sufficiency of the notice of special matter was taken in argument here.

[1] *S. C.* 51 Am. Dec. 540.

Opinion of the Court.

The special matter stated in the affidavits of defence was, that the plaintiff came to the defendants' mill, and there solicited and obtained an order for good merchantable rags, free from infection; that the defendants had no opportunity to inspect the rags before delivery; that the rags sent were infected with the small-pox before the plaintiff shipped them; that when some of them were unpacked and used at the defendants' mill, the infection in the rags caused the small-pox to break out in the mill, in consequence of which some of the workmen died, others were disabled from working, it became impossible to hire new ones at the usual rates, and customers were deterred from buying the defendants' paper; that by reason of the interruption and injury to the defendants' business thereby occasioned, and the money paid by the defendants to those disabled by the disease, they were put to loss and expense far exceeding the amount of the plaintiff's bill; that the plaintiff shipped the rags, knowing them to be infected, and intending to deceive, cheat and defraud the defendants; and that the defendants, as soon as they discovered the infection, informed the plaintiff of the fact, and held those which had not been consumed subject to his order, until their foreman by mistake used them up. The affidavits concluded by submitting that the defendants ought not to pay the prices charged, but such amount only as the rags were reasonably worth, if anything; and by asking for a certificate for the amount of their damages in excess of what the plaintiff might be entitled to.

In short, the matter stated in the affidavits of defence was a sale of rags, upon a warranty or a fraudulent representation that they were clean and free from infection, and a delivery by the plaintiff, under that contract of sale, of rags infected with the small-pox, causing the breaking out of the disease in the defendants' mill, and consequent injuries to their workmen and their business. The plaintiff, by counter affidavit of claim, met all the issues so notified to him by the defendants' plea and affidavits.

At the trial, the defendants, as appears by the answer of their counsel to an inquiry of the court after the arguments to

the jury, and by the statement thereupon made by the court in its charge, did not deny the sale and delivery of the rags at the prices sued for; but relied on their counterclaim for damages on the cause of action growing out of the infected condition of the rags, both by way of a full defence to the plaintiff's action, and also as a ground for obtaining a certificate and judgment for the damages sustained by them in excess of his claim.

The defendants offered evidence tending to show that the contract was for clean rags, that the rags delivered were filthy and infected with the small-pox, and that their infected condition caused the breaking out of the disease in the defendants' mill. This was of itself sufficient evidence to be submitted to the jury of a warranty and a breach of it. A warranty, express or implied, that rags sold are fit to be manufactured into paper, is broken, not only if they will not make good paper, but equally if they cannot be made into paper at all, without killing or sickening those employed in the manufacture.

Upon the question whether the plaintiff, when he shipped the rags, knew them to be infected with the small-pox, and fraudulently represented to the defendants that they were clean and free from infection, the evidence was as follows: The plaintiff, having been called as a witness in his own behalf, admitted on cross-examination that the rags were collected by him in Pittsburgh and Allegheny City and the country round about, where he knew that the small-pox was then epidemic, and that he bought rags from any and all dealers, not knowing where they were collected; and further testified that the rags were assorted and baled up under his instructions in his establishment, and had been baled up and lain in his warehouse for a year or more before; that to the best of his knowledge and belief they were clean and free from infection, and there was no sulphur, carbolic acid or other disinfectant in the bales; and that he never used disinfectants in his establishment. In contradiction of this testimony, the defendants produced a letter sent to them by him with the first invoice of rags, showing that he did not then have all the rest on hand; and introduced the testimony of three workwomen in the mill,

that the rags, when opened, smelt strongly of sulphur and carbolic acid.

This evidence, taken in connection with that already mentioned, was in our opinion sufficient to be submitted to the jury, as tending to prove that the plaintiff knew that the rags which he sold and shipped as clean rags, fit to be used in the manufacture of paper, were in fact infected with the small-pox, and that he fraudulently represented them to be clean, intending to deceive and defraud the defendants.

Upon the question of damages, there was distinct proof, not only of the rags being so infected with the small-pox that they could not be made into paper without injury to the workmen, but also of sums paid by the defendants to support those workmen who had been disabled by the disease; besides evidence that the defendants, in consequence of the injury to their business by the small-pox introduced in the rags, were obliged to run their mill short-handed, and lost a considerable part of a profitable country trade. This evidence was competent for the consideration of the jury; and the want of more full and definite proof of the amount of damages resulting to the defendants from the unfitness of the rags to be manufactured into paper, while it might lessen the sum which the jury could find in the defendants' favor, did not justify the court in withdrawing the defendants' claim from the jury.

In the rulings excluding evidence offered by the defendants in the course of the trial, there was no error. The court might properly decline to permit one of the defendants to testify in general terms what he estimated the amount of their damages to be, when he had not testified to the items of damage, or to any facts upon which his opinion was based. The testimony of workmen, not shown to be experts, that the infected rags were the cause of small-pox, which they or their children had taken, was clearly incompetent.

But for the reasons above stated, we are of opinion that the court erred in instructing the jury that the evidence admitted would not justify them in finding that the plaintiff knowingly and fraudulently shipped to the defendants rags infected with the small-pox; as well as in instructing them that there was no

evidence which would enable the jury to estimate the amount of damage, if any, which the defendants had sustained; and in directing the jury to return a verdict for the plaintiff for the whole amount of his claim. The defendants' exceptions to these instructions must therefore be sustained, and a new trial had.

For the guidance of the parties and their counsel, it may be well to re-state exactly what will be open to the defendants upon another trial.

By way of recoupment or equitable defence, which is limited to defeating the plaintiff's action, in whole or in part, the defendants may avail themselves of any evidence tending to show that by reason, either of a breach of warranty, or of a fraudulent representation, the goods were worth less than they would have been if they had been such as they were warranted or represented to be; as well as of any evidence tending to show that the defendants suffered damages which, in the contemplation of the parties, or according to the natural or usual course of things, were the consequences of the breach of warranty, or the fraudulent representation.

But under their counterclaim, seeking, as permitted by the statute of Pennsylvania, not only to defeat the plaintiff's action, but also to recover an affirmative judgment against him, they can avail themselves only of a claim sounding in contract, in the nature of an action of assumpsit upon the supposed warranty. If they fail to prove a warranty, express or implied, the statute can have no application; because it extends to no claim sounding in tort only, whether in the nature of an action of deceit, or of such an action as these defendants might maintain against a person, with whom they never had any contract, who wilfully or negligently introduced the small-pox into their mill.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

PORTER *v.* PITTSBURG BESSEMER STEEL COMPANY.

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

Submitted January 7, 1887. — Decided March 21, 1887.

In this case unsecured floating debts, due by a railroad company for construction, were, in the absence of a statutory provision, held not to be a lien on the railroad superior to the lien of a valid mortgage on it, duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value.

The question of what is a final decree, from which an appeal can be taken, considered.

THESE were five appeals brought by Henry H. Porter, in which the Pittsburg Bessemer Steel Company (Limited), the Cleveland Rolling Mill Company, the Smith Bridge Company, Crerar, Adams & Company, and Volney Q. Irwin are severally appellees.

The material facts out of which the questions for consideration arose were as follows:

In March, 1880, the Indiana and Chicago Railway Company was incorporated to construct and operate a railroad from a point on the state line of Indiana, in Lake County, to Attica, in Fountain County, Indiana. William Foster was the chief promoter of this enterprise, and was the president of the company, and of its successor, the Chicago and Great Southern Railway Company, from the organization of the Indiana and Chicago Railway Company down to March 15, 1882. From March, 1880, to June 23, 1881, Foster owned substantially all of the stock of the Indiana and Chicago Railway Company which had been issued, a few shares being held by the other directors, and he controlled the enterprise. Prior to June 23, 1881, the work of construction and of procurement of the right of way had progressed so far as Foster could procure and pay for the same, by the issuing of $50,250, par value,

of paid up capital stock of the company, of all of which stock Foster had on June 23, 1881, become the owner.

Prior to June, 1881, Henry Crawford purchased from A. J. Dull and Henry McCormick the entire capital stock, being 8648 shares, of the Chicago and Block Coal Railroad Company. This was a company organized and incorporated by the purchasers, at a foreclosure sale, of the Indiana North and South Railroad, and it owned and operated a railroad extending south from Attica, through Veedersburg, in Fountain County, to Yeddo, a little over twenty miles in length. It had also procured some right of way and constructed some road-bed south of Yeddo, in the direction of Brazil, Indiana. The purchase price of this stock was $200,000. Crawford made a cash payment of part at the time and gave his notes for the residue, the stock remaining in pledge with the vendors, as security for the payment of the notes.

On June 23, 1881, Foster sold to Crawford 1005 shares of the capital stock of the Indiana and Chicago Railway Company, of the par value of $50,250, under a written contract, by which Foster guaranteed to Crawford that the stock thus sold was all of the capital stock of the company, excepting $10,000 par value still held by Foster, and that the company was under no obligation to issue any more stock, except a small amount for rights of way contracted to be paid for in stock. In connection with this contract, a certificate of the secretary of the Indiana and Chicago Railway Company was delivered to Crawford, showing the exact amount of capital stock then outstanding. The $10,000 of stock retained by Foster had been issued to him in payment of his salary and personal expenses in connection with the enterprise.

On June 23, 1881, the company had no assets excepting the road-bed and right of way, which had been constructed and procured with the money represented by the $50,250 of stock, and excepting some $50,000 of aid voted by certain townships along the line, but not yet collected.

Foster remained president, and his board of directors remained directors, until March 15, 1882. Immediately after his purchase of the stock on June 23, 1881, Crawford, without any

specific contract with the Indiana and Chicago Railway Company, began furnishing from his own means the money and material with which the work of constructing the road was carried on.

On July 14, 1881, the board of directors of the company, at a special meeting, adopted a resolution, changing its name to that of "The Chicago and Great Southern Railway Company." On October 29, 1881, the board of directors of the Chicago and Great Southern Railway Company adopted resolutions authorizing the execution of the mortgage and the issuing of the bonds involved in this litigation. At that time, Crawford was not a director or officer of the company. The mortgage and the bonds bear date November 1, 1881. The resolutions authorized the issuing of bonds to the amount of $2,000,000, and the mortgage secures that amount. The mortgage was made to John C. New, as trustee, and describes the mortgaged premises as follows: "All and singular the northern division of railway of the said party of the first part, as the same now is or may hereafter be constructed, between Brazil, Clay County, Indiana, extending thence northwardly through the counties of Clay, Parke, Fountain, Warren, Benton, Newton, and Jasper to a junction with the Louisville, New Albany and Chicago Railway, at or northwest from Rensselaer, Indiana, being about one hundred miles in length."

Between June 23, 1881, and January 1, 1882, Crawford furnished from his own means over $300,000, which was paid out for work and material used in constructing the road between Attica and the junction at Fair Oaks, northwest of Rensselaer. In addition to this, Crawford, prior to January 1, 1882, had paid out of his own means to Dull and McCormick, upon his purchase of the stock of the Chicago and Block Coal Company, the sum of $85,000, leaving $115,000 and all interest still unpaid.

From June 23, 1881, onwards, Foster and his board of directors looked to Crawford to furnish the money and material with which to carry on the work of construction.

In pursuance of the resolutions of October 29, 1881, the mortgage was prepared and executed, and was duly recorded,

in November, 1881, in the several counties through which the line of the railroad ran.

About the last of December, 1881, Foster, then president of the Chicago and Great Southern Railway Company, executed and delivered to Crawford — the actual delivery being made to one Starin, an employee of Crawford, at Crawford's office at Chicago, Crawford being absent — 1000 bonds, each for $1000, negotiable in form, and payable to New or bearer, making $1,000,000, the payment of the bonds and of the interest coupons attached thereto being secured by the said mortgage. At the same time with the delivery of the bonds, Foster also delivered to Starin, for Crawford, the following memorandum, unsigned, but in the handwriting of Foster:

"Memorandum of agreement between the Chicago and Great Southern Railway Company and Henry Crawford as to applying the proceeds of an issue of one million dollars of bonds under date of November 1, 1881.

"First. In payment of Block Coal road, purchased by said Crawford, and the contract assigned by him to the Chicago and Great Southern Railway Company, with which it is to be consolidated, as provided by law.

"Second. To reimburse said Crawford for money advanced, and to be hereafter advanced, for construction and equipment of the Chicago and Great Southern Railway, which the bills of purchase and vouchers for the necessary payments shall be the evidence of expenditures made.

"Third. Any balance from the proceeds of the first issue or any subsequent issue shall be used and applied to the extension and development of the line of road covered by the mortgage of November 1st, 1881.

"Fourth. It is understood and agreed that said Crawford is to furnish the necessary amount of money to pay the debts contracted since the 1st of July, 1881, and to complete grading and superstructure, and to furnish and equip the line of road from junction with Air Line to Attica, as fast as the work can be done."

Prior to the delivery of the bonds by Foster to Crawford, Crawford had assigned to the Chicago and Great Southern

Railway Company his contract with Dull and McCormick for the purchase of the stock of the Chicago and Block Coal Railroad Company. When the bonds were thus delivered to Crawford he had no official connection with the company, but owned $50,250 of its stock, and had furnished to it a large amount of money, which it had paid out for construction.

In December, 1881, Crawford's note to Dull and McCormick matured and was unpaid. Crawford negotiated with Dull for an extension of time, and Dull agreed to give the extension if Crawford would deposit with him, as additional collateral security, all of the bonds then issued by the Chicago and Great Southern Railway Company, and all the stock which he had bought from Foster, and if he would also, by an agreement with New, the trustee, prevent the issue of any more bonds without Dull's written consent. This arrangement was carried out, and, on the 27th of January, 1882, Crawford delivered to Dull all of the stock which he had bought from Foster, and the 1000 bonds which Foster had delivered to him, and also procured from New the following paper, which was delivered to Dull:

"I, John C. New, of the city of Indianapolis, in the state of Indiana, do hereby make known, that, as trustee in a certain mortgage or deed of trust, bearing date the 1st day of November, 1881, made and executed by the Chicago and Great Southern Railway Company, a corporation of the state of Indiana, to me, as trustee, covering the railroad and other property of said company, to secure a certain issue of first-mortgage bonds of said company, aggregating the sum of two millions of dollars, I have, as such trustee, certified for issue one thousand of said bonds, of one thousand dollars each, and no more, and, at the request of Henry Crawford, Esq., of Chicago, I agree that I will, as such trustee, certify no more of said bonds without the consent in writing of A. J. Dull, Esq., of Harrisburg, Pa.

"Dated at New York, January 27, 1882.

JNO. C. NEW, *Trustee.*"

At this time, the balance due to Dull and McCormick was $115,000 and interest. The $85,000 which Crawford had paid to Dull and McCormick was in addition to the money he had furnished for constructing the new road north from Attica.

In February, 1882, the work of constructing the railroad being still in progress, and Crawford still continuing to furnish, without any contract with the company, the money used in prosecuting the work, he requested Foster and his board of directors to enter into a construction contract with him, and he sent to the board a written contract which he desired it to execute. The board, on the 7th of February, 1882, unanimously rejected the contract. Crawford then procured Foster to call another meeting of the board, which was held on March 15, 1882. Crawford attended this meeting, it being the first at which he was present. Becoming satisfied that Foster would prevent any contract or settlement from being made with him, unless he would buy from Foster the $10,000 of stock still held by Foster, he purchased that stock from Foster, and the two entered into a written contract, dated March 15, 1882, by which Crawford became the owner of all the remainder of the capital stock of the company. Crawford on the same day assigned and transferred to each of the following persons one share of the capital stock of the company, viz.: Henry Crawford, Jr., William A. Starin, D. H. Conklin, F. F. Lacey, H. Moore, G. W. McDonald, D. J. Lyon and H. Meiselbar. On the same day, Foster and his board of directors, at the request of Crawford, resigned, and Crawford caused himself and the eight persons above named to be elected directors of the company. On the same day, Crawford was elected president of the company, and remained such for four days, until March 18, 1882, when he ceased to be president and director; and he had no official connection with the company from that time until April or May, 1883, when he was again elected director and president.

On March 18, 1882, the new board of directors passed a resolution approving the mortgage to New, and ordering it to be copied at length in the minutes of the meeting, which was done. At the same meeting the board of directors entered

into a construction contract with Crawford. Between June 23, 1881, the date of Crawford's first purchase of stock from Foster, and March 18, 1882, the date of the construction contract, Crawford had paid out of his own means, for labor and material used in the construction of the company's railroad north from Attica, about $400,000, and for the purchase of the stock of the Chicago and Block Coal railroad, extending south from Attica, $85,000.

The Chicago and Block Coal Railroad Company and the Chicago and Great Southern Railway Company were consolidated in the spring of 1883, under the name of "The Chicago and Great Southern Railway Company." On the 9th of April, 1883, the consolidated company executed and delivered to John C. New, as trustee, a deed of further assurance, covering the railroad and property of the Chicago and Block Coal Railroad Company, extending southwardly from Attica to Yeddo, in addition to the property covered by the mortgage of November 1, 1881, and making the first named property a further security for the bonds issued under the mortgage of November 1, 1881. This deed of further assurance was duly recorded in the counties along the line of the railroad.

The work of construction was carried on until January, 1883, Crawford furnishing from his own means all the money paid for labor and material used in the construction between June 23, 1881, and January 5, 1883, except about $40,000 received on account of aid voted by certain townships along the line, which was also expended in paying for construction. Between January 23, 1882, (the date at which Crawford pledged the bonds and stock to Dull and McCormick,) and January 5, 1883, Crawford had been endeavoring either to sell the bonds so pledged to Dull and McCormick or to hypothecate them for a loan sufficiently large to pay off Dull and McCormick, and also to furnish money to build the road from Fair Oaks to Attica. Between June 23, 1881, and January 5, 1883, there had been paid out for the construction of the railroad about $500,000, all of which had been furnished by Crawford, except about $40,000 received from township aid.

On January 5, 1883, Crawford negotiated a loan from Drexel,

Morgan & Co., a banking house in the city of New York, under a written contract. This contract provided for a loan of $400,000, $250,000 to be paid at once, out of which the balance due to Dull and McCormick for the Chicago and Block Coal railroad was to be paid; $50,000 more to be paid when the new road should be completed from Iroquois River to Fair Oaks; $50,000 more when the road should be completed eight miles south from Oxford, and when Crawford should furnish satisfactory proof to Drexel, Morgan & Co. that he had put into the work $50,000 of his own money, in addition to all the moneys theretofore expended by him upon the construction of the road; the last $50,000 to be paid when the line should be completed from Fair Oaks to Yeddo. Crawford was to procure the consolidation of the Chicago and Block Coal railroad with the Chicago and Great Southern railway. As security for this loan, all of the capital stock of the Chicago and Block Coal Railroad Company, all of the capital stock of the Chicago and Great Southern Railway Company, and all of the bonds of the latter company, either then issued or thereafter to be issued, were to be delivered to and held by Drexel, Morgan & Co. Crawford was to give his individual notes for the loan, and Drexel, Morgan & Co. were to appoint, and did appoint, an agent to superintend the expenditure of all the money to be advanced by them, the money to be paid out only upon drafts drawn by Crawford and approved and countersigned by such agent. Under this contract, Drexel, Morgan & Co. advanced $350,000. As part of it, they paid to Dull and McCormick, on January 5, 1883, $132,379.99, being the entire balance due on the purchase of the stock of the Chicago and Block Coal Railroad Company, and received from Dull and McCormick all of the stock and bonds which they held as collateral. Drexel, Morgan & Co. received this stock and these bonds, not from Crawford, but from Dull and McCormick, Crawford never having had possession or control of the stock or the bonds from the time when he pledged them to Dull and McCormick. The remaining $217,620.01 was paid by Drexel, Morgan Co., through their agent, directly for labor and material used in the construction of the railroad, and was paid at

various times between January 5, 1883, and September, 1883. During the same period, Crawford, in addition to what he had theretofore expended out of his own means in the work of construction, and in addition to the money so paid by Drexel, Morgan & Co., paid out of his own means more than $50,000 for labor and material used in the construction of the railroad between Oxford and Attica. From January 5, 1883, to September, 1883, the contractors, sub-contractors, furnishers of material and laborers were informed and understood that the money paid to them from time to time during that period was mainly derived from a loan negotiated upon the mortgage bonds of the railway company. Each of these five appellees knew of the pledge of these bonds to Drexel, Morgan & Co. for this loan, and knew that they were getting part of the money loaned by Drexel, Morgan & Co.

After the Drexel, Morgan & Co. loan was exhausted, the work of construction was continued, the money paid for labor and material being furnished by Crawford, until about February, 1884, when the new road was so far constructed as to enable trains to be run from Attica to the junction at Fair Oaks. On the 18th of February, 1884, Crawford submitted to the board of directors a report, showing the then condition of the work, and asked the board to issue to him, in addition to the $1,000,000 of first mortgage bonds theretofore issued, a further sum of $200,000 of the first mortgage bonds, $1,200,000 of capital stock, and $1,200,000 of income bonds, as a payment to him on account. On the same day the board of directors passed the following resolution: "That, as a payment on account for the work done and material furnished up to the present time under such construction contract, there be allowed and paid to the contractor or order the sum of two hundred thousand dollars of first mortgage bonds, (in addition to the one million dollars heretofore appropriated,) and also ($1,200,000) one million two hundred thousand dollars of income bonds, and ($1,200,000) one million two hundred thousand dollars in the common stock, full paid, of this company, the proper officers of the company to execute the foregoing resolutions and take the proper vouchers for all payments."

Statement of Facts.

No income bonds were ever issued by the company. On the 5th of May, 1884, at the request of Crawford, the board of directors adopted a resolution, providing for an exchange of the old Indiana and Chicago Railway Company stock and of the old Chicago and Block Coal Railroad Company stock for new stock of the consolidated Chicago and Great Southern Railway Company. At the same meeting the board passed a resolution, that, in addition to the consolidated stock to be issued in exchange for the old stock of the original companies, the secretary should issue and deliver to the contractor additional new stock, as payment under the construction contract, so as to make the total consolidated stock outstanding amount to $1,200,000, par value. This exchange of stock was made, and enough additional new stock of the consolidated company was issued to make its total stock outstanding amount to $1,200,000, par value, all of which stock was delivered to Drexel, Morgan & Co. under their contract of loan. When Dull and McCormick, on January 5, 1883, delivered their stock and bonds to Drexel, Morgan & Co., they also delivered to the latter the following consent:

"John C. New, trustee:

"I hereby consent to the issue and certification of the remaining $1,000,000 of Chicago and Great Southern Railway bonds, whenever you are so requested to do by Drexel, Morgan & Co.

"New York, Jan. 5, 1883. A. J. Dull."

The additional $200,000 of bonds which Crawford was authorized to receive by such resolution of the board of February 18, 1884, were issued. Drexel, Morgan & Co. procured New, as trustee, to certify them, and they were delivered by Crawford to Drexel, Morgan & Co., in August, 1884.

While the construction of the railroad was in progress, Crawford became indebted to the First National Bank of Chicago in the sum of about $300,000, about two-thirds of which money Crawford expended in the construction of the Chicago Air Line railroad, and about one-third of it in the

construction of the Chicago and Great Southern railway. While the bonds and stock of the Chicago and Great Southern Railway Company were so held in pledge by Drexel, Morgan & Co., Crawford gave to the First National Bank of Chicago a second pledge of the same bonds and stock, to secure the payment of his indebtedness to the bank, he having already pledged to it certain other securities and property, as collateral. Crawford's notes to Drexel, Morgan & Co. matured and were not paid. Drexel, Morgan & Co., under the power given to them in their contract with Crawford, of January 5, 1883, advertised the pledged bonds and stock to be sold on June 2, 1884. By a written agreement between Crawford and Drexel, Morgan & Co., made May 27, 1884, the sale was postponed to June 20, 1884. In the meantime, Samuel M. Nickerson, President of the First National Bank of Chicago, which held the second pledge of the securities held by Drexel, Morgan & Co., and Henry H. Porter, a director and stockholder of the bank, entered into negotiations with Drexel, Morgan & Co. respecting the purchase of the bonds and stock from them, if Crawford should further fail to pay his debt to them and to redeem the securities. These negotiations resulted in a contract between Crawford and Drexel, Morgan & Co., by which the time of payment was extended for sixty days from June 20, 1884, and a further contract between Nickerson and Porter of the one part, and Drexel, Morgan & Co. of the other part, by which Nickerson and Porter agreed to buy the pledged securities from Drexel, Morgan & Co., and to pay them their claim in full with interest, if Crawford should fail to pay his debt to them at the expiration of the sixty days. These two contracts were both of them dated June 25, 1884. Crawford failed to pay his debt to Drexel, Morgan & Co. within the sixty days. Prior to January 12, 1885, Porter purchased Nickerson's interest in the contract of June 25, 1884, between Nickerson and Porter, and Drexel, Morgan & Co. On January 12, 1885, Porter paid to Drexel, Morgan & Co. $392,363.24 by drafts, and sent them the drafts enclosed in a letter, in which Nickerson concurred. Drexel, Morgan & Co. received the payment, and delivered the pledged bonds

and stock to Porter, accompanying the delivery with a letter giving in detail a list of the stocks, bonds, notes, agreements and papers held by them as collateral to the loan. One of the papers enclosed by them to Porter was a consent signed by them, authorizing New, as trustee, to certify the remaining uncertified $800,000 of first mortgage bonds whenever so requested to do by Porter. Porter associated with himself certain other persons, who entered into a subscription or syndicate agreement, for the purpose of buying in the railroad and reorganizing, completing, and extending it. By this agreement it was provided, that Porter, as the agent and attorney of the parties concerned, should go on "in his own name" and foreclose the mortgage, sell the property, bid it off, reorganize the company, and convey the property to be purchased under the foreclosure to the reorganized company. The agreement was, in effect, one by the subscribers to pay so much money for so much stock and bonds of the new company to be organized after the foreclosure and sale by Porter. It gave to Porter absolute power over and control of all the bonds of the existing company, with full authority in his own name to foreclose the mortgage and reorganize the company upon the foreclosure purchase, and conduct and control the new enterprise.

On the 26th of December, 1884, Porter and Crawford entered into a contract, under which Porter and the syndicate represented by him purchased and became the absolute owner of any and all right Crawford might have to redeem from Porter the bonds and stock he should receive from Drexel, Morgan & Co., by paying to him the amount he should pay to them. This contract recognized the right of Crawford so to redeem the bonds and stock. Drexel, Morgan & Co. did not sell the bonds and stock at public auction on notice, but sold to Porter at private sale their debt against Crawford, and put Porter in their place as to the collateral security for the debt. Crawford was willing that Porter should take the bonds and stock in this way if he, Crawford, could still have an opportunity to protect his second pledge of them to the First National Bank of Chicago. By this contract Porter and

his associates fixed the ultimate price they were willing to pay for the bonds and stock, which price left a margin for the bank after paying off Drexel, Morgan & Co. On the same day, and as a part of the same transaction, Crawford, by written assignment, transferred to the First National Bank of Chicago all of his right, title, and interest in and to the contract of the same date between himself and Porter, and all the rights, claims, demands, moneys, and payments he, Crawford, might be or become entitled to by reason of and under that contract. These two instruments simply constituted the method pursued to protect the bank in its second lien upon the bonds and the stock, and were entered into for the purpose of securing to it any margin of value there might be in the bonds and stock, after paying the Drexel, Morgan & Co. debt.

The amount of money furnished by Crawford and expended in the construction of the railroad during the time the Drexel, Morgan & Co. loan was being used in construction, and during the time after that loan was exhausted, amounted to at least $250,000, in addition to the moneys which Crawford had theretofore paid out for such construction. The total expenditure in constructing the Chicago and Great Southern railway was something over $1,000,000, all of which came from Crawford's private means, and from the Drexel, Morgan & Co. loan, except some $40,000 or $50,000 received from aid voted by some townships along the line. The mortgage bonds involved in this litigation represent this $1,000,000 expended in construction, and the accrued interest thereon. The railroad from Yeddo to Fair Oaks was opened for business in April or May, 1884. Prior to the appointment of a receiver, on October 28, 1884, the company did not earn sufficient money to pay its operating expenses. No interest was ever paid on any of the mortgage bonds issued by the company. Crawford never received anything from the company for personal services or expenses, or any repayment of moneys expended by him in constructing the railroad.

On October 27, 1884, John Hack and others filed a creditors' bill in the Circuit Court of Jasper County, Indiana, against

the Chicago and Great Southern Railway Company and Henry Crawford. On the same day, that court entered an order appointing Philip B. Shumway receiver. Afterwards, on March 5, 1885, Crawford filed his answer in the suit, disclaiming all interest in its result, and upon that answer an order was entered that Crawford recover from the plaintiffs his costs, and that he had no interest in any controversy pertaining to the action. On February 26, 1885, the court removed Shumway and appointed as receiver, in his stead, William Foster. In the order appointing Foster there was this provision:

"And the Court, as a condition of the appointment of said receiver, reserves the right to make any further order respecting the priority and payment of labor and supply claims accruing prior to the receivership herein as may hereafter seem and appear to the court to be equitable and just."

On the 4th of April, 1885, the Hack suit was removed into the Circuit Court of the United States for the District of Indiana. On the 9th of March, 1885, Porter filed in that court his bill of complaint against the Chicago and Great Southern Railway Company, John C. New, trustee, and others, alleging that New, as trustee, refused to bring the suit, and praying for the foreclosure of the mortgage of November 1, 1881, and of the deed of further assurance of April 9, 1883. On the 18th of April, 1885, this suit and the Hack suit were consolidated under the title of the Porter suit. On April 29, 1885, and August 15, 1885, orders were entered authorizing the receiver to issue certificates to pay receiver's indebtedness, and to make needed repairs and replacements on the railroad. Under these orders receiver's certificates, amounting in the aggregate to $153,000, were issued. The railway company filed an answer in the consolidated suit, admitting the averments of the bill. A decree *pro confesso* was entered against New, trustee. Various creditors of the company were made parties defendant to the bill, some being judgment creditors and some not. Other creditors filed intervening petitions. In May, 1885, the trustees of four townships, two in Benton County, and two in Newton County, which had voted aid in the construction of the railroad amounting to about $40,000, applied

to the court, as trustees of common schools, to be made defendants, and to be allowed to defend against the foreclosure; but the application was denied.

In June, 1885, the same trustees, as trustees of the townships voting aid, applied to be permitted to defend against the foreclosure, as minority stockholders. This application was denied on the ground that under the statutes of Indiana the individual tax-payers of the townships which had voted aid were entitled to the benefit of the stock, in proportion to the amount of taxes paid by them respectively. Thereupon, John W. Swan and Cephas Atkinson, as tax-payers of two townships, applied for leave to become defendants and to defend against the foreclosure. Without disposing of that application the court, on the 17th of August, 1885, entered a decree of foreclosure and sale.

On the 30th of September, 1885, the application of Swan and Atkinson was reheard by the court, and it entered an order admitting Swan and Atkinson as defendants, and allowing them to file their petition and answer. The order contained this provision: "This order shall in nowise affect the decree heretofore made for the sale of the railroad by the court or rights of parties thereunder." Swan and Atkinson filed their petition and sworn answer, charging that the mortgage and the bonds were fraudulently executed and issued, and were without consideration and void, and that Crawford's construction contract was fraudulent and void. On October 8, 1885, Swan and Atkinson and others filed a petition to set aside the foreclosure decree of August 17, 1885, containing substantially the same charges against the mortgage that were contained in the answer of Swan and Atkinson. On the 12th of October, 1885, the court set aside the foreclosure decree, and made an order giving the defendants thirty-nine days in which to take their evidence "as to so much of said case as involves the validity of the mortgage and mortgage debts, as the same are described in the bill of said Porter and the defendants' answers." Porter filed a replication to the answer of Swan and Atkinson.

Voluminous testimony was taken, on which the case was

heard, and a decree of foreclosure was entered on the 16th of February, 1886. That decree denied the relief prayed by the answer of Swan and Atkinson, as stockholders, and dismissed their petition. It declared that 1200 of the mortgage bonds were issued and delivered by the company to Crawford; that 1000 thereof were to be accounted for by Crawford under the construction contract; that 200 of them were delivered to Crawford under that contract; that the 1200 bonds were sold and delivered by Crawford to Porter and his associates; and that the remaining 800 of them had never been issued. It recited the making, delivery, and recording of the two mortgages of November 1, 1881, and April 9, 1883; that the company defaulted in paying the interest due July 1, 1882, on the bonds; that there were $291,860 of interest in default upon the bonds issued; and that the mortgages "are valid and binding obligations as against the" company, and a paramount lien on all the property thereby conveyed, "excepting as hereinafter provided." It then proceeded to decree as follows:

"Sixth. That all unpaid valid claims against said railway company, accrued for right of way, lands, labor, rolling-stock, and material used in the construction and betterment of said railway, whether reduced to judgment or remaining in open account, are hereby adjudged and decreed to be prior, superior, and paramount to the lien of the said mortgages or deeds of trust and the bonds secured thereby; that all unpaid valid claims for labor, supplies, rolling-stock, and material used in the operation of said railway prior to the appointment of a receiver, whether reduced to judgment or remaining in open account, are hereby adjudged and decreed to be prior, superior, and paramount in lien to the said lien of said mortgages or deeds of trust and the bonds secured thereby; and all of said claims accrued in the construction of said railway and its betterment; and all of said claims accrued in the operation of said railway, prior to the appointment of a receiver, as hereinabove in this paragraph of this decree described; are hereby adjudged and decreed to be prior, superior, and paramount in lien to the lien of any and all receiver's certificates issued under the order of this court in this cause, excepting only

receiver's certificates to the amount of twenty-three thousand dollars ($23,000), issued under the order of this court of April 29, A. D. 1885, the proceeds of said certificates other than said twenty-three thousand dollars ($23,000) representing construction or betterment of said railway.

"Seventh. That all court and receiver's indebtedness accrued against said property since the appointment of a receiver is hereby adjudged and decreed to be prior, superior, and paramount in lien to the lien of said mortgages or deeds of trust and the bonds secured thereby."

It then provided for the sale of the mortgaged property at public auction, by a master, for not less than $500,000; for the payment of the purchase money into the registry of the court; and for a reference to the master to take testimony and report his findings and such testimony as to certain specified matters, among which was the following:

"5. The amount due the several claimants under the sixth paragraph of this decree, showing the amount due each claimant and the aggregate amount due upon each of the two classes of the claims mentioned in said sixth paragraph."

On March 27, 1886, the railroad was sold by the master, and bought by Porter, for $501,000. On April 5, 1886, the sale was confirmed by the court, and the purchaser was empowered to pay, as cash, in part payment of the purchase money, all receiver's certificates outstanding, then amounting, with interest, to $157,884.64, the remainder of the purchase money, $343,115.36, being paid in cash.

The reference was had before the master, and much testimony was taken upon it. On August 31, 1886, the master filed his first report under the reference, in which he allowed the following claims at the following amounts: The Cleveland Rolling Mill Company, $29,643.97; Crerar, Adams & Company, $7809.94; the Smith Bridge Company, $20,900.24; the Pittsburg Bessemer Steel Co. (Limited), $12,944.20. Porter duly filed exceptions to these allowances. On the 8th of October, 1886, the master filed his report as to the claim of Irwin, allowing it at the sum of $10,950.30. Porter duly excepted to this allowance. On the 9th of October, 1886, on a hearing on

the reports and exceptions, the court made the following decree:

"First. That the said five several defendants, claimants and intervening petitioners hereinbefore named, have each done work or furnished materials which have been used in the construction and betterment of the railway of said Chicago and Great Southern Railway Company prior to the appointment of the receiver therefor, which respective claims for such labor and material are valid claims against said railway company to the amounts hereinafter named, and which said amounts are adjudged and decreed to be valid claims under and in pursuance of the sixth paragraph of the decree heretofore, on the 16th day of February, 1886, entered in this cause, prior and superior and paramount to the lien of the mortgages or deeds of trust in said decree mentioned and the bonds secured thereby.

"Second. And the court further finds, that there is now in the registry of this court, to the credit of this cause, the sum of $325,194.27, derived from the sale of said property, and remaining after the payment of all receiver's certificates and certain of the indebtedness incurred by the court since it assumed the control and management of said railroad, and which sum is largely in excess of the total amount of claims filed or proven under the terms of said decree entered on the 16th day of February, 1886, including all unpaid costs and indebtedness incurred by the court since it took possession of said railway property.

"Third. And the court further finds that there is due to the Smith Bridge Company the sum of $20,900.24, with interest to be added from the 27th day of October, 1884, at the rate of six per cent. per annum.

"That there is due to the Cleveland Rolling Mill Company the sum of $29,643.97, with interest to be added from the 27th day of October, 1884, at the rate of six per cent. per annum.

"That there is due to Crerar, Adams & Co. the sum of $7809.94, with interest to be added from the 27th day of October, 1884, at the rate of six per cent. per annum.

"That there is due to the Pittsburg Bessemer Steel Com-

pany the sum of $12,944.20, with interest to be added from the 27th day of October, at the rate of six per cent. per annum.

"That there is due Volney Q. Irwin the sum of $11,450.30, with interest to be added from the 27th day of October, 1884, at the rate of six per cent. per annum.

"Which several sums of money are due to said above-named parties, respectively, for and on account of labor or material used in the construction and betterment of said railway, as provided and set forth in the sixth paragraph of said decree, entered in said cause on the 16th day of February, 1886.

"It is, therefore, finally ordered, adjudged, and decreed by the court, that the clerk of this court shall pay out of the said fund in the registry of the court to the credit of this cause, the said several sums of money, with interest to be computed thereon, to the said parties, respectively, or their solicitors of record, viz.: To the Smith Bridge Company, the sum of $23,345.54; to the Cleveland Rolling Mill Company, the sum of $33,112.32; to Crerar, Adams & Co., the sum of $8723.71; to the Pittsburg Bessemer Steel Company, the sum of $14,458.65; to Volney Q. Irwin, the sum of $12,789.98.

"Said several payments shall be made, with interest at the rate of six per centum per annum from the date of the entry of this decree, in full payment and discharge of said respective claims against said railway property and franchises."

Porter appealed separately from each of these decrees and orders of payment, and these were the appeals now presented for consideration.

Mr. J. E. McDonald, *Mr. John M. Butler*, *Mr. A. L. Mason*, *Mr. O. Peckham*, and *Mr. R. B. F. Pierce* for appellant.

Mr. A. C. Harris, *Mr. W. H. Calkins*, *Mr. John S. Cooper*, and *Mr. E. W. Tolerton* for appellees.

Mr. Justice Blatchford, after stating the facts as above reported, delivered the opinion of the court.

It it alleged that the Circuit Court erred in decreeing the several claims of these five appellees to be liens on the railroad

and property of the original Chicago and Great Southern Railway Company superior to the lien of the mortgage of November 1, 1881; and that it also erred in decreeing these claims to be liens on the railroad and property of the consolidated company superior to the lien of the mortgage of April 9, 1883, conveying the railroad and property formerly known as the Chicago and Block Coal railroad.

It is urged, in maintenance of the decree below, that the relations which Crawford sustained towards the several appellees when their claims respectively accrued, and his relations to the railway company, were such as to preclude him from acquiring the mortgage bonds in controversy to the prejudice of the appellees; that his construction contract was fraudulent and void as against the appellees, as creditors of the company; that, as between him and the appellees, he is estopped, by the provisions of his construction contract, from claiming the right to a prior lien upon, or an equal distribution of, the proceeds of sale of the property of the company; that the legal situation was that of a nominal corporation vested with the legal title to its property for the use of Crawford as sole beneficiary; that Dull and McCormick received the bonds subject to the same equities against them which could be urged while they were in Crawford's possession; that the equities of the appellees against the $1,000,000 of bonds, in the hands of Drexel, Morgan & Co., were precisely what they were while the bonds were in the hands of Crawford; that the appellees are entitled, in equity, to be paid out of the assets of the company the amounts of their respective claims in preference to Crawford; that all rights which Nickerson and Porter might have had to be subrogated to the position of Drexel, Morgan & Co. were lost by the syndicate agreement of December 26, 1884; that the legal effect of that agreement was a purchase by Porter directly from Crawford; that the amounts in controversy on these appeals are a part of the purchase price of the securities on such purchase of them by Porter, reserved by him to be paid either to Crawford or to the appellees; that the real controversy here is between Crawford and the First National Bank of Chicago on the one hand and the appellees

on the other; that the appellant had no interest in that controversy; that, by the purchase of the securities under the syndicate agreement, Porter was charged with full notice of all the facts from which the equities of the appellees against Crawford and the mortgage bonds arise; that the First National Bank acquired no better rights against the appellees, by the assignment to it of Crawford's interest in the syndicate agreement, than Crawford himself had; that the equities of the appellees to be paid the amounts due to them out of the fund in court are superior to those of Porter, as the nominal party, and to those of Crawford as the real party; and that Porter, by reason of his ownership and possession of over $700,000 of unpaid capital stock of the company, had no right, as against the appellees, to foreclose the mortgage for the benefit of his bonds until the claims of the appellees should first be paid.

The considerations which seem to us to show that the Circuit Court erred in awarding priority to the claims of these creditors over the mortgage bonds, are few and controlling.

The mortgages and the bonds are valid and binding as against the company; the company owes a large debt for the construction of its road, which is represented by the bonds; there was no bad faith, irregularity, deceit, or fraud in the execution of the mortgages or in the issuing of the bonds thereunder; the bonds in the hands of Porter represent actual values received by the company; they represent the entire purchase money that was paid for the Chicago and Block Coal railroad, extending south from Attica to Yeddo; they represent all the money that was paid directly by Drexel, Morgan & Co., through their agent, for the construction of the railroad north of Attica, a considerable portion of which money was paid to these five appellees; they represent all the money that was paid by Crawford out of his own means for the construction of the new railroad north of Attica; in fact, they represent all the money that has ever been paid by the company for the Chicago and Block Coal railroad and for the construction of the sixty miles of new road from Attica to Fair Oaks,

excepting only some $40,000 or $50,000 received from aid voted by townships.

To the objection, that, at the time the mortgage of November 1, 1881, was executed and the bonds were issued, Crawford owned the entire stock of the company and dominated the board of directors, and that the mortgage and bonds were issued under his dictation and coercion, even if such an objection could be legally tenable, it is a sufficient answer, that when the mortgage was made, and the $1,000,000 of bonds were issued and pledged to Dull and McCormick, Crawford was not a director or officer of the company. Foster was its president, and he and his associates constituted the entire board of directors, and they remained in full control until March 15, 1882. That this board was not dominated or controlled by Crawford is shown by the fact that when, on February 7, 1882, eleven days after Crawford had delivered in pledge to Dull & McCormick the $1,000,000 of bonds, Crawford asked the board to enter into a construction contract with him, and sent them a draft of the contract which he desired, the board unanimously rejected it. At the time the mortgage was executed, and at the time the bonds were issued and pledged to Dull and McCormick, Crawford held $50,250 par value of the stock, and Foster held $10,000 par value of it. The mere fact that Crawford owned a majority of the stock did not give him the legal control of the company; nor from such ownership can the legal inference be drawn that he dominated the board of directors. *Pullman Car Co.* v. *Missouri Pacific Co.*, 115 U. S. 587, 596.

The circumstances attending the issuing of the $1,000,000 of bonds show that they were issued by Foster and his board of directors in good faith, and largely for indebtedness of the company then existing. There is no foundation for the suggestion that the mortgage and the bonds were without consideration, nor does it lie in the mouths of these appellees to raise the objection as to the absence of a legal board of directors of the company; for, if the mortgage and the bonds are invalid for want of such legal board, and for want of the legal existence of the corporation, the contracts between these

appellees and the company, upon which their claims are based, are invalid for the same reason, and the consolidation by which the company procured the Chicago and Black Coal Company's road would be void, and that road would be free from all debts incurred by the Chicago and Great Southern Railway Company. Moreover, the directors were directors *de facto*, who held themselves out to the world as such, under such circumstances that their official acts bind the corporation and all persons who claim under it.

The claims of the appellees are for the original construction of the railroad. This is not a case where the proceeds of the sale of the property of a railroad, as a completed structure, open for travel and transportation, are to be applied to restore earnings which, instead of having been applied to pay operating expenses and necessary repairs, have been diverted to pay interest on mortgage bonds and the improvement of the mortgaged property, the debts due for the operating expenses and repairs having remained unpaid when a receiver was appointed. The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale of railroad property, of such debts for operating expenses and necessary repairs, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it. These five appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went towards keeping a completed road in operation, either in the way of labor or of material. When these claims accrued, the road of the company had not been opened for use. The claims accrued after the mortgage had been executed and recorded, and after $1,000,000 of the bonds secured by it had been issued and pledged to innocent *bona fide* holders for value. We are not aware of any well-considered adjudged case which, in the absence of a statutory provision, holds that unsecured floating debts for construction are a lien on a railroad superior to the lien of a valid mortgage duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value. The authorities are all the other way.

On the facts of this case, the mortgage and the bonds are not affected by the existence of Crawford's construction contract, which was made on the 18th of March, 1882, after the issuing of the bonds and the pledging of them to Dull and McCormick. The amount of those bonds constitute the present value of the entire railroad property. By the construction contract, Crawford, in consideration of the bonds and stock which he was to receive under it, bound himself not only to complete, but to equip the road. The contract was not an unfair one. It was performed in part. Only $200,000 of the bonds were issued after the construction contract was made. At the date of that contract, Crawford was a large creditor of the company for money advanced by him and expended in construction. He had been advancing from his own means large amounts of money, and it was to reimburse to him the $300,000 or $400,000 of his own means already expended in the work, and to enable him to complete the payment for the Chicago and Block Coal railroad, and to proceed with the work of construction, that the $1,000,000 of bonds were issued to him. All the money received by the company for the bonds went into the property. The property produced by that money has never been worth what was expended in its production. From the date of the construction contract, the company was never able to issue or deliver a single bond under it, except by the consent of Dull and McCormick, or of Drexel, Morgan & Co., the parties who held the bonds and stock in pledge. The advances of money made by Crawford after the date of the construction contract were made without any security to him. Every bond issued after the date of the contract with Drexel, Morgan & Co. was required by that contract to be delivered directly to them, as additional security to them. Crawford realized no profits out of the mortgaged property, and never received anything for his services, or any reimbursement of the large sums of money he expended in this work. On these facts, it is impossible to see that the existence of the construction contract can have any bearing upon the case. Under any circumstances, no contract under which about sixty miles of railroad had been constructed would

be held invalid for the reasons assigned in this case, without the repayment to the contractor of the amount actually expended by him in good faith under the contract. *Thomas* v. *Brownville Railroad Co.*, 109 U. S. 522, 526.

Moreover, it is a well settled principle, that subsequent creditors cannot be heard to impeach an executed contract, where their dealings with the company, of which they claim the benefit, occurred after the contract became an executed contract. *Graham* v. *Railroad Co.*, 102 U. S. 148. The claims of all the appellees except the Cleveland Rolling Mill Company accrued after the construction contract was made. As to that company, it, after the construction contract was made, and while Crawford was carrying on the work of construction under it, knowingly received on account of its claims money which came directly from Drexel, Morgan & Co., as a result of the pledge of the bonds to that firm.

Dull and McCormick, Drexel, Morgan & Co., and Porter were respectively, in succession, purchasers in good faith of these bonds, as negotiable commercial securities, without notice of any irregularity or infirmity in them; and are entitled to the benefit of the principles applicable under such circumstances. Porter paid to Drexel, Morgan & Co. more than $392,000 in money for the bonds, and, under all circumstances, is entitled to protect his title by that of Drexel, Morgan & Co., and, through them, by the title of Dull and McCormick.

It is contended for the appellees that Porter did not purchase the bonds from Drexel, Morgan & Co., but bought them directly from Crawford. The evidence shows that Crawford, after January 27, 1882, the date at which he pledged the $1,000,000 of bonds to Dull and McCormick, never had one of those bonds in his possession or under his control. Dull and McCormick, not Crawford, delivered the bonds to Drexel, Morgan & Co., upon the payment to them by Drexel, Morgan & Co. of the debt due to them on account of the purchase of the Chicago and Block Coal railroad. The $200,000 of bonds issued after the negotiation of the loan from Drexel, Morgan & Co. were at once delivered to them, under their contract of pledge. This pledge vested in them the legal title to the

bonds, and Porter purchased that legal title from them. In opposition to this view, it is urged that the terms of the written agreement between Crawford and Porter of December 26, 1884, show that the purchase by Porter was from Crawford; but the true purport and effect of that instrument is, as before stated, a sale by Crawford to Porter and his associates of Crawford's right to redeem the bonds from Porter and his associates by paying the amount of money which Porter had paid to Drexel, Morgan & Co. By the contract of June 25, 1884, between Porter and Nickerson and Drexel, Morgan & Co., the former bound themselves to pay to the latter Crawford's debt to them, upon receiving from them the stock and bonds which they held as collateral to the debt. Nickerson assigned to Porter his interest in this contract, and Porter paid to Drexel, Morgan & Co. the amount of Crawford's debt to them, and took from them the bonds pledged to them by Crawford as collateral. By this transaction Porter became the owner of the legal title to the bonds, and was subrogated to all the rights of Drexel, Morgan & Co. in them. The contract of December 26, 1884, between Crawford and Porter, merely extinguished Crawford's right to redeem the pledged bonds. Under these circumstances, whatever it was that Porter purchased from Crawford, the former would, in equity, be subrogated to all the rights of Drexel, Morgan & Co., and, through them, to all the rights of Dull and McCormick.

Certain clauses in the agreement between Crawford and Porter of December 26, 1884, are cited as creating an equity or lien in favor of the appellees. By one clause in the agreement the syndicate represented by Porter agrees: "Second. To pay and clear off any and all claims against said Chicago and Great Southern Railway Company which may be decided by the court to be liens upon the said line of railway paramount to the lien of the bonds and coupons secured by the trust deed to said John C. New, dated November 1, 1881, or which the court may decide shall be equitably payable out of the proceeds of the sale of the said line of railway prior to any payment of the said bonds or coupons, including therein any and all claims for right of way and depot grounds, engine-house

and station buildings, water-tanks and shops, between Fair Oaks and Yeddo, both inclusive, bridges and other structures heretofore built and put in place on said railway, and essential to the operation thereof, but the title to which is not in said railway company, and which the court may decide must be paid for in preference to said bonds, and also any and all indebtedness incurred by the receiver in possession of said property prior to January 15, 1885, and not paid out of moneys earned by the operation of said road prior to January 15, 1885." By the same instrument, Crawford agrees as follows: "Section 5. The party of the first part hereby, in consideration of the premises, guarantees and agrees that the claims, liens, and other possible indebtedness mentioned in subdivision two, which shall be held to be prior in right to payment over said twelve hundred bonds and coupons, shall not in any event exceed the sum of one hundred thousand dollars ($100,000)."

These clauses do not create the lien or equity supposed. They leave the question as to the existence of any such "claims, liens, and other possible indebtedness," mentioned in the agreement, to be adjudicated by the court, and also leave to be decided by the court the question of the priority of such claims over the bonds, and merely provide for the rights of the parties as between themselves in case the court establishes such priority. As before said, the purpose of Crawford, in making the agreement of December 26, 1884, was to protect the second pledge of the bonds and stock to the First National Bank of Chicago, he having put into the construction of the railroad about $100,000 of the money which he had borrowed from the bank; and he immediately assigned to the bank all his interest in the contract with Porter. The contract between Porter and Crawford, and that between Crawford and the bank, having been entered into in contemplation of the purchase of the bonds from Drexel, Morgan & Co. by Porter, the legal relation of the appellees to the company and to its property, as unsecured holders of construction claims, was not affected by these transactions, so as to give them any greater rights against the mortgaged property than they had previously had. In any event, as before said, the bonds would be

sustained in the hands of Porter, as a first lien, to the amount actually advanced upon the faith of the pledge of them and expended in constructing the railroad, with interest. It is found by the final decree that there is now in court $325,194.27 derived from the sale of the mortgaged property. All the money advanced by Drexel, Morgan & Co. went directly into this property. The amount paid by Porter to Drexel, Morgan & Co., on January 12, 1885, was $392,363.24, exceeding by $67,168.97 the entire net proceeds in court, saying nothing about interest for over two years on the amount paid by Porter. This view is entirely conclusive of this case, and shows that there is no fund in court arising from the sale of the property that can upon any principle be held applicable to the payment of the construction claims of these appellees; and this is irrespective of the fact that, in addition, Crawford put into this property, in good faith, out of his own individual means, the further sum of $600,000.

It is contended, however, that Crawford was all the time substantially the owner of the entire railroad property, and that the claims of the appellees were debts due to them from Crawford for work and material in constructing his railroad, and that these claimants have a lien, in this way, superior to the lien of the mortgage bonds. In answer to this view, in addition to the suggestions already made, and treating Crawford as the owner of the railroad, it may be said, that the rights of Porter would be no different from his rights as dealing with the company as owner of the property. The delivery by Crawford of the bonds secured by a mortgage made by himself on the railroad, to a third person, for a valuable consideration, made the mortgage a valid security, and made the bonds in the hands of Dull and McCormick a valid lien on the railroad. An owner of a railroad, though he may be in debt to those who aid in constructing it by furnishing materials, may still execute a mortgage on it which will be good against unsecured creditors. No more than this was done, upon the theory we are now considering. The creditors would have no lien superior to the lien of the bonds. The mortgage was recorded, and the $1,000,000 of bonds were issued before the

claims accrued. It results from these views, that the entire purchase money now in court, arising from the foreclosure sale, after paying the costs and the receiver's indebtedness, should be paid out upon the bonds and coupons secured by the mortgage, in preference to the payment of the claims of the appellees, such net amount being less than the amount of money advanced by Drexel, Morgan & Co. on the pledge of the bonds and reimbursed to them by Porter.

It has been contended for the appellees, that the appeals by Porter now under consideration are appeals only from the decree of October 9, 1886; that he did not perfect any appeal from the decree of February 16, 1886; that the latter decree was a final decree; that the errors which Porter now insists on were errors committed in entering the decree of February 16, 1886; and that none of the errors now assigned can be considered by this court, because of the want of any appeal from the decree of February 16, 1886, and because the adjudications now complained of were made by that decree, and not by the decree of October 9, 1886.

It is a sufficient answer to these contentions to say, that the decree of February 16, 1886, though a final decree of foreclosure and sale as respected the interest of the mortgagor, and in some other respects, was not a final decree in respect of the matters involved in these appeals. The sixth clause of that decree merely provided that all unpaid, valid claims against the company for right of way, lands, labor, rolling-stock, and material used in the construction and betterment of the railway, were prior, superior, and paramount to the lien of the mortgages and the bonds; but determined nothing as to who were the holders of such claims, or as to what were their amounts. It designated no persons who could be appellees in any appeal by Porter in respect of such claims, and it provided for a reference to ascertain who were the several claimants under the sixth paragraph of the decree, and what were the amounts due to them severally. The first and only decree from which Porter could appeal, in respect of the claims of these appellees, was the decree of October 9, 1886. The sale made under the decree of February 16, 1886, was

not made subject to any claim of any of these appellees. An amendment of that decree, made on the 2d of March, 1886, prior to the sale, provided "that the sale of the property hereinbefore ordered shall pass to the purchaser a title thereto, free and discharged of all liens and claims, including the two classes of claims mentioned in the sixth paragraph of said decree." The question of the existence and priority of those claims is, therefore, one open for consideration on these appeals.

The various questions above stated as being raised by the appellees, which are not particularly adverted to, have been fully considered, and it is not regarded as necessary to further remark upon them, or upon the special points made in regard to the particular claims of the appellees, as the views on which we have rested the case seem to us to be controlling on those questions and points.

The decree of the Circuit Court, made October 9th, 1886, is reversed, in so far as it decrees that the claims of the five appellees are prior, superior, and paramount to the lien of the mortgages or deeds of trust mentioned in the decree of February 16th, 1886, and of the bonds secured thereby; and in so far as it provides for the payment to the appellees, out of the fund in the registry of the court, of the several sums of money specified in the said decree of the 9th of October, 1886; and the case is remanded to the Circuit Court, with a direction to take such further proceedings as shall not be inconsistent with this opinion.

BALDWIN *v.* FRANKS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Submitted April 26, 1886. — Decided March 7, 1887.

Congress has power, under the Constitution, to provide for the punishment of persons guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by the treaty

Statement of Facts.

of November 17, 1880; but Congress has not made such provision in § 5519, Rev. Stat., nor in § 5508, nor in § 5336.

Section 5519, Rev. Stat., is unconstitutional as a provision for the punishment of a conspiracy, within a state, to deprive an alien of rights guaranteed to him therein by a treaty of the United States: whether it can be enforced in a territory, against persons conspiring there with that object, is not now decided.

United States v. *Reese*, 92 U. S. 214, affirmed, and applied to the facts in this case.

To give effect to the rule that when part of a statute is constitutional and part is unconstitutional, that which is constitutional will, if possible, be enforced, and that which is unconstitutional will be rejected, the two parts must be capable of separation, so that each can be read by itself; limitation by construction is not separation.

Packet Co. v. *Keokuk*, 95 U. S. 80, and *Presser* v. *Illinois*, 116 U. S. 252, distinguished.

In describing the offence against a citizen of the United States for which punishment is provided by Rev. Stat. § 5508, the word "citizen" is used in its political sense, with the same meaning which it has in the Fourteenth Amendment to the Constitution; and not as being synonymous with "resident," "inhabitant," or "person."

To constitute the offence described in the first clause of Rev. Stat. § 5336, it is not enough that a law of the United States is violated, but there must be a forcible resistance to a positive assertion of their authority as a government.

To constitute an offence under the second clause of Rev. Stat. § 5336 there must be a forcible resistance to the authority of the United States while they are endeavoring to carry their laws into execution.

Petition for writ of *habeas corpus*. The petitioner set forth that he was arrested by the defendant in error, United States Marshal for the District of California, under a warrant issued by a commissioner of the Circuit Court of the United States charging him with conspiring with others to deprive certain subjects of the Emperor of China "of the equal protection of the laws and of equal privileges and immunities under the laws." The petition set forth the warrant, describing the alleged illegal acts, and closed with this averment and prayer:

"And your petitioner claims and avers that the said commissioner of the said Circuit Court had no jurisdiction or authority to issue the said warrant, or to commit your said petitioner to the custody of the said United States Marshal, for the said offence alleged in the said complaint, nor has the said

Marshal any warrant or authority of law to confine your said petitioner or restrain him of his liberty, as aforesaid; that the offence charged in the said complaint, and for which the said warrant was issued, and for which your said petitioner is now being held in confinement, is one purely of state jurisdiction, and over which the Government of the United States and its tribunals have no jurisdiction whatsoever. That your petitioner is a citizen of the United States and of the state of California, and that said offence is alleged to have been committed in the county of Sutter and within the jurisdiction of said state; Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus*, to be directed to the said J. C. Franks, may issue in this behalf, so that your petitioner may be forthwith brought before this court to do, submit to, and receive what the law may require."

The court below refused the writ. The petitioner then sued out this writ of error.

Mr. A. L. Hart for plaintiff in error.

Mr. Hall McAllister for defendant in error.

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

This is a writ of error brought by Thomas Baldwin, the plaintiff in error, for the review of a judgment of the Circuit Court of the United States for the District of California refusing his discharge, on a writ of *habeas corpus*, from the custody of the marshal of the district, and the questions presented for consideration arise on a certificate of the judges, holding the court, of a division of opinion between them in the progress of the trial. The record shows that Baldwin was held in custody by the marshal, under a warrant issued by a commissioner of the Circuit Court, on a charge of conspiracy with Bird Wilson, William Hays, and others to deprive Sing Lee and others, belonging to "a class of Chinese aliens, being . . . subjects of the Emperor of China, of the equal protection of the laws and of equal privileges and immunities under the laws,

for that said . . . persons so belonging to the class of Chinese aliens did then . . . reside at the town of Nicolaus, in said county of Sutter, in said State of California, and were engaged in legitimate business and labor to earn a living, as they had a right to do, and they at that time had a right to reside at said town of Nicolaus, . . . and engage in legitimate business and labor to earn a living, under and by virtue of the treaties existing, and which did then exist, between the Government of the United States and the Emperor of China, and the Constitution and laws of the United States; but, nevertheless, while said . . . persons were . . . so residing and pursuing their legitimate business and labor for the purpose aforesaid, said conspirators . . . did, . . . having conspired together for that purpose, unlawfully and with force and arms, violently and with intimidation, drive and expel said persons, . . . belonging to said class of Chinese, . . . from their residence at said town of Nicolaus, . . . and did . . . deprive them . . . of the privilege of conducting their legitimate business and of the privilege of laboring to earn a living, and, without any legal process, . . . placed said Chinese aliens . . . under unlawful restraint and arrest, and so detained them for several hours, and . . . by force and arms, and with violence and intimidation, placed them . . . upon a steamboat barge, then plying on the Feather River, and drove them from their residence and labor and from said county."

The questions certified relate only to the sufficiency of this charge for the detention of the prisoner. There are nine questions in all, the first six having reference to § 5519 of the Revised Statutes, and the others to §§ 5508 and 5336, as the authority for the prosecution. The fourth fairly presents the whole case as it arises under § 5519, and that is as follows:

"4. Whether a conspiracy of two or more persons in the State of California, for the purpose of depriving Chinese residents, lawfully residing in California, in pursuance of the provisions of the several treaties between the United States and the Emperor of China, of the right to live and pursue their lawful vocations at the town of Nicolaus in said State,

and in pursuance of such conspiracy, actually, forcibly expelling such Chinese from said town, in the manner shown by the record, is: 1. A violation of and an offence within the meaning of § 5519 of the Revised Statutes of the United States. 2. Whether said section, so far as it applies to said state of facts and such Chinese residents, and makes the acts stated an offence against the United States, is constitutional and valid?"

The seventh presents all the points for consideration under §§ 5508 and 5336, as follows:

"7. Where two or more persons, with or without disguise, go upon the premises of Chinese subjects, lawfully residing in the State of California, with intent to prevent and hinder their free exercise or enjoyment of any right secured to them by the several treaties between the United States and the Emperor of China, and, in pursuance of such conspiracy, forcibly prevent their exercise and enjoyment of such rights, and expel such Chinese subjects from the town in which they reside:

"Whether (1) such acts so performed constitute an offence within the meaning of the provisions of § 5508 of the Revised Statutes of the United States? and,

"(2) If so, whether the provisions of said section, so making said acts an offence, are constitutional and valid?

"(3) Whether such acts so performed constitute an offence within the meaning of that clause of § 5336 of the Revised Statutes of the United States, which makes it an offence for two or more persons in any state to conspire, 'by force, to prevent, hinder, or delay the execution of any law of the United States,' or within the meaning of any other clause of said section? and,

"(4) Whether said section, so far as applicable to the facts stated, is a constitutional and valid law of the United States?"

The precise question we have to determine is not whether Congress has the constitutional authority to provide for the punishment of such an offence as that with which Baldwin is charged, but whether it has so done.

That the treaty-making power has been surrendered by the states and given to the United States, is unquestionable. It is

true, also, that the treaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States.

Articles II and III of a treaty between the United States and the Emperor of China, concluded November 17, 1880, and proclaimed by the President of the United States, October 5, 1881, are as follows:

"ARTICLE II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

"ARTICLE III. If Chinese laborers or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty." 22 Stat. 827.

That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty, we do not doubt. What we have to decide, under the questions certified here from the court below, is, whether this has been done by the sections of the Revised Statutes specially referred to. These sections are as follows:

"SEC. 5519. If two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection

of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

"SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars, and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

"SEC. 5336. If two or more persons in any state or territory conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States contrary to the authority thereof; each of them shall be punished by a fine of not less than five hundred dollars and not more than five thousand dollars; or by imprisonment, with or without hard labor, for a period not less than six months, nor more than six years, or by both such fine and imprisonment."

As the charge on which Baldwin is held in custody was evidently made under § 5519, and that is the section which was most considered in the court below, we will answer the questions based on that first. It provides for the punishment of those who "in any state or territory conspire . . . for

the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws."

In *United States* v. *Harris*, 106 U. S. 629, it was decided that this section was unconstitutional, as a provision for the punishment of conspiracies of the character therein mentioned, within a state. It is now said, however, that in that case the conspiracy charged was by persons in a state against a citizen of the United States and of the state, to deprive him of the protection he was entitled to under the laws of that state, no special rights or privileges arising under the Constitution, laws, or treaties of the United States being involved; and it is argued that, although the section be invalid so far as such an offence is concerned, it is good for the punishment of those who conspire to deprive aliens of the rights guaranteed to them in a state, by the treaties of the United States. In support of this argument reliance is had on the well settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts — that which is constitutional and that which is unconstitutional — must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable, so that it can be enforced in a territory, though not in a state, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens — those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the

United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough.

Thus, in *United States* v. *Reese*, 92 U. S. 214, the indictment was against two of the inspectors of a municipal election in Kentucky, under §§ 3 and 4 of the act of May 31, 1870, c. 114, 16 Stat. 140, which provided in general terms for the punishment of inspectors who should wrongfully refuse to receive the vote of a citizen when presented under certain circumstances, and for the punishment of those who by unlawful means hindered or delayed any citizen from doing any act required to be done to qualify him to vote, or from voting at any election. There was nothing in either of the sections to limit their operation to a refusal or hindrance "on account of the race, color, or previous condition of servitude" of the voter, and it was held that they were unconstitutional because, on their face, they were broad enough to cover wrongful acts without as well as within the constitutional power of Congress. An attempt was made there as here to limit the statute by construction, so as to make it operate only on that which Congress might rightfully prohibit and punish; but to this the court said, p. 221: "For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only." This was answered in the negative, the court remarking: "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one."

Following this were the *Trade-Mark Cases*, 100 U. S. 82, in

which there were indictments under §§ 4 and 5 of the act of August 14, 1876, c. 274, 19 Stat. 141, "to punish the counterfeiting of trade-mark goods and the sale or dealing in of counterfeit trade-mark goods." Of this act the court said, speaking through Mr. Justice Miller, p. 98, that its broad purpose "was to establish a universal system of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here." A statute so broad and sweeping was then held not to be within the constitutional grant of legislative power to Congress, but p. 95, "whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control," was properly left undecided. The indictment, however, presented a case in which the defendant was charged with having in his possession counterfeits and colorable imitations of the trade-marks of foreign manufacturers, and it was suggested that if Congress had power to regulate trade-marks used in commerce with foreign nations and among the several States, this statute might be held valid in that class of cases, if no further; but the court decided otherwise, and in so doing said, p. 98: "While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part, where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body." And again, further on, after citing *United States* v. *Reese*, and quoting from the opinion in that case, it was said, p. 99: "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what,

if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under State law."

The same question was also considered and the former decisions approved in *United States* v. *Harris*, *supra*; and in the *Virginia Coupon Cases*, 114 U. S. 269, 305, it was said that "to hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact."

It is suggested, however, that *Packet Co.* v. *Keokuk*, 95 U. S. 80, and *Presser* v. *Illinois*, 116 U. S. 252, are inconsistent with *United States* v. *Reese* and the *Trade-Mark Cases*; but we do not so understand them. In *Packet Co.* v. *Keokuk*, the question arose upon an ordinance of the city of Keokuk establishing a wharf on the Mississippi River and the rates of wharfage to be paid for its use. In its general scope the ordinance was broad enough to include a part of the shore of the river declared to be a wharf, which was in its natural condition and unimproved. The city had, however, actually built, paved, and improved a wharf at a large expense within the limits of the ordinance, and the charges then in question were for the use of the facilities thus provided for receiving and discharging cargoes. An objection was made to the validity of the ordinance, because it provided for charges to be paid for the use of the unimproved bank as well as for the improved wharves, but the court said, p. 89: "The ordinance of Keokuk has imposed no charge upon these plaintiffs which it was beyond the power of the city to impose. To the extent to which they are affected by it there is no valid objection to it. Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case. It may be conceded that the ordinance is too broad, and that some of its provisions are unwarranted. When those provisions are attempted to be enforced, a different question may be presented." That was

not a penal statute, but only a city ordinance regulating wharfage, and the suit was civil in its nature. The only question was whether the packet company was bound to pay for the use of improved wharves when the ordinance, taken in its breadth, fixed the charges and required payment for the use of that part of the established wharf which was unimproved as well as that which was improved. The precise point to be determined was whether, under those circumstances, the vessel owners were excused from paying for the use of that which was improved.

In *Presser* v. *Illinois*, the indictment was for a violation of the provisions of one of the sections of the Military Code of Illinois, and it was claimed that the whole code was invalid, because in its general scope and effect it was in conflict with Title XVI of the Revised Statutes of the United States upon the subject of "The Militia." But the court held that, even if the first two sections of the code, on which the objection rested, were invalid, they were easily separable from the rest which could be maintained. The objectionable sections related to the enrolment of the militia in the state generally, and the rest to the organization of eight thousand men as a "volunteer active militia." This evidently brought that case within the rule which controls the determination of this class of questions, that the constitutional part of a statute may be enforced and the unconstitutional part rejected, "where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforcible, even though the other part should fail." *Virginia Coupon Cases*, 114 U. S. at p. 305. As was said in *Louisiana* v. *Allen*, 103 U. S. 80, 84: "The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

Applying this rule to the present case, it is clear that § 5519 cannot be sustained in whole or in part in its operation within a state, unless *United States* v. *Harris* is overruled, and this

we see no occasion for doing. That case was carefully considered at the time, and subsequent reflection has not changed our opinion as then expressed. For this reason we answer the second branch of the fourth question, which has been certified in the negative. This disposes of all the other points included in the first six questions, and no further answer to them is necessary.

We come now to the questions certified, which arise under § 5508. That this section is constitutional was decided in *Ex parte Yarbrough*, 110 U. S. 651, and *United States* v. *Waddell*, 112 U. S. 76. The real question to be determined, therefore, is, whether what is charged to have been done by Baldwin constitutes an offence within the meaning of its provisions.

The section is found in Title LXX, c. 7, of the Revised Statutes embracing "Crimes against the Elective Franchise and Civil Rights of Citizens," and it provides for the punishment of those "who conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same;" and of those who go in companies of two or more "in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured." The person on whom the wrong to be punishable must be inflicted is described as a *citizen*. In the Constitution and laws of the United States the word "citizen" is generally, if not always, used in a political sense to designate one who has the rights and privileges of a citizen of a state or of the United States. It is so used in section 1 of Article XIV of the amendments of the Constitution, which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," and that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But it is also sometimes used in popular language to indicate the same thing as resident, inhabitant, or person. That it is not so used in § 5508 in the Revised Statutes is quite

clear, if we revert to the original statute from which this section was taken. That statute was the act of May 31, 1870, c. 114, 16 Stat. 140, "to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other purposes." It is the statute which was under consideration as to some of its sections in *United States* v. *Reese*, *supra*, and from its title, as well as its text, it is apparent that the great purpose of Congress in its enactment was to enforce the political rights of citizens of the United States in the several states. Under these circumstances there cannot be a doubt that originally the word "citizen" was used in its political sense, and as the Revised Statutes are but a revision and consolidation of the statutes in force December 1, 1873, the presumption is that the word has the same meaning there that it had originally.

This particular section is a substantial re-enactment of § 6 of the original act, which is found among the sections that deal exclusively with the political rights of citizens, especially their right to vote, and were evidently intended to prevent discriminations in this particular against voters on account "of race, color, or previous condition of servitude." Sometimes, as in §§ 3 and 4, the language is broader than this, and therefore, as decided in *United States* v. *Reese*, those sections are inoperative, but still it is everywhere apparent that Congress had it in mind to legislate for citizens, as citizens, and not as mere persons, residents or inhabitants.

This section is highly penal in its character, much more so than any others, for it not only provides as a punishment for the offence a fine of not more than five thousand dollars and an imprisonment of not more than ten years, but it declares that any person convicted shall "be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." It is, therefore, to be construed strictly; not so strictly as to defeat the legislative will, but doubtful words are not to be extended beyond their natural meaning in the connection in which they are used. Here the doubtful word is "citizen," and it is used in connection with the rights and privileges pertaining to a man as a citizen,

and not as a person only or an inhabitant. And, besides, the crime has been classified in the revision among those which relate to the elective franchise and the civil rights of citizens. For these reasons we are satisfied that the word "citizen," as used in this statute, must be given the same meaning it has in the Fourteenth Amendment of the Constitution, and that to constitute the offence which is there provided for, the wrong must be done to one who is a citizen in that sense.

It is true that the word "citizen" only occurs in the first clause of the section, but in the second clause there is nothing to indicate that any other than a citizen was meant, and the section of the original statute from which this was taken has nothing from which any different inference can be drawn. That clearly deals with citizens alone, and the revision differs from it only in a re-arrangement of the original sentences and the exclusion of some superfluous words. Sections 5506 and 5507, which immediately precede this in the revision, clearly refer to political rights only, for they both relate to the privilege of voting, § 5506 being for the protection of citizens in terms, and § 5507 being for the protection of those to whom the right of suffrage is guaranteed by the Fifteenth Amendment of the Constitution. It may be that by this construction of the statute some are excluded from the protection it affords who are as much entitled to it as those who are included; but that is a defect, if it exists, which can be cured by Congress, but not by the courts.

We therefore answer the first subdivision of the seventh question certified in the negative. The second subdivision need not be answered otherwise than it has been elsewhere in this opinion.

It remains only to consider that part of the questions certified which relates to § 5336. That section provides for the punishment of those who conspire, 1, "to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof;" or, 2, "by force to prevent, hinder, or delay the execution of any law of the United States;" or, 3, "by force to seize, take, or possess any property of the United States con-

trary to the authority thereof." This is a re-enactment of similar provisions in the act of July 31, 1861, c. 33, 12 Stat. 284, "to define and punish certain Conspiracies," and in that of April 20, 1871, c. 22, § 2, 17 Stat. 13, "to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

It cannot be claimed that Baldwin has been charged with a conspiracy to overthrow the government or to levy war within the meaning of this section. Nor is he charged with any attempt to seize the property of the United States. All, therefore, depends on that part of the section which provides a punishment for "opposing" by force the authority of the United States, or for preventing, hindering, or delaying the "execution" of any law of the United States.

This evidently implies force against the government as a government. To constitute an offence under the first clause, the authority of the government must be opposed; that is to say, force must be brought to resist some positive assertion of authority by the government. A mere violation of law is not enough; there must be an attempt to prevent the actual exercise of authority. That is not pretended in this case. The force was exerted in opposition to a class of persons who had the right to look to the government for protection against such wrongs, not in opposition to the government while actually engaged in an attempt to afford that protection.

So, too, as to the second clause, the offence consists in preventing, hindering, or delaying the government of the United States in the execution of its laws. This, as well as the other, means something more than setting the laws themselves at defiance. There must be a forcible resistance of the authority of the United States while endeavoring to carry the laws into execution. The United States are bound by their treaty with China to exert their power to devise measures to secure the subjects of that government lawfully residing within the territory of the United States against ill treatment, and if in their efforts to carry the treaty into effect they had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the statute would have

arisen. But that is not what Baldwin has done. His conspiracy is for the ill treatment itself, and not for hindering or delaying the United States in the execution of their measures to prevent it. His force was exerted against the Chinese people, and not against the government in its efforts to protect them. We are compelled, therefore, to answer the third subdivision of the seventh question in the negative, and that covers the fourth subdivision.

This disposes of the whole case, and, without answering the questions certified more in detail,

We reverse the judgment of the Circuit Court, and remand the case for further proceedings not inconsistent with this opinion.

Mr. Justice Harlan dissenting.

By the treaty of 1880–1881, with China, the Government of the United States agreed to exert all its power to devise measures for the protection, against ill treatment at the hands of other persons, of Chinese laborers or Chinese of any other class, permanently or temporarily residing, at the time, in this country, and to secure to them the same rights, privileges, immunities and exemptions to which the citizens or subjects of the most favored nation are entitled, by treaty, to enjoy here. It would seem from the decision in this case, that if Chinamen, having a right, under the treaty, to remain in our country, are forcibly driven from their places of business, the Government of the United States is without power, in its own courts, to protect them against such violence, or to punish those who, in this way, subject them to ill treatment. If this be so, as to Chinamen lawfully in the United States, it must be equally true as to the citizens or subjects of every other foreign nation, residing or doing business here under the sanction of treaties with their respective governments.

I do not think that such is the present state of the law, and must dissent from the opinion and judgment of the court.

It is conceded in the opinion of the court to be within the constitutional power of Congress to provide — as by § 5508 of

the Revised Statutes it has done — that "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined," &c. It is also conceded that, in the meaning of that section, a treaty between this Government and a foreign nation is a "law" of the United States; and that the wrongs done by Baldwin and others to the subjects of the Emperor of China, named in the warrant, prevented the free exercise and enjoyment of rights and privileges secured to those aliens by the treaty between the United States and China. I concur in these views, but am unable to assent to the proposition that the offence charged is not embraced by the foregoing section or by any other valid enactment of Congress.

My brethren hold that § 5508 describes only wrongs done to a "citizen;" in other words, that Congress did not intend, by that section, to protect the free exercise or enjoyment of rights secured by the Constitution or laws of the United States, except where citizens are concerned. This, it seems to me, is an interpretation of the statute which its language neither demands nor justifies. Observe, that the subject with which Congress was dealing was the protection of "*any* right or privilege" secured by the Constitution or laws of the United States. There is, perhaps, plausible ground for holding that the first clause of § 5508 embraces only a *conspiracy* directed against a "citizen." But the succeeding clause describes two other and distinct offences, namely, the going of two or more persons "in disguise on the highway," and the going of two or more persons "on the *premises* of another" — that is, upon the premises of another *person* — with intent, in either case, to prevent or hinder the free exercise or enjoyment by such person of any right or privilege secured to him by the Constitution or laws of the United States. The use of the word

"another," instead of "citizen," in the latter clause, shows that, in respect of rights and privileges so secured, Congress had in mind the protection of persons, whether citizens or not. In this view, the statute is not unlike the Fourteenth Amendment, the first section of which recognizes as well rights appertaining to citizenship as rights belonging to persons. Baldwin and others, according to the statements in the warrant, certainly did go "on the premises of another," with the intent to interfere with rights which the court concede are secured by treaty, and, therefore, by the supreme law of the land. *Chew Heong* v. *United States*, 112 U. S. 536, 540; *Head Money Cases*, 112 U. S. 580. In my judgment the case is within both the letter and spirit of the statute. It is, however, excepted by the court from its operation by imputing to Congress the purpose of withholding national protection from those who do not happen to enjoy the privileges of American citizenship, — a purpose inconsistent with the obligations which the nation has assumed by treaties with other countries. I cannot think it possible that Congress, while providing for the punishment of two or more persons, who go on the *premises* of a citizen, with intent to prevent his free exercise or enjoyment of rights secured by the Constitution or laws of the United States, purposely refrained from providing for the punishment of the same persons going on the premises of one, not a citizen, with intent to prevent the enjoyment by the latter of rights secured by the same Constitution and laws.

The rule of interpretation which the court lays down, if applied in other cases, will lead to strange results. We have statutes which give "to every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws," &c., Rev. Stat. §§ 2289, 2290, and 2291, the right, for purposes of a homestead, and under certain conditions, to enter unappropriated public lands. The party making the entry, or, if he be dead, his widow, &c., will be entitled ultimately to receive a patent, provided he resides upon and cultivates the land for a certain length of time, and provided, in

the case of the foreigner, he shall have become a citizen of the United States prior to his application for a patent. Now, suppose that an entry is made, under the homestead statute, by a citizen, and a similar entry is made at the same time, in the same locality, by one who has only filed his declaration of intention to become a citizen. During the period of residence upon and cultivation of the lands both of the parties so making entries are, we will suppose, forcibly driven from the land by a lawless band of persons, with the intent to prevent them from perfecting their respective rights to a patent. In the case of the citizen thus wronged, we held in *United States* v. *Waddell*, 112 U. S. 76, that he may invoke the protection given by § 5508, and in that way have the wrong-doers punished in a court of the United States as therein prescribed. But in the case of the person who has only declared his intention to become a citizen, the wrong-doers cannot be reached by indictment in a court of the United States, because, under the decision in this case, that section only furnishes protection to *citizens*.

It is said — though I believe no such suggestion is made by the court — that the words "if two or more persons go in disguise on the highway, or on the premises of another," apply only when the offenders are "in disguise." I cannot suppose that Congress intended to make a distinction between wrong-doers going in disguise "on the premises of another," for the purpose of interfering with rights secured by the Constitution or laws of the United States, and wrong-doers who openly and without masks enter upon the same premises with a like unlawful purpose. It intended, rather, to guard the homes of all persons against invasion by combinations of lawless men, who seek, by entering those homes, to prevent the free exercise of rights secured by the Constitution or laws of the United States. If the clause had read, "if two or more persons go on the highway in disguise, or on the premises of another," it would never occur to any one that the words "on the premises of another" were qualified by the words "in disguise." The free exercise of personal rights secured by the United States should not be made to depend upon the trifling circumstance that the

words "in disguise" precede, rather than follow, the words "on the highway."

In my judgment the going of two or more persons, whether openly or in disguise, on the premises of another, whether the latter be a citizen or not, with intent to prevent his free exercise or enjoyment of a right secured by the Constitution or laws of the United States, was made by § 5508 an offence against the United States.

I feel obliged also to express my non-concurrence in so much of the opinion of the court as holds that Congress is without power under the Constitution to make it — as by § 5519 of the Revised Statutes it is made — an offence against the United States for two or more persons, in any state, "to conspire, or go in disguise on the highway, or on the premises of another, for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state . . . from giving or securing to all persons within such state . . . the equal protection of the laws."

It is not necessary, in this case, to inquire what is the full scope of that clause of the Fourteenth Article of Amendment, which provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is sufficient to say, that that provision does something more than prescribe the duty and limit the power of the states. Taken in connection with the fifth section, conferring upon Congress power to enforce the Amendment by appropriate legislation, that provision is equivalent to a declaration, in affirmative language, that every *person* within the jurisdiction of a state has a right to the equal protection of the laws; just as the prohibition in the Thirteenth Amendment, against the existence of slavery, operated not only to annul state laws upholding that institution, but to establish "universal civil and political freedom throughout the United States," and to invest every individual person within their jurisdiction with the right of freedom, *Civil Rights Cases*, 109 U. S. 3, 20; and just as the prohibition in the Fifteenth Amendment, against

the denial or abridgment of the right of citizens of the United States to vote, on account of their race, color, or previous condition of servitude, operated to invest such citizens with "a new constitutional right," which "comes from the United States," namely, "exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude." *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Reese*, 92 U. S. 214.

In the *Civil Rights Cases*, p. 23, above cited, it was held that Congress, under its express power to enforce, by appropriate legislation, the provisions of the Thirteenth Amendment, could, so far as necessary or proper, enact legislation, "direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not," for the purpose of eradicating "all forms and incidents of slavery and involuntary servitude." And since, in the matter of voting, the exemption of citizens from discrimination on account of race, color, or previous condition of servitude is a right which "comes from the United States," and is "granted or secured by the United States," *United States* v. *Cruikshank* above cited, can it be doubted that Congress, under its express power to enforce the Fifteenth Amendment, by appropriate legislation, could make it an offence against the United States for two or more persons to conspire to deny or abridge the citizen's right to vote, on account of his race or color? Is there any recognized exception to the general rule that Congress may, by appropriate legislation, secure and protect rights derived from or guaranteed by the Constitution or laws of the United States? Believing that these questions must be answered in the negative, I am unable to perceive any constitutional objection to § 5519; certainly, none of such a serious character as to justify this court in holding that Congress, by enacting it, has transcended its powers. If the United States is powerless to secure the equal protection of the laws to persons within the jurisdiction of a state, until the state, by hostile legislation, or by the action of her judicial authorities, shall have denied such protection, and can even then interfere only through the courts of the Union in suits involving either the validity of such state

legislation, or the action of the state authorities, it is difficult to understand why Congress was invested with power, by appropriate legislation, to enforce the provisions of the Fourteenth Amendment; for, without such power of legislation, the courts of the Union are competent to annul any state laws or reverse any action of state judicial officers, which deny the equal protection of the laws to any particular person or class of persons. Indeed, since the organization of the government, there has existed a remedy in the courts of the Union for any denial, in a state court, of rights, privileges, or immunities derived from the United States. It seems to me that the main purpose of giving Congress power to enforce, by *legislation*, the provisions of the Amendment was, that the rights therein granted or guaranteed might be guarded and protected against lawless combinations of individuals, acting without the direct sanction of the state. The denial by the state of the equal protection of the laws to persons within its jurisdiction may arise as well from the failure or inability of the state authorities to give that protection, as from unfriendly enactments. If Congress, upon looking over the whole ground, determined that an effectual and appropriate mode to secure such protection was to proceed directly against combinations of individuals, who sought, by conspiracy or by violent means, to defeat the enjoyment of the right given by the Constitution, I do not see upon what ground the courts can question the validity of legislation to that end.

There is another view of this question which seems to be important. In *United States* v. *Waddell*, 112 U. S. 76, and again in this case, the court has sustained the power of Congress to enact § 5508, which, among other things, makes it an offence against the United States for two or more persons to "go in disguise on the highway, or on the premises of another," with intent to prevent or hinder his free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States. Now, it is difficult to understand why, if Congress can do this, it may not make it an offence for the same persons (§ 5519) to "go in disguise on the highway, or on the premises of another, for the purpose

of depriving, directly or indirectly, any person or class of persons, of the equal protection of the laws." The only possible answer to this suggestion is to say that "the equal protection of the laws" is not a right or privilege secured by the Constitution of the United States. But that, it seems to me, cannot be said, without doing violence to the language of that instrument, and defeating the intention with which the people adopted it.

It was long since announced by this court that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." *United States* v. *Fisher*, 2 Cranch, 358. And in *McCulloch* v. *Maryland*, 4 Wheat. 361, 421, Chief Justice Marshall, speaking for the court, said: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people." In view of these settled doctrines of constitutional law, I am unwilling to say that it is not appropriate legislation for the enforcement of the right, given by the Constitution, to the equal protection of the laws, for Congress to make it an offence against the United States, punishable by fine and imprisonment, for two or more persons in any state to conspire, or go in disguise on the highway, or go on the premises of another, for the purpose of depriving him of the equal protection of the laws.

Mr. Justice Field dissenting.

I agree with the majority of the court in its construction of the different sections of the Revised Statutes which have been under consideration in this case, except the third clause of § 5336, and the last clause of § 5508.

The third clause of § 5336 declares that if two or more persons in any state or territory conspire "by force to prevent, hinder, or delay the execution of any law of the United

States," each of them shall be punished by a fine of not less than $500 or more than $5,000, or by imprisonment, with or without hard labor, for a period of not less than six months or more than six years; or by both such fine and imprisonment.

By the treaty with China of 1868 the United States recognize the right of Chinese to emigrate to this country, and declare that in the United States the subjects of that empire shall enjoy the same privileges and immunities in respect to residence which are enjoyed by citizens or subjects of the most favored nation.

The complaint against the plaintiff in error is, that he conspired with others to expel by force from the town of Nicolaus, and the county of Sutter, in the State of California, the subjects of the Emperor of China, who were residing and doing business there, and in furtherance of the conspiracy entered the homes of certain persons of that class, seized them, and forcibly placed them upon a barge on Feather River, on the bank of which the town of Nicolaus is situated, and drove them from the county, and thus deprived them of privileges and immunities conferred by the treaty.

For this alleged offence the plaintiff in error, with others, was arrested. On application for a *habeas corpus* for his discharge, the judges of the Circuit Court were divided in opinion. This court holds that a conspiracy thus violently to expel the Chinese from the county and town where they resided and did business, and thus defeat the provisions of the treaty, was not a conspiracy to prevent or hinder by force the execution of a law of the United States, although a treaty is declared by the Constitution to be the supreme law of the land.

Under the Constitution, a treaty between the United States and a foreign nation is to be considered in two aspects — as a compact between the two nations, and as a law of our country. As a compact, it depends for its enforcement on the good faith of the contracting parties, and to carry into effect some of its provisions may require legislation. For any infraction of its stipulations importing a contract, the courts can afford no redress except as provided by such legislation. The matter is one to be settled by negotiation between the executive depart-

ments of the two governments, each government being at liberty to take such measures for redress as it may deem advisable. *Foster* v. *Neilson*, 2 Pet. 253, 314; *Head Money Cases*, 112 U. S. 580, 598; *Taylor* v. *Morton*, 2 Curtis, 454, 459; *In re Ah Lung*, 9 Sawyer, 306; *S. C.* 18 Fed. Rep. 28.

But in many instances a treaty operates by its own force, that is, without the aid of any legislative enactment; and such is generally the case when it declares the rights and privileges which the citizens or subjects of each nation may enjoy in the country of the other. This was so with the clause in some of our early treaties with European nations, declaring that their subjects might dispose of lands held by them in the United States, and that their heirs might inherit such property, or the proceeds thereof, notwithstanding their alienage. Thus the treaty with Great Britain of 1794 provided that British subjects then holding lands in the United States, and American citizens holding lands in the dominions of Great Britain, should continue to hold them according to the nature and tenure of their respective estates and titles therein, and might grant, sell, or devise the same to whom they pleased, in like manner as if they were natives, and that neither they nor their heirs nor assigns should, as far as might respect the said lands, and the legal remedies incident thereto, be regarded as aliens. Art. 9, 8 Stat. 122. A clause to the same purport, and embracing also movable property, was in the treaty with France of 1778, art. 11, 8 Stat. 18, and also in that of 1800, art. 7, 8 Stat. 182. It required no legislation to give force to this provision. It was the law of the land by virtue of the Constitution, and congressional legislation could not add to its efficacy. Whenever invoked by the alien heirs, the rights it conferred were enforced by the Federal courts. *Chirac* v. *Chirac*, 2 Wheat. 259; *Carneal* v. *Banks*, 10 Wheat. 181; *Hughes* v. *Edwards*, 9 Wheat. 489, 496. See also the Treaty with the Swiss Confederation of 1850, art. 5, 11 Stat. 590; *Hauenstine* v. *Lynham*, 100 U. S. 483.

This is so also with clauses, found in some treaties with foreign nations, stipulating that the subjects or citizens of those nations may trade with the United States, and, for that purpose, freely enter our ports with their ships and cargoes, and

reside and do business here. Thus the treaty of commerce with Italy of February 26, 1871, provides that "Italian citizens in the United States, and citizens of the United States in Italy, shall mutually have liberty to enter, with their ships and cargoes, all the ports of the United States and of Italy respectively, which may be open to foreign commerce. They shall also have liberty to sojourn and reside in all parts whatever of said territories." Art. 1, 17 Stat. 845. These stipulations operate by their own force; that is, they require no legislative action for their enforcement. Treaty of commerce with Great Britain of 1815, art. 1, 8 Stat. 228; renewed and continued for ten years by art. 4 of the treaty of 1818, 8 Stat. 249; and continued indefinitely by art. 1 of the treaty of 1827, 8 Stat. 361; treaty with Bolivia of May 13, 1838, art. 3, 12 Stat. 1009; treaty with Costa Rica of July 10, 1851, art. 2, 10 Stat. 917; treaty with Greece of December, 1837, art. 1, 8 Stat. 498; treaty with Sweden and Norway of July 4, 1827, art. 1, 8 Stat. 346.

The right or privilege being conferred by the treaty, parties seeking to enjoy it take whatever steps are necessary to carry the provisions into effect. Those who wish to engage in commerce enter our ports with their ships and cargoes; those who wish to reside here select their places of residence, no congressional legislation being required to provide that they shall enjoy the rights and privileges stipulated. All that they can ask, and all that is needed, is such legislation as may be necessary to protect them in such enjoyment. That they have, I think, to some extent, in the clause punishing any conspiracy to prevent or hinder by force the execution of a law of the United States. The section in which this clause appears is a reënactment in part of the act of July 31, 1861, and declares, among other things, a conspiracy of two or more persons to overthrow by force the Government of the United States, or to oppose by force its authority, or "by force to prevent, hinder, or delay the execution of *any* law of the United States," or by force to seize and possess any of their property against their authority, to be a high crime, and prescribes for it severe punishment. As thus seen, the section is not intended as a

protection against isolated or occasional acts of individual personal violence. For such offences the laws of the states make ample provision. It is intended to reach *conspiracies* against the supremacy and authority of the Government of the United States, and against the enforcement of its laws. It is directed not only against those who conspire to overthrow the government, but those also who conspire to defeat the execution of its laws, including under the latter treaties as well as statutes, and thus permanently deprive others of the rights, benefits, and protection intended to be conferred by such laws. In the case before us, the purpose of the alleged conspirators was to permanently deprive the Chinese residing in Nicolaus — not any particular Chinese, but all of that class of persons — of the right of residence conferred by the treaty. That right is not limited to any particular place; it may be exercised wherever it is lawful for any one to reside without encroachment upon the equal right of others. The conspirators well knew, as every one in California knows, the provision of the treaty and its meaning, and their purpose was to nullify and defeat it.

A treaty, in conferring a right of residence, requires no congressional legislation for the enforcement of that right; the treaty in that particular is executed by the intended beneficiaries. They select their residence. They are not required, as said above, to reside in any particular place, or do business there. A conspiracy to prevent by force a residence in the town or county selected by them appears to me, therefore, to be a conspiracy to prevent the operation — that is, the execution — of a law of the United States, and to be within the letter and spirit of the third clause of § 5336. If the conspirators can expel the Chinese from their residence in the town and county of their selection without being amenable to any law of the United States, they can, with like exemption from legal liability, expel the Chinese from the entire state, and thus utterly defeat the stipulations of the treaty.

So, also, a conspiracy to prevent by force ships belonging to subjects of a foreign nation — not any particular ship, but ships generally belonging to them — from entering our ports with their cargoes would, in my judgment, be a conspiracy to pre-

vent by force the operation of the treaty with that nation, which stipulates that its subjects shall have that privilege. And in all other cases where a clause of a treaty conferring rights or privileges operates by its own terms and does not require congressional legislation to give it effect, a conspiracy to prevent by force their enjoyment is a conspiracy to prevent by force the execution of a law of the United States; that is, to prevent its having, with respect to the rights and privileges stipulated, any effectual operation. I do not see how Congress could improve the matter, or do more than it has already done, by declaring that those who thus conspire by force to deprive parties of the rights or privileges conferred by a treaty should be punished. Its declaration to that effect would be no more than what the present law provides.

The last clause of § 5508 declares that "if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder the free exercise or enjoyment of any right or privilege so secured, [by the Constitution or laws of the United States,] they shall be fined not more than five thousand dollars, and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

I do not agree with the majority of the court that this clause is limited in its application only to offences against citizens. The first clause of the section is thus limited, but, in my judgment, the last is more extensive, and reaches an invasion of the premises of any one, whether citizen or alien, by two or more persons for the unlawful purposes mentioned. But I am not clear that the qualification of going "in disguise" on the highway does not also extend to the going on the premises of another — and thus render the clause inapplicable to the case before the court; though there is much force in the view of Mr. Justice Harlan, that the clause should be read as though its words were: "If two or more persons go on the highway in disguise, or on the premises of another, with the intent," &c., thus making the words "in disguise" apply only to the offence on the highway. If his view be correct, the last pro-

vision of the clause would describe the exact offence charged against the plaintiff in error and his co-conspirators — that they went on the premises of the Chinese with the intent to deprive them of rights and privileges conferred by the treaty — the law of the land — an intent which they carried out by forcibly expelling the Chinese from the town and county of their residence aud business. But without adopting or rejecting his view, I prefer to place my dissent upon what I deem the erroneous construction by the court of the third clause of § 5336, in holding that it does not cover this case, but applies only to cases where there has been a forcible resistance to measures adopted by Congress for the execution of a law, or a treaty of the United States.

The result of the decision is, that there is no national law which can be invoked for the protection of the subjects of China in their right to reside and do business in this country, notwithstanding the language of the treaty with that empire. And the same result must follow with reference to similar rights and privileges of the subjects or citizens resident in this country of any other nation with which we have a treaty with like stipulations. Their only protection against any forcible resistance to the execution of these stipulations in their favor is to be found in the laws of the different states. Such a result is one to be deplored.

VITERBO *v.* FRIEDLANDER.

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

Submitted January 4, 1886. — Decided March 7, 1887.

The Civil Code of Louisiana, following the civil law of Rome, Spain, and France, and differing from the common law, regards a lease for years as a mere transfer of the use and enjoyment of the thing leased; and holds the landlord bound, without any express covenant, to keep it in repair and otherwise fit for the use for which it is leased, even when the want of repair or the unfitness is caused by an inevitable accident; and if he does not do so, authorizes the tenant to have the lease annulled or the rent abated.

Statement of Facts.

In construing those articles of the Civil Code of Louisiana, which were originally enacted both in French and in English, the French text may be taken into consideration for the purpose of clearing up obscurities or ambiguities in the English text.

The breaking of a crevasse in the levees by the waters of the Mississippi River is a fortuitous or unforeseen event, within the meaning of the Civil Code of Louisiana; and if in consequence thereof a sugar plantation, leased for five years, with the buildings, mules and implements necessary for the cultivation of sugar cane, and with the growing crop of cane (which the lessee agrees to cut and plant as seed cane, and, by way of reimbursing the lessor for, to leave a certain amount of growing cane on the plantation at the end of the lease), is overflowed for three months, all the cane destroyed, the canals and ditches necessary for drainage filled up, the bridges swept away, and a deposit from three to six inches deep left over the whole ground, making it necessary, in order to cultivate it as a sugar plantation the following year, to spend large sums of money to dig out canals and ditches, repair bridges, and buy seed cane, the plantation is partially destroyed, or ceases to be fit for the use for which it was leased, within the meaning of articles 2697 (2667) and 2699 (2669) of that code, and the lessee is entitled to have the lease annulled; notwithstanding the provision of article 2743 (2714) that the tenant of a predial estate cannot claim an abatement of rent for a destruction of the whole or a part of his crop by inevitable accidents, unless they are of such a nature that they could not have been foreseen by either party when the lease was made.

This was a petition, filed October 2, 1884, by a citizen of France against a citizen of Louisiana, to annul a lease of a sugar plantation from the defendant to the petitioner for five years; and alleging that by an extraordinary rise of the Mississippi River, which could not have been foreseen, and without any fault of the lessee, a crevasse was made in the levees of a neighboring plantation, the leased plantation overflowed, all the cane destroyed, and the plantation rendered wholly unfit for the purpose for which it had been leased; and that the petitioner requested the defendant, as soon as the water from the crevasse should have withdrawn, to put back the plantation in the same condition as when leased, and to replace the plant cane and stubble, and the defendant refused to do so. By direction of the Circuit Court, the case was transferred to the chancery side, and the petitioner filed a bill in equity, containing similar allegations, and praying for like relief.

The lease in question was dated October 27, 1883, and was

of "a sugar plantation, situated in the parish of St. Charles in this state, known as Friedlander's plantation," and "all the buildings, outhouses, fences, sugar-houses, and other appurtenances thereof," (particularly described,) from September 27, 1883, to December 15, 1888, at an annual rent of $5000, which the lessee agreed to pay; and contained the following provisions:

"And the said lessor further declared that he does hereby give unto said lessee all of the growing cane crop of 1883 now standing in the field, which the said lessee expressly binds himself to plant as seed cane on said plantation. And to reimburse said lessor for said cane crop, said lessee binds himself to leave on said plantation for the sole use and benefit of said lessor, at the termination of this lease, December 15, 1888, eighty-five acres of full-standed seed cane (such as is usually called first year's stubble) which has been thoroughly cultivated, cut at the proper time for saving seed, and carefully windrowed, especially for seed; and in addition thereto, said lessee shall also leave on said plantation for said lessor not less than two hundred acres of stubble from what is called plant cane, which shall be properly protected in the ground."

"And said lessee binds himself to deliver said plantation at the expiration of this lease, with the ditches in a good draining condition, sufficiently so for the proper cultivation of as much land as may have been under cultivation by said lessee during his fourth year's occupancy of said plantation; and the foregoing clause means that said lessee shall not neglect nor allow the filling up of said ditches during the last year of this lease any more than ditches usually fill up in one year on a well managed sugar plantation in good cultivation."

"And the said lessor further declared that he leaves with said lessee, to be used in the culture of sugar cane on said plantation, thirty-four mules," valued at $3700, and implements of husbandry and sugar culture, (particularly enumerated,) valued at $500; all of which the lessee agrees to return in kind or value at the expiration of the lease.

The answer admitted the execution of the lease; and that in March, 1884, when the waters of the Mississippi River were

at their usual spring rise or flood, the levees along its banks near the leased property gave way, and inundated the country to some extent; and the demand and refusal to restore the plantation to its original condition and to replace the cane; but denied the other allegations of the bill.

After the filing of a general replication, the case was referred to a master, who reported the facts as follows:

"The lessee, on entering upon the lease, according to the evidence, found the ditches in a bad condition, and no canal into which to drain the fields, except one on the lower side of the plantation. In order to prepare the ground for cultivation of sugar cane, he decided that a more perfect system of drainage was necessary, and he caused a canal to be dug through the centre of the plantation from the front to the swamp, and enlarged and deepened the ditches, securing thereby a better system of drainage."

"In March, 1884, a crevasse occurred upon what is known as the Davis plantation, the back waters from which crevasse overflowed a large portion of the Friedlander plantation, especially that portion used for cultivation; and it was under water for several months.

"The damage caused by this overflow I find from the evidence to be as follows: The lessee lost, by reason of said overflow, the entire crop of sugar cane of 1884; that is, the 200 acres of stubble cane and the 85 acres of plant cane were destroyed; the ditches were partially, and in some places entirely, filled; the canals, especially the one dug by the lessee, were partially filled, and the bridges generally swept away; the water remained over the land until July, 1884; a deposit was left over the land of from three inches to six inches. To cultivate the land as a sugar plantation the following year (1885), it would require ditches to be redug, the canals to be opened or cleaned out, the bridges replaced, and seed cane to be obtained and planted, all at considerable expense, to put the plantation in the condition it was at date of the crevasse."

"The plaintiff admits the plantation would grow a crop of cane. But it would require a considerable sum of money and labor to put it in good condition for the growing of cane; that

is, it would require seed cane, the canals and ditches to be dug out, and the bridges rebuilt. This work is an incident to the growing of a crop of sugar cane annually. Some years it may require more seed cane, more labor to put the canals and ditches in order, than in others. The land, therefore, has not ceased to be fit for the purposes for which it was leased; on the contrary, some of the witnesses suggest that the deposit has enriched and greatly benefited the land."

The master, after discussing at length the law of the case, concluded and reported that the property leased was not destroyed, and had not ceased to be fit for the purpose for which it was leased; that the loss of the growing crop, the partial filling of the canals and ditches, and the washing away of the bridges, were not caused by an "unforeseen event;" that equity could give no relief to the plaintiff, and that his bill should be dismissed.

Exceptions taken by the plaintiff to the master's report, in regard both to his findings of fact and to his conclusions of law, were overruled by the Circuit Court, and a decree entered for the defendant, dismissing the bill. 24 Fed. Rep. 320.

The plaintiff appealed to this court, and filed the following assignment of errors:

"1st. That when property leased has been rendered unfit for the purpose for which it was leased, by the act of God, the lease is dissolved.

"2d. That the facts show that the plantation leased as a sugar plantation has been destroyed, and the lease is at an end.

"3d. That sugar cane, which is in the form of plant and rattoon or stubbles, is a part and portion of the land, and when destroyed the destruction annuls the lease.

"4th. That the draining ditches and canals, dug by the lessee in fulfilment of his obligation under his lease, become the property of the lessor, and when destroyed by a crevasse it becomes the duty of the lessor to put them back in the condition they were before the crevasse.

"5th. That when a lessor is duly put in default to fulfil a part of his obligations as landlord, and refuses, the lease is dissolved."

Mr. Charles Louque and *Mr. Albert Voorhies* for appellant.

Mr. George H. Braughn and *Mr. Charles F. Buck* for appellee.

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

In considering this case, it is important to keep in mind that the view of the common law of England and of most of the United States, as to the nature of a lease for years, is not that which is taken by the civil law of Rome, Spain, and France, upon which the Civil Code of Louisiana is based.

The common law and the civil law concur in holding that in the case of an executed sale a subsequent destruction of the property by any cause is the loss of the buyer. *Res perit domino.* They also concur in holding that performance of an executory obligation to convey a specific thing is excused by the accidental destruction of the thing, without the fault of the obligor, before the conveyance is made. *Taylor* v. *Caldwell*, 3 B. & S. 826; *Wells* v. *Calnan*, 107 Mass. 514; Pothier, Obligations, nos. 657, 668; Contrat de Louage, no. 65; Civil Code of Louisiana, art. 2219 (2216).

But as to the nature and effect of a lease for years, at a certain rent which the lessee agrees to pay, and containing no express covenant on the part of the lessor, the two systems differ materially. The common law regards such a lease as the grant of an estate for years, which the lessee takes a title in, and is bound to pay the stipulated rent for, notwithstanding any injury by flood, fire, or external violence, at least unless the injury is such a destruction of the land as to amount to an eviction; and by that law the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are leased. *Fowler* v. *Bott*, 6 Mass. 63; 3 Kent Com. 465, 466; Broom's Legal Maxims (3d ed.) 213, 214; *Doupe* v. *Genin*, 45 N. Y. 119; *Kingsbury* v. *Westfall*, 61 N. Y. 356; *Naumberg* v. *Young*, 15 Vroom, 331; *Bowe* v. *Hunking*, 135 Mass. 380; *Manchester Warehouse Co.* v. *Carr*, 5 C. P. D. 507.

Opinion of the Court.

The civil law, on the other hand, regards a lease for years as a mere transfer of the use and enjoyment of the property; and holds the landlord bound, without any express covenant, to keep it in repair and otherwise fit for use and enjoyment for the purpose for which it is leased, even when the need of repair or the unfitness is caused by an inevitable accident; and if he does not do so, the tenant may have the lease annulled, or the rent abated. Dig. 19, 2, 9, 2; 19, 2, 15, 1, 2; 19, 2, 25, 2; 19, 2, 39; 2 Gomez, Variae Resolutiones, c. 3, §§ 1–3, 18, 19; Gregorio Lopez, in 5 Partidas, tit. 8 ll. 8, 22; Domat, Droit Civil, pt. 1, lib. 1, tit. 4, sect. 1, no. 1; sect. 3, nos. 1, 3, 6; Pothier, Contrat de Louage, nos. 3, 6, 11, 22, 53, 103, 106, 139–155.

It is accordingly laid down in the Pandects, on the authority of Julian, "if any one has let an estate, that, even if anything happens by *vis major*, he must make it good, he must stand by his contract," *si quis fundum locaverit, ut, etiamsi quid vi majore accidisset, hoc ei præstaretur, pacto standum esse;* Dig. 19, 2, 9, 2; and on the authority of Ulpian, that "a lease does not change the ownership," *non solet locatio dominium mutare;* Dig. 19, 2, 39; and that the lessee has a right of action, if he cannot enjoy the thing which he has hired, *si re quam conduxit frui non liceat*, whether because his possession, either of the whole or of part of the field, is not made good, or a house, or stable or sheepfold, is not repaired; and the landlord ought to warrant the tenant, *dominum colono præstare debere*, against every irresistible force, *omnem vim cui resisti non potest*, such as floods, flocks of birds, or any like cause, or invasion of enemies; and if the whole crop should be destroyed by a heavy rainfall, or the olives should be spoiled by blight, or by extraordinary heat of the sun, *solis fervore non assueto*, it would be the loss of the landlord, *damnum domini futurum;* and so if the field falls in by an earthquake, for there must be made good to the tenant a field that he can enjoy, *oportere enim agrum præstari conductori, ut frui possit;* but if any loss arises from defects in the thing itself, *si qua tamen vitia ex ipsa re oriantur*, as if wine turns sour, or standing corn is spoiled by worms or

weeds, or if nothing extraordinary happens, *si vero nihil extra consuetudinem acciderit*, it is the loss of the tenant, *damnum coloni esse.* Dig. 19, 2, 15, 1, 2.

So Domat says: "If the tenant is expelled by the act of the sovereign, by *vis major*, or by some other accident, or if the property is destroyed by an inundation, by an earthquake, or other event, the lessor, who was bound to give the property, cannot demand the rent, and will be bound to restore so much of it as he has received, but without any other damages; for no one ought to answer for accidents." Droit Civil, pt. 1, lib. 1, tit. 4, sect. 3, no. 3.[1]

Pothier brings out the same principles more fully, as applicable to cases resembling the case at bar, saying: "When the thing leased, which the lessor offers to deliver to the lessee, is found not to be entire, the lessor having lost a part of it since the contract, or when it is not in the same condition in which it was at the time of the contract; when what is wanting in the thing, or when the change that has happened in the thing, is such that the lessee would not have been willing to hire this thing, if it had been such as it has since become; in that case, the lessee has the right to refuse to receive the thing, and to demand the annulment of the contract. This takes place, even if it is by a *vis major* occurring since the contract, that the thing is no longer entire, or is destroyed; as, for example, if, since the contract, lightning has burned a considerable part of the house that you have leased to me, and the rest is not sufficient for me to dwell in with my family; or, if a field, that you have leased to me, has been inundated by an overflow of a river, which has left a hurtful deposit that has spoiled the grass; but in this case I can only demand the annulment of the bargain, without being able to claim any damages for its non-execution."[2] Contrat de Louage, no. 74.

[1] "3. Si le preneur est expulsé par le fait du prince, par une force majeure, ou par quelque autre cas fortuit, ou si l'héritage périt par un débordement, par un tremblement de terre, ou autre événement, le bailleur, qui était tenu de donner le fonds, ne pourra prétendre le prix du bail, et sera tenu de rendre ce qu'il en avait reçu, mais sans aucun autre dédommagement; car personne ne doit répondre des cas fortuits."

[2] "74. Lorsque la chose louée, que le locateur offre de délivrer au conducteur, ne se trouve pas entière, le locateur en ayant perdu une partie depuis le

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Again; after laying down the general principles that "the tenant, lessee or farmer ought to have an abatement of the whole rent, when the lessor has not been able to procure him the enjoyment or the use of the thing leased;" and that "when the tenant has not been absolutely deprived of the enjoyment of the thing, but by an unforeseen accident his enjoyment has suffered a change and a very considerable diminution, he can demand a proportionate diminution in the rent, during the time that his enjoyment has suffered that diminution;" he says that, according to these principles, "when by *vis major* a farmer has been deprived of the power of gathering the fruits of one of the years of his lease; as if an enemy has ravaged all the standing corn on the land leased, or all the fruits yet ungathered have been destroyed by an overflow of a river, or by a swarm of locusts, or by any like accident; in all these cases, the farmer ought to have an abatement of the year's rent;" but that "the accident, which has caused a considerable loss of the fruits, must be an extraordinary accident, and not one of those ordinary and frequent accidents which a farmer ought to expect. For example, the tenant of a vineyard cannot demand an abatement of his rent for the loss caused by frost, blight or hail, unless it was an extraordinary frost or hail storm that caused the total loss of the fruits."[1]

contrat, ou lorsqu'elle ne se trouve pas au même état qu'elle était lors du contrat; quand ce qui manque de la chose, ou quand le changement, qui est arrivé dans la chose, est tel que le conducteur n'eût pas voulu prendre cette chose à loyer, si elle se fût trouvée telle qu'elle est devenue depuis; en ce cas, le conducteur est bien fondé à refuser de recevoir la chose, et à demander la résolution du contrat. Cela a lieu, quand même ce serait par une force majeure survenue depuis le contrat, que la chose ne se trouverait plus entière, ou se trouverait détruite; comme, par exemple, si, depuis le contrat, le feu du ciel avait brûlé une partie considérable de la maison que vous m'aviez louée, et que ce qui en reste ne fût pas suffisant pour m'y loger avec ma famille; ou si une prairie, que vous m'aviez louée, avait été inondée par un débordement de rivière, lequel y a laissé un mauvais limon qui en a gâté l'herbe; mais, dans ce cas, je ne pourrais demander que la résolution du marché, sans pouvoir prétendre aucuns dommages et intérêts pour son inexécution."

[1] "PREMIER PRINCIPE. Le conducteur, locataire ou fermier, doit avoir la remise du loyer pour le tout, lorsque le locateur n'a pu lui procurer la jouissance ou l'usage de la chose louée."

Contrat de Louage, nos. 139–163. See also nos. 309, 477; Introduction aux Coutumes d'Orléans, tit. 19, nos. 17–22.

The Civil Code of Louisiana affirms the same general principles. A lease is defined to be a contract by which "one party gives to the other the enjoyment of a thing" at a fixed price. Art. 2669 (2639). "He who grants a lease is called the *owner* or *lessor*. He to whom the lease is made is called the *lessee* or *tenant*." Art. 2677 (2647). "The lessor is bound, from the very nature of the contract, and without any clause to that effect: 1. To deliver the thing leased to the lessee. 2. To maintain the thing in a condition such as to serve for the use for which it is hired. 3. To cause the lessee to be in peaceable possession of the thing during the continuance of the lease." Art. 2692 (2662). "The lessor is bound to deliver the thing in good condition and free from any repairs. He ought to make, during the continuance of the lease, all the repairs which may accidentally become necessary, except those which the tenant is bound to make, as hereafter directed." Art. 2693 (2663). "The lessor guarantees the lessee against all the vices and defects of the thing which may prevent its being used," even if unknown to the lessor at the time of making the lease, or arising since, if they do not arise from the fault of the lessee; and to indemnify him for any loss result-

"Sixième principe. Lorsque le conducteur n'a pas été privé absolument de la jouissance de la chose, mais que, par un accident imprévu, sa jouissance a souffert une altération et une diminution très considérable, il peut demander une diminution proportionnée dans le loyer, depuis le temps que sa jouissance a souffert cette diminution."

"153. Suivant les principes proposés au paragraphe premier, lorsqu'un fermier a été, par une force majeure, privé de pouvoir recueillir les fruits de quelqu'une des années de son bail; *putà*, si un parti ennemi a fourragé tous les blés encore en herbe de la terre qu'il tient à ferme, ou si tous les fruits, qui étaient encore sur pied, ont péri par une inondation de rivière, par un essaim de sauterelles, ou par quelque accident semblable; en tous ces cas, le fermier doit avoir remise de l'année de ferme."

"163. Il faut que l'accident, qui a causé une perte considérable des fruits, soit un accident extraordinaire, et non pas de ces accidents ordinaires et fréquens auxquels un fermier doit s'attendre. Par exemple, le fermier d'une vigne ne doit pas demander une remise de sa ferme pour la perte qu'a causée la gelée, la coulure ou la grêle, à moins que ce ne fût une gelée ou une grêle extraordinaire qui eût causé la perte totale des fruits."

ing from them. Art. 2695 (2665). "The lessee is bound: 1. To enjoy the thing leased as a good administrator, according to the use for which it was intended by the lease. 2. To pay the rent at the terms agreed on." Art. 2710 (2680). The repairs which the tenant is bound to make are mere petty repairs inside a house, and repairs of windows, including "replacing window glass, when broken accidentally, but not when broken, either in whole or in their greatest part, by a hail storm or by any other inevitable accident." Art. 2716 (2686). "The expenses of the repairs which unforeseen events or decay may render necessary must be supported by the lessor, though such repairs be of the nature of those which are usually done by the lessee." Art. 2717 (2687). "The lessee is only liable for the injuries and losses sustained through his own fault." Art. 2721 (2691). And the lease "is dissolved by the loss of the thing leased." Art. 2728 (2699).

The above articles of the Codes of 1825 and 1870, with only verbal differences, and in the same order, are all to be found in the Louisiana Code of 1808,[1] and all of them, (except that which designates the parties, and the two last above quoted, which are but repetitions or corollaries of the others,) in the Code Napoleon;[2] and the books, titles and chapters, under which the various matters are arranged in the Code of 1808, correspond for the most part to those of the Code Napoleon of 1807, or Code Civil des Français of 1804, and still more closely to those of the *projet* or commissioners' report of that code, which had been published in 1801. 2 Discussions du Code Civil, 536, note. Chief Justice Martin states that in 1807, when the first Civil Code of Louisiana was reported to the territorial legislature by Moreau Lislet and Brown, no copy of the French Code had as yet reached New Orleans; "and the gentlemen availed themselves of the project of that work, the arrangement of which they adopted, and *mutatis mutandis* literally transcribed a considerable portion of it." 2 Martin's History of Louisiana, 291. The provisions of the laws of Spain, as they formerly existed in Louisiana, upon the

[1] Louisiana Code of 1808, lib. 3, tit. 8, arts. 2, 6, 17–19, 26, 30, 31, 35, 40.

[2] Code Napoleon, arts. 1709, 1719–1721, 1728, 1754, 1755.

subject before us, were quite different in their details. Asso and Manuel's Institutes, lib. 2, tit. 14; 1 White's Land Laws, 201–204; 5 Partidas, tit. 8, ll. 1, 4–7, 18–24; Schmidt's Law of Spain and Mexico, 163–170. It is manifest, therefore, that the language of these provisions of the Louisiana Code was taken from the French Code.

The Codes of 1825 and 1870 also contain the following article:

"Art. 2697 (2667). If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price, or a revocation of the lease. In neither case has he any claim for damages."[1]

This article was in a more condensed form in the Code of 1808, lib. 3, tit. 8, art. 20, namely: "If by any accident, the thing leased should be either totally or partly destroyed, the lessee may, according to the nature of the case, either claim a diminution of the rent or the cancelling of the lease, but he cannot claim to be indemnified."[2]

As it now stands, it has been restored to the very words of the corresponding article 1722 of the Code Napoleon, except in omitting the words "according to circumstances," *suivant les circonstances*, as affecting the claim of the lessee in the case of partial destruction, which were in that article, as well as in the Code of 1808; and in inserting the words "or if it be taken for a purpose of public utility," which were not expressed in the Code Napoleon, but would doubtless be implied, for a taking of property for the public use was always deemed

[1] Also in French, in the Code of 1825: "Si, pendant la durée du bail, la chose louée est détruite en totalité par cas fortuit, ou est prise pour un objet d'utilité publique, le bail est résilié de plein droit. Si elle n'est détruite qu'en partie, le preneur a le choix de demander une diminution de prix, ou la résiliation du bail. Dans l'un et l'autre cas, il n'y a lieu à aucun dédommagement."

[2] And in French: "Si, pendant la duree du bail, la chose louée est détruite, en tout ou en partie, par cas fortuit, le preneur peut, suivant les circonstances, demander, ou une diminution du prix, ou la résiliation du bail; mais sans aucun autre dédommagement."

a species of destruction by *vis major*. Pothier, Contrat de Louage, no. 65; 3 Duvergier, Droit Civil, no. 332.

The following article, not to be found in so many words in the Code Napoleon, or in the Louisiana Code of 1808, first appears in the Code of 1825:

"Art. 2699 (2669). If, without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded, as if a neighbor, by raising his walls, shall intercept the light of a house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity."[1]

But this article, too, only affirms a reasonable, if not necessary, construction of article 2697 (2667); for the lessor being held to warrant that the lessee shall enjoy the property for the use for which it was leased, any cause which makes his enjoyment impossible has the same effect as if it destroyed the property. This is clearly shown by Ulpian and by Pothier, in the various passages above referred to. So Troplong says, that if the *vis major* lets the thing exist in whole and in all its parts, but prevents the lessee from taking or keeping the enjoyment, this case does not come exactly within the letter of article 1722 of the Code Napoleon; but the spirit should give life to the text, *mais l'esprit doit venir vivifier le texte;* and it is certain that this case of *vis major* would give an opening for an annulment of the lease or an abatement of the rent. Troplong, Droit Civil, no. 225. See also 6 Marcadé, 450; *Bowditch* v. *Heation*, 22 La. Ann. 356. From the earliest times, also, the building up by a neighbor so as to darken the lights of a house leased was held to entitle the tenant to relief. Dig. 19, 2, 25, 2; Domat, pt. 1, lib. 1, tit. 4, sect. 3, no. 6; Pothier, Contrat de Louage, no. 325.

Under articles 2697 (2667) and 2699 (2669) of the Louisiana Code, as under article 1722 of the Code Napoleon, it is not, of

[1] And in French, in the Code of 1825: "Si la chose cesse, sans le fait du bailleur, d'être propre à l'usage pour lequel elle était louée, ou si l'usage en est devenu très incommode, comme si un voisin, en élevant ses murs, intercepte les jours de la maison louée, le preneur peut, suivant le cas, obtenir la résiliation du bail: mais il ne lui est dû aucune indemnité."

course, every destruction of part of the thing leased, or injury to its fitness for the use for which it was leased, by an unforeseen event or *cas fortuit*, that entitles the lessee to have the lease annulled; and it is for the court to decide whether the destruction or the injury is grave enough. But if by such an event an important part of the property is destroyed, or the property is made unfit for its destined use, the lessee has the right to elect the annulment of the lease, and is not obliged to be satisfied with an abatement of the rent. Troplong, nos. 202, 213; 30 Dalloz, Louage, nos. 200–202; 6 Marcadé, 448; 25 Laurent, Droit Civil, arts. 402–404.

The learned counsel for the defendant much relied on some dicta of Louisiana judges to the effect that the law of the State does not favor the abrogation of a lease when the loss or inconvenience is not caused by the fault of the lessor. *Dussnau* v. *Generis*, 6 La. Ann. 279; *Denman* v. *Lopez*, 12 La. Ann. 823; *Foucher* v. *Choppin*, 17 La. Ann. 321; *Penn* v. *Kearny*, 21 La. Ann. 21, 23. But such dicta cannot be understood as laying down a general rule, in opposition to the express words of articles 2697 (2667) and 2699 (2669) of the Civil Code. The circumstances of each of the cases in which they were uttered were quite different from those before us; in two of them the injury or inconvenience was comparatively unimportant; and in the other two the tenant had not surrendered the lease, but remained in possession. In a later case than any of these, which was one of partial destruction by fire of a building in a city, the court held that under article 2697 (2667) the lessee, although he might, if he pleased, have the rent abated, had a perfect right to elect to have the whole lease annulled. *Higgins* v. *Wilner*, 26 La. Ann. 544.

All the articles, already cited, except perhaps those regarding tenant's repairs, clearly apply to farms and plantations as well as to houses; for one of the first articles of the Louisiana Code on the subject of leases declares, "The letting out of things is of two kinds, to wit: 1. The letting out houses and movables. 2. The letting out predial or country estates." Art. 2676 (2646); Code of 1808, lib. 3, tit. 8, art. 4. And the corresponding articles in the Code Napoleon, excepting the

introductory definitions, are placed under the heading "Of the rules common to leases of houses and of rural property;" those as to tenant's repairs being placed under the heading "Of the rules peculiar to leases for hire," that is to say, of houses and furniture.

The Louisiana Code of 1808, lib. 3, tit. 8, art. 54, as well as each of the subsequent codes, contains the following article relating to rural or predial estates only:

"Art. 2743 (2714). The tenant of a predial estate cannot claim an abatement of the rent, under the plea that, during the lease, either the whole or a part of his crop has been destroyed by accidents, unless those accidents be of such an extraordinary nature that they could not have been foreseen by either of the parties at the time the contract was made, such as the ravages of war extending over a country then at peace, and where no person entertained any apprehension of being exposed to invasion, or the like.

"But even in these cases, the loss suffered must have been equal to the value of one half of the crop at least, to entitle the tenant to an abatement of the rent.

"The tenant has no right to an abatement, if it is stipulated in the contract that the tenant shall run all the chances of all foreseen and unforeseen accidents." [1]

To this the following article was added in the Code of 1825:

"Art. 2744 (2715). The tenant cannot obtain an abatement, when the loss of the fruit takes place after its separation from the earth, unless the lease give to the proprietor a portion of

[1] And in French, in the Codes of 1808 and 1825:

"Le fermier d'un bien rural ou de campagne ne peut obtenir aucune remise sur le prix du bail sous prétexte que, pendant la durée de son bail, la totalité, ou partie de sa récolte, lui aurait été enlevée par des cas fortuits, si ce n'est que ces cas fortuits fussent d'une nature extraordinaire, et dont l'événement n'a pu raisonnablement être prévu, ou supposé par les parties, lors du contrat, tels que les ravages de la guerre au milieu d'un pays qui était en paix, et où l'on devait se croire naturellement à l'abri de toute invasion, et autres cas semblables.

"Encore, pour obtenir cette remise, faut-il que la perte éprouvée soit au moins de la moitié de la récolte, et que le preneur ne soit pas chargé par le bail de tous les cas prévus ou imprévus."

the crop in kind; in which case the proprietor ought to bear his share of the loss, provided the tenant has committed no unreasonable delay in delivering his portion of the crop." [1]

These articles take the place of several articles contained in the Code Napoleon, under the heading "Of the rules peculiar to leases of rural property," of which the following is a translation: [2]

"1769. If the lease is made for several years, and if, during the continuance of the lease, the whole or at least the half of a crop is destroyed by accidents, the tenant may demand an abatement of the rent, unless he is indemnified by the preceding harvests. If he is not indemnified, the estimate of the abatement can only take place at the end of the lease, at which time an account is taken of all the years of enjoyment; and nevertheless the judge may provisionally relieve the tenant from paying a part of the rent, by reason of the loss suffered.

"1770. If the lease is only for one year, and the loss is of the whole of the fruits, or at least of the half, the tenant shall

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[1] And in French: "Le fermier ne peut obtenir de remise, lorsque la perte des fruits arrive après qu'ils sont séparés de la terre, à moins que le bail ne donne au propriétaire une quotité de la récolte en nature; auquel cas le propriétaire doit supporter sa part de la perte, pourvu que le preneur ne fût pas en demeure de lui délivrer sa portion de récolte."

[2] The original text is as follows:

"1769. Si le bail est fait pour plusieurs années, et que, pendant la durée du bail, la totalité ou la moitié d'une récolte au moins soit enlevée par des cas fortuits, le fermier peut demander une remise du prix de sa location, à moins qu'il ne soit indemnisé par les récoltes précédentes. S'il n'est pas indemnisé, l'estimation de la remise ne peut avoir lieu qu'à la fin du bail, auquel temps il se fait une compensation de toutes les années de jouissance; et cependant le juge peut provisoirement dispenser le preneur de payer une partie du prix, en raison de la perte soufferte.

"1770. Si le bail n'est que d'une année, et que la perte soit de la totalité des fruits, ou au moins de la moitié, le preneur sera déchargé d'une partie proportionnelle du prix de la location. Il ne pourra prétendre aucune remise, si la perte est moindre de moitié.

"1771. Le fermier ne peut obtenir de remise, lorsque la perte des fruits arrive après qu'ils sont séparés de la terre, à moins que le bail ne donne au propriétaire une quotité de la récolte en nature; auquel cas le propriétaire doit supporter sa part de la perte, pourvu que le preneur ne fût pas en demeure de lui délivrer sa portion de récolte. Le fermier ne peut égale-

be discharged from a proportional part of the rent. He cannot claim any abatement, if the loss is less than half.

"1771. The tenant cannot obtain an abatement, when the loss of the fruits takes place after they are severed from the land, unless the lease gives to the landlord a portion of the crop in kind; in which case the landlord ought to bear his part of the loss, provided the tenant has not been guilty of unreasonable delay in delivering to him his portion of crop. Likewise, the tenant cannot demand an abatement, when the cause of the damage was in existence and known at the time when the lease was made.

"1772. The tenant may be charged with accidents by an express stipulation.

"1773. That stipulation is understood of ordinary accidents only, such as hail, lightning, frost or blight. It is not understood of extraordinary accidents, such as the ravages of war, or an inundation, to which the country is not ordinarily subject, unless the lessee has been charged with all accidents, foreseen or not foreseen."

The last clause of article 2743 (2714) of the Louisiana Code was evidently taken from articles 1772 and 1773 of the Code Napoleon. The rest of the article was apparently derived from the view expressed by Pothier in his Contrat de Louage, no. 163, above quoted, which, as has been pointed out by the commentators on the Code Napoleon, was rejected by the framers of that code. Troplong, no. 710; 4 Duvergier, no. 183; 9 Duranton, 261. And article 2744 (2715) is copied word for word from so much of article 1771 of the Code Napoleon.

The decision of the present case mainly depends upon the true construction of articles 2697 (2667) and 2699 (2669) taken

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ment demander une remise, lorsque la cause du dommage était existante et connue à l'époque où le bail a été passé.

"1772. Le preneur peut être chargé des cas fortuits par une stipulation expresse.

"1773. Cette stipulation ne s'entend que des cas fortuits ordinaires, tels que grêle, feu du ciel, gelée ou coulure. Elle ne s'entend pas des cas fortuits extraordinaires, tels que les ravages de la guerre, ou une inondation, auxquels le pays n'est pas ordinairement sujet, à moins que le preneur n'ait été chargé de tous les cas fortuits, prévus ou imprévus."

in connection with article 2743 (2714) of the Civil Code of Louisiana. But before proceeding to the particular examination of these articles, some other general considerations should be adverted to.

The ordinary rules of interpretation of statutes are applicable to the Louisiana Code.

The Code itself lays down as rules for "the application and construction of laws," that "where the words of a law are dubious, their meaning may be sought by examining the context, with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning;" that "laws *in pari materia*, or upon the same subject matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another;" and that "the most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it." Arts. 16–18 (16–18); Code of 1808, prel. tit. arts. 16–18.

In the same spirit Chief Justice Eustis said: "A statute must be construed with reference to its object, to the legislation and system of which it forms a part, in order to ascertain its true meaning and intent; and if its purpose and well ascertained object are inconsistent with the precise words of a part, the latter must yield to the paramount and controlling influence of the will of the legislature resulting from the whole." *Commercial Bank* v. *Foster*, 5 La. Ann. 516, 517. And in *Childers* v. *Johnson*, 6 La. Ann. 634, 638, the court said: "It is a sound rule of interpretation, in construing an article of the Code with reference to a subject matter, to take into view the general system of legislation upon the subject matter, contained in the same work; and where a provision of the Code is invoked in derogation of the common rule regulating the subject matter, the intention so to derogate should be clear and beyond reasonable doubt. If an interpretation can be given to the particular article, which, without doing violence to its terms, will make it harmonize with the general rules and the other provisions of the Code regulating the subject matter, such interpretation should be adopted."

Opinion of the Court.

It is to be remembered that the Louisiana Code, as it was originally enacted in 1808, and as it was again promulgated in 1825, and remained in force until 1870, was in French as well as in English. The Code of 1808, enacted before the admission of the State of Louisiana into the Union, was entitled "A Digest of the Civil Laws now in force in the Territory of Orleans, with alterations and amendments adapted to its present system of government;" and the act of March 31, 1808, c. 29, declaring and proclaiming it to be in force in that territory, was published in both languages, and provided that "if, in any of the dispositions contained in the said digest, there should be found any obscurity or ambiguity, fault or omission, both the English and French texts shall be consulted, and shall mutually serve to the interpretation of [the] one and the other."[1] 2 Martin's Digest, 98, 99.

The Constitution of the State of Louisiana, ever since its admission into the Union, has provided that all laws shall be promulgated in the language in which the Constitution of the United States is written. Constitutions of 1812, art. 6, § 15; 1845, art. 103; 1852, art. 100; 1864, art. 103; 1868, art. 103. The constitutions of 1845 and 1852 also contained provisions, that "the secretary of the senate and clerk of the house of representatives shall be conversant with the French and English languages, and members may address either house in the French or English language;" that "the Constitution and laws of this state shall be promulgated in the English and French languages;" and that any amendment of the Constitution, proposed by the legislature, should be published in French and English before being submitted to the vote of the people. Constitutions of 1845, arts. 104, 132, 140; 1852, arts. 101, 129, 141. These provisions were omitted in the constitutions of 1864 and 1868; and the Code of 1870 was promulgated in English only.

But it is a familiar canon of interpretation, that all former

[1] In French: "Si, dans quelqu'une des dispositions contenues dans ledit digeste, il se trouve quelque obscurité ou ambiguité, ou quelque faute ou omission, les deux textes Anglais et Français seront consultés pour s'interpréter mutuellement."

statutes on the same subject, whether repealed or unrepealed, may be considered in construing the provisions that remain in force. *Bank for Savings* v. *Collector*, 3 Wall. 495; *Ex parte Crow Dog*, 109 U. S. 556, 561. The reasons are no less strong for referring to former statutes, embodied in a code of laws, to aid in the interpretation of that code. *Bank of Louisiana* v. *Farrar*, 1 La. Ann. 49, 54; *United States* v. *Bowen*, 100 U. S. 508, 513; *Myer* v. *Car Co.*, 102 U. S. 1, 11; *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642; *Baldwin* v. *Franks*, *ante*, 678. And the Supreme Court of Louisiana has always held that in construing those parts of the Code which reënact provisions originally enacted in both languages, both texts may be taken into consideration to aid in ascertaining their meaning as parts of one law; and obscurities or ambiguities in the English text have often been cleared up by referring to the greater precision of the French text; although, if the two texts cannot be reconciled, the English must prevail. *Hudson* v. *Grieve*, 1 Martin, 143; *State* v. *Dupuy*, 2 Martin, 177; *Breedlove* v. *Turner*, 9 Martin, 353; *Chretien* v. *Theard*, 2 Martin (N. S.) 582; *Borel* v. *Borel*, 3 Louisiana, 30; *Durnford* v. *Clark's Estate*, 3 Louisiana, 199, 202; *State* v. *Moore*, 8 Rob. La. 518; *State* v. *Mix*, 8 Rob. La. 549; *State* v. *Ellis*, 12 La. Ann. 390; *State* v. *Judge of Eighth District Court*, 22 La. Ann. 581; *Lafourche* v. *Terrebonne*, 34 La. Ann. 1230, 1233.

This accords with the judgment of this court in a case arising under the treaty of 1819, by which Spain ceded Florida to the United States, which was drawn up in Spanish as well as in English; the English part declaring that grants of lands previously made by the king of Spain "shall be ratified and confirmed to the persons in possession;" and the corresponding clause of the Spanish part declaring that such grants "shall remain ratified and confirmed" to the persons in possession. 8 Stat. 258, 259. Chief Justice Marshall said: "The treaty was drawn up in the Spanish as well as in the English language. Both are originals, and were unquestionably intended by the parties to be identical." "If the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail.

If, as we think must be admitted, the security of private property was intended by the parties; if this security would have been complete without the article, the United States could have no motive for insisting on the interposition of the government in order to give validity to the titles which, according to the usages of the civilized world, were already valid. No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words 'shall be ratified and confirmed' are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they 'shall be ratified and confirmed' by the force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable." *United States* v. *Percheman*, 7 Pet. 51, 88, 89.

Upon a comparison of the English text with the French of so much of the Louisiana Code as bears upon this case, the greater uniformity and precision of the French text, and its striking resemblance to the Code Napoleon, make it quite clear that the French is the original and the English the translation. Moreover, in the concluding article 3556 (3522) of verbal definitions, the French words in the Code of 1825 are arranged alphabetically, with the English equivalent opposite each one, regardless of its own alphabetical order. In the French column, "*Cas fortuits*" are defined as "*Evénemens occasionés par une force à laquelle on ne peut pas résister*," or events caused by a force that one cannot resist; opposite to which in the English column is, "Fortuitous event is that which happens by a cause which we cannot resist." But on turning back to the other articles, we find the French "*cas fortuit*" rendered in English in various ways; as "unforeseen event," [1] as "unforeseen accident," [2] as "fortuitous event," [3] as "fortuitous accident," [4] as "accident," [5] and as "chance." [6] In one place, "*cas fortuit ou force majeure*" is rendered "fortuitous event or

[1] Art. (2667).
[2] Art. (2756).
[3] Arts. (2290) (2445) (2511).
[4] Art. (2216).
[5] Arts. (2714) (563).
[6] Arts. (571) (2870) (2871) (2872).

irresistible force,"[1] and in another, "accidental and uncontrollable events;"[2] thus treating the two alternative expressions as synonymous. In the concluding article, also, "*Force*" is defined, both in French and in English, as "the effect of a power which cannot be resisted;" and "*Force majeure*," *vis major*, as "*un fait, un accident que la prudence humaine ne peut ni prévoir ni empêcher*," or a fact or accident which human prudence can neither foresee nor prevent — with a corresponding definition of the English equivalent, "Superior force." "*Force majeure*" is also rendered in different places "unforeseen events,"[3] "overpowering force,"[4] and "force,"[5] only; "*événement de force majeure*" as "accident;"[6] and "*accidens de force majeure*" as "inevitable accident."[7] It cannot be doubted, therefore, that the words "unforeseen event" and "accident," as used in the articles now under consideration, have the meaning of "fortuitous event" or "irresistible force."

The Louisiana Code, following the French law and the Code Napoleon, recognizes two kinds or degrees of what, under various but equivalent names, has been called *vis major*, *cas fortuit*, irresistible force, inevitable accident, or unforeseen event; the one, ordinary, which might have been foreseen by any man of common prudence as not unlikely to happen at some time; the other, extraordinary, which could not have been foreseen, or expected to occur at any time. The distinction is clearly stated by Domat, and more fully brought out by the commentators on the Code Napoleon; and, as those commentators have clearly shown, the words "*prévus ou imprévus*," as used in speaking of express stipulations by the tenant, literally, "foreseen or unforeseen," respectively mean in this connection those which could have been foreseen as likely to happen, and those which could not have been so foreseen. Domat, pt. 1, lib. 1, tit. 4, sect. 4, no. 6; Troplong, nos. 204, 211, 756; 4 Duvergier, no. 182; 6 Marcadé, 508. The concurrent opinions of the French jurists upon the meaning of the French Code are of the greatest weight in the interpretation of similar pro-

[1] Art. (1927). [3] Art. (2687). [5] Art. (2917). [7] Art. (2686).
[2] Art. (2725). [4] Art. (2910). [6] Art. (783).

visions in the Code of Louisiana. *Johnson* v. *Bloodworth*, 12 La. Ann. 699, 701.

The general purpose and the common rule of the civil law, as expressed in the Code of Louisiana, are that the lessor shall secure to the lessee the possession, use and enjoyment of the thing leased, against everything but the fault of the latter; and that any loss of the thing, or deprivation of its use or enjoyment, by accidents or fortuitous events, shall be borne by the lessor and not by the lessee. This appears from the general provisions in the articles above quoted, by which the lessor is bound, from the very nature of the contract of lease, and without any clause to that effect, not only to deliver the thing leased to the lessee, but also to maintain it in such a condition as to serve the purpose for which it is leased, to cause the lessee to be in peaceable possession of the thing during the continuance of the lease, to make, during its continuance, all repairs, except some petty internal ones, and to make even those when rendered necessary by unforeseen events; as well as by articles 2697 (2667) and 2699 (2669), which apply both to country estates and to town houses, and entitle the lessee, whenever by a fortuitous event, and without his fault, the thing is either destroyed, or ceases to be fit for the purpose for which it has been leased, or its use is much impeded, to demand the annulment of the lease, and if it is only destroyed in part, to demand either a revocation of the lease or a diminution of the rent.

Article 2743 (2714) is in derogation of this general purpose and common rule, and is therefore to be strictly construed.

A comparison of the language of articles 2697 (2667) and 2699 (2669) with that of article 2743 (2714) discloses substantial differences between the former and the latter, in the cause of injury, in the thing injured, and in the form of relief, of which they speak. It will be convenient to consider these three points of difference in the inverse order.

First. As to the form of relief: Articles 2697 (2667) and 2699 (2669) deal wholly with the ending, revocation or annulment of the lease, except that in the case of a partial destruction of the thing leased the alternative of a diminution of rent

is permitted. But article 2743 (2714) relates to the abatement of rent only, and does not affect the right of the lessee to have the lease annulled.

The case of a tenant demanding an abatement of rent, while retaining his lease, and thereby reserving the opportunity of reaping profits during the rest of the term, stands on quite different ground from the case of a tenant seeking to annul the lease, and thus to give up all prospective benefits at the same time that he is relieved from all burdens.

Second. The injuries spoken of in articles 2697 (2667) and 2699 (2669) are the total or partial destruction of the thing leased, or its ceasing to be fit for the purpose for which it was leased. But article 2743 (2714) is limited to a destruction of the crop only.

There is no doubt that by the civil law, as by the common law, crops, so long as they are standing and ungathered, are part of the land to which they are attached. Louisiana Code, art. 465 (456); Code of 1808, lib. 2, tit. 1, art. 17; Code Napoleon, art. 520; Pothier, de la Communauté, no. 45. In strictness of principle, the title of the standing crops, as of the land on which they stand, would be in the landlord, and a destruction of the crops might have been considered as a partial destruction of the land itself, within article 2697 (2667) of the Louisiana Code, and article 1722 of the Code Napoleon, if no special provision as to the crops had been added; and such was the opinion of Troplong. Troplong, nos. 695–697. On the other hand, it might be considered that as the lessor only warranted to the tenant the enjoyment of the thing leased, that is to say, the possibility of enjoying it, and did not warrant to him the fruits of the enjoyment, a destruction of the crops only, not injuring the capacity of the land to produce other crops, ought not to considered as a destruction or injury of the thing leased. 25 Laurent, no. 455. The framers of either code have solved the difficulty by making special provisions with relation to the loss of a crop by fortuitous events, without otherwise modifying the previous articles which establish the rules applicable to a destruction, by such events, of the property itself, or of its capacity for the use for which it

was leased. One of the principal commentators on the Code Napoleon. after stating the well established construction, above mentioned, that a general stipulation by the tenant against accidents is to be understood of ordinary, and not of extraordinary accidents, says that for the same reason if the tenant assumes the risk, either of ordinary accidents, or of all accidents whatsoever even if extraordinary, he must be understood (unless a different intention is clearly manifested) to stipulate against accidents causing a loss of the crops only, and not against those which deprive him of the use and enjoyment of the property itself. 6 Marcadé, 508.

Third. The contingencies guarded against in articles 2697 (2667) and 2699 (2669) include any unforeseen event, (meaning thereby, as we have seen, any fortuitous event or irresistible force,) whether ordinary or extraordinary, one that might have been foreseen, as well as one that could not have been foreseen. But in article 2743 (2714) the only accidents relieved against are those "of such an extraordinary nature that they could not have been foreseen by either of the parties at the time the contract was made."

Under this article, the Supreme Court of Louisiana in 1861 refused to allow to the tenant of a predial estate an abatement of the stipulated rent, on account of the destruction of his crop by an overflow of the Mississippi River, and gave the following reasons for the decision: "The overflow of the Mississippi River is of such frequent occurrence, that it cannot be regarded as belonging to that class of extraordinary and unforeseen accidents which entitle the tenant of a predial estate to an abatement of rent. Indeed, the overflows of this river are so frequent, that a system of levees has been constructed under the authority of the State, for the purpose of preventing, we may say, the annual inundation of its banks; and so frequently have the waters of this river made breaches in the levees, that even a crevasse itself cannot be considered as an extraordinary accident in the sense of article 2714 of the code, and as such entitle the tenant of a predial estate to a reduction of the stipulated rent, although such crevasse should be the means of overflowing the land leased by the tenant, and thereby de-

stroying a part or the whole of his crop. The periodical overflow of the waters of a river is not an extraordinary accident; and if a party seeks to give to an inundation that character, he must show that it was unusual, unforeseen, and one to which the country was not ordinarily subjected. See Troplong, du Louage, nos. 207, 211. The frequency of overflows and crevasses on the Mississippi River is not disputed in this case, but is, on the other hand, sufficiently established by the evidence." *Vinson* v. *Graves*, 16 La. Ann. 162. That decision has since been followed, without further discussion. *Masson* v. *Murray*, 21 La. Ann. 535; *Jackson* v. *Michie*, 33 La. Ann. 723.

But the utmost extent of those decisions is, that neither an overflow of the Mississippi River, nor even a crevasse, is an "extraordinary and unforeseen accident," for a destruction of a crop caused by which the tenant can have an abatement of rent under article 2743 (2714). That the court did not intend to imply, that such an overflow or crevasse was not an unforeseen accident at all, clearly appears by the carefully guarded language of the opinion in *Vinson* v. *Graves*, as well as by the reference in that opinion to the passages of Troplong in which the violence of a river leaving its bed is classed, with earthquakes and extraordinary snows or rains, as a *cas fortuit*, and is distinguished from the usual rains and snows, and risings of rivers, which necessarily occur in the order of the seasons, and the view of earlier jurists is approved, which divides accidents into accustomed and unaccustomed, ordinary and extraordinary. Troplong, nos. 206, 207, 211. The civilians generally class an inundation under *vis major* or *cas fortuit*. Ulpian and Domat, *ubi supra;* 5 Partidas, tit. 8, l. 22; 4 Duvergier, no. 183; 9 Duranton, 261. And Pothier, in a passage already quoted, states the case of the overflow of a field by a river, leaving a deposit that spoils the grass, as one of those in which the tenant is entitled to have the lease annulled. Contrat de Louage, no. 74.

The annual rise and overflow of a river may doubtless in some countries and places be considered as one of the things that necessarily occur in the order of the seasons. But the

bursting of a river through its natural banks or through artificial dikes must generally be regarded as an accident or *cas fortuit*, ordinary or extraordinary, according to the frequency or infrequency with which it takes place in the tract of country in question. In France, "an inundation, to which the country is not ordinarily subject," is expressly ranged, in article 1773 of the Code Napoleon, before quoted, with the ravages of war, under extraordinary accidents, *cas fortuits extraordinaires*. In Louisiana, the breaking of the Mississippi through the levees occurs so often that it is held not to be an extraordinary accident; but that does not take it out of the general class of accidents or unforeseen events, *cas fortuits*.

The breaking of a crevasse in the Louisiana levees by the waters of the Mississippi River, causing a plantation to be overflowed, must therefore be considered as a *cas fortuit*, a fortuitous or unforeseen event, within the meaning and scope of articles 2697 (2667) and 2699 (2669), entitling the lessee, if thereby the plantation is wholly or partly destroyed, or is rendered unfit for the purpose for which it was leased, to have the lease annulled; although it is not a *cas fortuit extraordinaire*, an extraordinary as well as an unforeseen accident, within the meaning of article 2743 (2714), so as to justify an abatement of rent if the crop only is destroyed.

In the case at bar, the thing leased is a sugar plantation, with the buildings, mules and implements necessary for the cultivation and making of sugar, and the growing crop of sugar cane. This crop is not sold to the lessee absolutely, with the right to use and consume it as he pleases; but it is leased to him as part of the plantation, and to be replanted on the plantation as seed cane; and he expressly binds himself to do this, as well as, by way of reimbursing the lessor for this cane, to leave a certain amount of growing cane on the plantation at the end of the lease. These stipulations as to the growing cane leased with the plantation, and the growing cane to be left on the plantation at the end of the lease, do not constitute a separate contract of exchange of one thing for another, under article 2660 (2630) of the Louisiana Code; or a letting of moveables, or of things which cannot be used without being destroyed

by the use, within the meaning of article 2678 (2648); or a payment of rent in a portion of the crop, under article 2671 (2641). But they are parts and incidents of the principal contract of lease into which the parties have entered; and that contract is the lease of one entire thing, a sugar plantation, with growing cane upon it, and otherwise fit for the cultivation of sugar, to be used and enjoyed as such by the lessee until the end of the lease, and then to be returned by him to the lessor in like condition, barring such accidents as may excuse the lessee from the performance of the contract on his part.

The material facts regarding the cultivation of sugar cane, as appearing by the evidence returned with the master's report, are these: Sugar cane is propagated by cutting standing cane and planting it as seed cane. The cane so cut from one acre will plant not more than three acres. The plants that spring up from the seed cane are called plant cane; the roots from which cane has been cut are called stubble; and the shoots which spring up in the following years from those roots are called rattoons (*rejetons*), and are cut for sugar in the two years succeeding the first cutting, after which it is usual to plant the ground anew.

It also appears that the plaintiff at once performed the obligation, expressly assumed by him in the lease, of cutting the standing cane leased to him with the plantation, and planting it as seed cane; and that, when this cane was a little above the ground, the inundation took place, the facts concerning which, as stated in the master's report, were as follows:

The lessee, upon entering into possession under the lease, in the autumn of 1883, found the plantation in bad condition for want of proper drainage, and, in order to prepare the ground for the cultivation of sugar, dug a new canal and enlarged and deepened the ditches. Early in the spring of 1884, the Mississippi River made a crevasse in the levees opposite a neighboring plantation, and the waters coming through the crevasse overflowed the plantation leased. By reason of the overflow, the lessee lost the entire crop of sugar cane of 1884, the two hundred acres of stubble cane and eighty-five acres of plant cane were destroyed, the canals and ditches were par-

tially, and in some places wholly, filled up, and the bridges generally swept away. The whole plantation remained under water for three months; and when the waters went down, they left a deposit of from three to six inches in depth. To put the plantation in the condition in which it was at the time of the crevasse, and to fit it for cultivation as a sugar plantation in 1885, would require the canals to be opened or cleaned out, ditches to be redug, the bridges replaced, and seed cane to be obtained, all at considerable expense.

Upon comparing the master's report with the evidence taken in the case, the above appears to be a fair statement of the material facts, except that the master would seem to have overstated the number of acres of stubble cane, and understated the number of acres of plant cane; but that is immaterial, since there is no question of the whole amount of cane destroyed, or of its having been all the cane on the plantation.

But we cannot concur in the conclusions of the master and of the Circuit Court, that the property was neither destroyed, nor rendered unfit for the purpose for which it was leased; that the loss of the growing crop and the injuries to the plantation were not caused by an "unforeseen event;" and that the plaintiff was not entitled to relief. As the case is on the equity side of the court, it is not important to consider how far those conclusions involved inferences of fact, and how far they consisted of matter of law.

The object of this suit is not to obtain an abatement of rent, under article 2743 (2714) of the Civil Code of Louisiana, on account of the destruction of the crop; but it is to have the lease annulled, under articles 2697 (2667) and 2699 (2669), because the plantation has been destroyed or rendered unfit for the purpose for which it was leased.

That the breaking in and overflow of the waters of the Mississippi River was a fortuitous and unforeseen event, within the meaning of these articles, necessarily results from the reasons already stated, which need not be recapitulated. The remaining question is whether that event destroyed the thing leased, or rendered it unfit for the purpose for which it was leased. This question lies in smaller compass.

The plaintiff had hardly put the plantation in a condition suitable for the cultivation of sugar cane, which was the sole purpose of the lease, and planted one crop, when the inundation came, putting the plantation under water for three months, filling up the canals and ditches necessary for its drainage, sweeping away the bridges, and leaving a deposit from three to six inches deep over the whole land, and making it necessary, in order to cultivate the thing leased as a sugar plantation the following year, to spend large sums of money to open and dig out canals and ditches and replace bridges; and also destroying all the stubble cane as well as all the plant cane, and leaving the plantation without any cane upon it, either to make sugar of, or to cut seed cane from for planting in succeeding years.

In short, the inundation left the thing leased in such a condition, that it was unfit for the purpose of a sugar plantation, for which it had been leased, and could not be made fit for that purpose without spending large sums of money to restore it to a condition fit for the cultivation of sugar cane, and to obtain seed cane elsewhere to start it afresh. It not only destroyed the whole crop for the year 1884, but it destroyed the plants which would otherwise have produced, both in that year and afterwards, cane for making sugar, as well as what was needed for seed cane, and destroyed the entire capacity of the plantation to grow cane and make sugar, until it should be restored to a condition fit for cultivation and planted anew. This was not a mere destruction of a crop for one year, like the destruction of a crop of wheat, or of grapes, or of apples; but it was more like the destruction of the vines, or of the apple trees, from which present and future crops are to be gathered.

Upon the whole case, we are of opinion that the lease being of a sugar plantation for the purpose of being used to cultivate sugar cane, the injuries proved to the plantation, and to its capacity for producing cane and sugar, amounted to a partial destruction of the plantation, or, what is the same thing in legal effect, to making it cease to be fit for the purpose for which it was leased; that those injuries were caused by a for-

tuitous or unforeseen event; and that under articles 2697 (2667) and 2699 (2669) of the Civil Code, construed in the light of the other articles that we have cited, and of the principles of the civil law, as established in Louisiana, the plaintiff was entitled to have the lease annulled. The decree of the court below dismissing the bill must therefore be reversed; and any equities of the parties which should affect the form of the decree may more conveniently be dealt with in that court.

Decree reversed, and case remanded to the Circuit Court with directions to take such further proceedings therein as may be in conformity with law, and not inconsistent with the opinion of this court.

EX PARTE PARKER.

ORIGINAL.

Argued March 7, 1887. — Decided March 21, 1887.

A statute of Washington Territory enacts that "a part of several co-parties may appeal or prosecute a writ of error; but in such case they must serve notice thereof upon all the other parties." One of two defendants in a cause served upon the other written notice, entitled in the cause, that he would, on a day therein named, "file a notice of appeal and stay-bond, and appeal said cause," and added, "You are herewith requested to join in said appeal." The other defendant answered in writing, "I hereby accept service of the above notice," "and decline to join in an appeal in said cause." *Held*, that this was an exact and effectual compliance with the provision of the statute.

A statute of Washington Territory relating to appeals provides that "in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the Supreme Court, and shall be so certified, not by transcript, but in the original form: but a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant." In an appeal in equity the appellant requested the clerk to "transmit to the Supreme Court all the papers filed in this

Counsel for Parties.

cause except subpœnas as by law provided." The cause had been referred to a referee, who had returned with his report and finding, five packages, numbered 1, 2, 3, 4, and 5, with a certificate that it was "the evidence written down before me and taken in said action, and that the same, with the documentary evidence returned herewith by me into court, constitutes the evidence submitted to and taken by me in said action." The clerk of the court transmitted these packages to the Supreme Court with a certificate that "the letters, papers, and exhibits herewith transmitted and numbered . . . are all the papers, letters, and evidence introduced in said cause before said referee, and by him deposited with the clerk of said court," and further certified that the transcript on appeal was a "full, true, and correct transcript of so much of the record . . . as I am by statute and directions of attorneys in said cause required to transmit to the Supreme Court." *Held,* that the certificates showed that the transcript contained all the evidence introduced by the parties on the trial below, and that the appeal had been duly taken and perfected.

The writ of mandamus properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof; but it will not lie to correct alleged error occurring in the exercise of its judicial discretion while acting within its jurisdiction. In this case it is ordered that the writ be issued.

This was a petition for a writ of mandamus to the Supreme Court of Washington Territory, directing that court to take jurisdiction of an appeal of which it had declined to take jurisdiction.

At October Term, 1885, motion was made for leave to file the petition. Leave was granted, and a motion was submitted for a rule to show cause. The rule issued, and, complete returns not having been made before the end of the term, it was continued. At this term a motion was made for a peremptory mandamus. The hearing on this motion was continued from time to time until complete returns were made, when the cause was argued. The case is stated in the opinion of the court.

Mr. Walter H. Smith for petitioner. *Mr. John H. Mitchell* and *Mr. Alfred G. Isham;* and *Mr. A. T. Britton*, *Mr. A. B. Browne* and *Mr. W. W. Upton* filed briefs for same.

M. J. H. Hoffecker, Jr., opposing. *Mr. John B. Allen* was with him on the brief.

Opinion of the Court.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is an application under § 688 of the Revised Statutes for a writ of mandamus, directed to the Supreme Court of Washington Territory, to reinstate an appeal from a decree of the District Court of the Territory for the First Judicial District, in a suit in equity wherein Elizabeth Denney, executrix of the estate of Timothy P. Denney, is plaintiff, and Hollon Parker and John F. Boyer are defendants. The decree in question was against each of the defendants severally, and the appeal was taken by the defendant Hollon Parker. Upon his petition heretofore filed a rule to show cause has been issued, to which the Chief Justice and Associate Justices of the Supreme Court of the Territory of Washington, on behalf of the court, have made and filed their return. They set forth that at the time the said Hollon Parker sought to appeal said cause referred to from said District Court to said Supreme Court of Washington Territory, the manner of taking such appeal was defined by § 458 of the Territorial Code, still in force, as follows:

"SEC. 458. An appeal or writ of error is taken by filing with the clerk of the court in which the judgment or order of the court appealed from is entered, a notice, stating the appeal from the same, or some specific part thereof, and serving a copy of said notice on the adverse party or his attorney. Every notice of appeal or writ of error must be signed by the party taking the same or his attorney of record, and must contain the title of the District Court in which the proceedings sought to be reviewed were had; the title of the cause as in the District Court; a particular description of the judgment, decree, or order sought to be reviewed; and in case of appeal, a particular description of every decision, ruling, order, or decree by which the appellant claims to have been aggrieved, and which he relies upon as grounds for a reversal or modification of the judgment, order, or decree; and in case of a writ of error, a particular description of the errors assigned."

The return further sets forth that the defendant, John F. Boyer, did not join in said appeal as an appellant, nor was he

made an appellee therein, as appears by the notice of appeal which is set out. This notice of appeal is entitled "In the District Court of the First Judicial District of the Territory," with the title of the cause, and is addressed to Timothy P. Denney, the plaintiff, James K. Kennedy, W. A. George, John B. Allen, and T. J. Anders, attorneys for plaintiff, and A. Reeves Ayres, clerk of the court, giving notice that the said Hollon Parker in the above entitled action "hereby appeals to the Supreme Court of Washington Territory from the decree and judgment therein made and entered in the District Court of the First Judicial District of Washington Territory, in and for Walla Walla County, in favor of the plaintiff, Timothy P. Denney, in said action, and against the defendants, Hollon Parker and John F. Boyer, and from the whole thereof, said decree and judgment rendered on the 31st day of March, 1882, against the defendants, Hollon Parker and John F. Boyer."

It is further stated in the return that no notice of appeal was served on Boyer, nor was service thereof waived by him. The statute of Washington Territory relative to co-parties on appeal is as follows:

"SEC. 454. A part of several co-parties may appeal or prosecute a writ of error; but in such case they must serve notice thereof upon all the other co-parties, and file the proof thereof with the clerk of the Supreme Court."

It is further set forth that § 464 of the Code of Washington Territory prescribed the only means by which, in a cause appealed to the Supreme Court of the Territory, the evidence upon which the same was tried could be certified to said Supreme Court. That section is as follows:

"SEC. 464. In an action by ordinary proceedings, and in an action by equitable proceedings, tried in whole or in part on oral testimony, all proper entries made by the clerk, and all papers pertaining to the cause and filed therein, except subpœnas, depositions, and other papers which are used as mere evidence, are to be deemed part of the record. But in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence, are to be certified up to the Supreme Court, and shall be so cer-

tified, not by transcript, but in the original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant. If so certified, when not material to the determination of the appeal or writ of error, the court may direct the person blamable therefor to pay the costs thereof."

It is further set forth that, accompanying a large quantity of written testimony, and a great number of detached papers in said cause, were two certificates, copies of which are, respectively, as follows:

"*Certificate of referee.*

"I, B. L. Sharpstein, referee in the case of Timothy P. Denney *v.* H. Parker and J. F. Boyer, do hereby certify that the foregoing evidence, consisting of five packages or bundles numbered one (1), two (2), three (3), four (4), and five (5) is the evidence written down before me and taken in said action, and that the same, with the documentary evidence returned herewith by me into court, constitute the evidence submitted to and taken by me in said action.

"Dated March 10, 1882. B. L. Sharpstein, *Referee.*"

"*Certificate of clerk.*

"I, A. Reeves Ayres, clerk of the District Court of Washington Territory and for the First Judicial District thereof, holding terms at Walla Walla, Walla Walla County, in said territory, do hereby certify that the five packages of testimony, herewith transmitted to the Supreme Court, and numbered by pages from 1 to 1572, is all the testimony in the case of Timothy P. Denney *v.* Hollon Parker and John F. Boyer as taken before B. L. Sharpstein, Esquire, referee in said case, and by him deposited with the clerk of said court; and I further certify that the letters, papers, and exhibits herewith transmitted and numbered in red ink figures from 1 to 130, respectively, are all the papers, letters, and evidence introduced in said cause before said referee, and by him deposited with the clerk of said court.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of June, 1883.

"[SEAL.] "A. REEVES AYRES, *Clerk*,
"By FRANK W. GOODHUE, *Deputy*,
"*U. S. District Court, First Judicial District,*
"*Walla Walla, Washington Territory.*"

The evidence in said cause was in no other manner authenticated.

It further appears that the said cause was docketed in the Supreme Court as upon the appeal of Hollon Parker. That after divers motions had been determined in said cause, the same was argued on the merits at the regular July Term, 1883, and taken under advisement; but before a decision had been reached, by an act of Congress, the organization of the Supreme Court of Washington Territory was so altered as to make the same consist of four justices, and as to disqualify the justice rendering a decision or judgment from sitting in the review thereof.

The death of the appellee was suggested, and due showing made, and thereupon Elizabeth Denney, executrix of the last will of Timothy P. Denney, deceased, was substituted as appellee, and thereupon the cause was again placed upon the docket of the Supreme Court for hearing at its regular July Term, 1885. At that time the appellee moved to dismiss the appeal on the grounds; first, that all the co-parties had not joined in said appeal, and had not been served with any notice of appeal; and, second, because no evidence was properly certified. After argument it was determined by the court and decided that each of the grounds in said motion was well taken; and thereupon, for want of jurisdiction to hear and determine the cause upon its merits, a final judgment of the court was entered that the appeal from the judgment of the said District Court be dismissed with costs.

Although the Supreme Court of Washington Territory rendered judgment in this case for costs against Parker, the appellant, it, nevertheless, dismissed his appeal for want of juris-

diction in that court to entertain it. There were two grounds alleged in the motion to dismiss, and in the opinion of the court giving its reasons for granting the same, on which it was contended and decided that Parker had failed to take the necessary preliminary steps to transfer his cause from the District Court to the Supreme Court of the territory. It was adjudged against him that he had not complied with the requisition of the law prescribing the conditions precedent to perfecting his appeal. The Supreme Court refused to hear the cause and to decide it upon its merits, because it considered that the cause was not lawfully before the court; that the parties were not in court for the purposes of an appeal. This presents a case for the exercise of the jurisdiction of this court in mandamus according to the principles and practice applicable thereto. That writ properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof; but it will not lie to correct alleged errors occurring in the exercise of its judicial discretion within its jurisdiction. As was said in *Ex parte Brown*, 116 U. S. 401, "Mandamus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction." In that case the motion for the writ was denied because the court below, having entertained jurisdiction of the cause, had dismissed it for want of due prosecution. That is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action; although the statement in the report does not sufficiently recite the facts from the record on which the opinion is based. In the present case, the Supreme Court of Washington Territory, on consideration, decided that it could not legally exercise jurisdiction upon the appeal of the petitioner Parker. The question for our determination is whether that decision was in conformity with law.

It appears from the record that on the 19th day of June, 1882, Parker addressed to his codefendant Boyer, a notice, in which, after setting out the title of the court and of the cause, it proceeds as follows:

"*To John F. Boyer, one of the defendants in the above-entitled cause:*

"You will please take notice that your codefendant, Hollon Parker, in the above-entitled action, will, on this the 19th day of June, 1882, file a notice of appeal and stay bond, and appeal said cause to the Supreme Court of Washington Territory, holding terms at Olympia, July Term, 1883, and you are herewith requested to join in said appeal."

This notice was duly signed and dated. Service of this notice was acknowledged in writing by Boyer, as follows:

"I hereby accept service of the above notice this 19th day of June, 1882, and decline to join in an appeal in said cause, wherein T. P. Denney is plaintiff and Hollon Parker and John F. Boyer are defendants."

It was held by the Supreme Court of the territory that this notice upon Boyer was not a sufficient compliance with § 454, because it was a notice of an intention to appeal, and not notice of an actual appeal. The language of that section, already quoted, is:

"SEC. 454. A part of several co-parties may appeal or prosecute a writ of error; but in such case they must serve notice thereof upon all the other co-parties and file a proof thereof with the clerk of the Supreme Court."

This was a notice of a present intention to appeal, with a request to Boyer, as a codefendant, to join in it. We cannot understand how it could more exactly and effectually comply with this section of the statute. If the required notice must be of an appeal already actually taken, then it is not a condition precedent to the perfecting of the appeal, and the failure to give it would not deprive the court of jurisdiction to proceed in the cause; but if the notice is a necessary prerequisite to perfecting the appeal, then it cannot be a notice of an appeal already taken. Besides which the codefendant Boyer expressly declined to join in the appeal, which, of itself, was a waiver of any further notice.

The other ground on which the court proceeded was that there was nothing in the transcript to certify to the court that

it had before it the whole of the evidence. Section 451 of the Code of Washington Territory is as follows:

"When a cause is tried by the court, it shall not be necessary, in order to secure a review of the same in the Supreme Court, that there should have been any finding of facts or conclusions of law stated in the record; but the Supreme Court shall hear and determine the same whenever it shall appear from a certificate of the judge, agreement of parties, or their attorneys, or, in case the evidence consists wholly of written testimony, from the certificate of the clerk, that the transcript contains all the evidence introduced by the parties on the trial in the court below."

By § 464, heretofore set out, it is provided that "in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the Supreme Court, and shall be so certified, not by transcript, but in the original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant. If so certified, when not material to the determination of the appeal or writ of error, the court may direct the person blamable to pay the costs thereof."

In this case the appellant, in writing, in his notice of appeal, gave the following direction to the clerk of the court:

"And you, the clerk of said court, will please transmit to the Supreme Court *all the papers filed* in this cause, (except subpœnas,) as by law provided in §§ 459 and 464, Code of 1881, together with your certificate, as provided in Rule 2 of the Supreme Court."

The cause, it will be remembered, while in the District Court had been referred to B. L. Sharpstein as a referee. The order of reference directed him to "take the evidence and a full accounting of said cause, and find the facts thereon, and that he report the same to this court," &c. The cause was heard by the District Court upon exceptions to the report of the referee, consisting of the testimony as returned by him, with his findings of fact thereon. The decree sought to be appealed from was based upon that report and the findings and conclu-

sions of the referee, the exceptions to which on behalf of Parker were overruled. The certificate of the referee returned into the District Court, and sent up to the Supreme Court as a part of the transcript by the clerk of the District Court, in pursuance of the appeal, was as follows:

"I, B. L. Sharpstein, referee in case of Timothy P. Denney *v.* H. Parker and J. F. Boyer, do hereby certify that the foregoing evidence, consisting of five packages or bundles, numbered one (1), two (2), three (3), four (4), five (5), is the evidence written down before me and taken in said action, and that the same, with the documentary evidence returned herewith by me into court, constitutes the evidence submitted to and taken by me in said action."

The clerk of the District Court stated in his certificate, contained in the transcript transmitted to the Supreme Court, "that the five packages of testimony herewith transmitted to the Supreme Court, and numbered by pages from 1 to 1572, is all the testimony in the case of Timothy P. Denney *v.* Hollon Parker and John F. Boyer, as taken before B. L. Sharpstein, Esquire, referee in said case, and by him deposited with the clerk of said court. And I further certify, that the letters, papers, and exhibits, herewith transmitted and numbered in ink figures from 1 to 130 respectively, are all the papers, letters, and evidence introduced in said cause before said referee, and by him deposited with the clerk of said court."

The transcript on appeal also was certified by the clerk, stating "that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute and directions of attorneys in said cause required to transmit to the Supreme Court."

It appears from these documents very clearly that nothing was omitted in the transcript by direction of attorneys except the subpœnas; that all the testimony introduced by the parties on the trial before the referee was returned into the Supreme Court, duly certified as such; and that that constituted all the evidence introduced by the parties on the trial in the court below, in accordance with § 451 of the Territorial Code: because it appears by the decree sought to be appealed from

that the cause was finally heard upon the report of the referee, the exceptions thereto of the defendant Parker being overruled, and the report of said referee being in all things confirmed, except as modified and altered by the findings and conclusions of the court itself. It thus appears with certainty that the transcript contained all the evidence introduced by the parties on the trial in the court below. It follows that Parker's appeal had been duly taken and perfected, and the cause had been properly transferred from the District to the Supreme Court of the territory; and that the latter, having acquired jurisdiction thereof, should have proceeded in the exercise of its jurisdiction to hear and determine the same upon its merits. For the failure to do so

The writ of mandamus must issue. It is accordingly so ordered.

FOURTH NATIONAL BANK OF NEW YORK *v.* FRANCKLYN.

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

Argued January 14, 1887. — Decided March 21, 1887.

Where the statutes of the state which creates a corporation, making the stockholders liable for the corporate debts, provide a special remedy, the liability of a stockholder can be enforced in no other manner in a court of the United States.

Under the statutes of Rhode Island, making the stockholders of a manufacturing corporation liable for its debts until its capital stock has been paid in and a certificate thereof recorded; and originally providing that the property of stockholders might be taken on writ of attachment or execution issued against the corporation, or the creditor might have his remedy against the stockholders by bill in equity; and since modified by enacting that all proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, or by action of debt on the judgment obtained against the corporation; a creditor of a Rhode Island corporation cannot bring an action at law against the executor of a stockholder in the Circuit Court of the United States in New York, without having obtained a judgment against the corporation, even if the corporation has been adjudged bankrupt.

Statement of Facts.

THIS was an action at law, brought December 10, 1879, by a national bank against the executor of Edwin Hoyt, a stockholder in the Atlantic De Laine Company, to recover the amount of a debt for upwards of $100,000, due from that corporation to the plaintiff on promissory notes made and payable in December, 1873, and January, 1874.

The parties duly waived a jury, and submitted the case to a referee under a rule of court; and also agreed in writing upon "a statement of certain of the facts in this action," which defined the amount of the debt due from the corporation to the plaintiff, and the material parts of the rest of which were as follows:

The Atlantic De Laine Company was a manufacturing corporation, established in the State of Rhode Island, under a charter granted in 1851 by the General Assembly of that state, which fixed and limited its capital stock at $300,000, and by section 8 of which "the liability of the members and officers of this corporation for the debts of the company shall be fixed and limited by, and the corporation, its members and officers, shall in all respects be subject to, the provisions of an act" mentioned below. [Rhode Island Laws of May Session, 1851, pp. 33–36.]

"Fourth. In and by an act entitled 'An act in relation to manufacturing corporations,' passed at the June session of 1847 by the aforesaid general assembly of the State of Rhode Island, it was provided, among other things, as follows: 'The members of every manufacturing company that shall be hereafter incorporated shall be jointly and severally liable for all debts and contracts made and entered into by such company until the whole amount of the capital stock, fixed and limited by the charter of said company, or by vote of the company in pursuance of the charter, shall have been paid in, and a certificate thereof shall have been made, and recorded in a book kept for that purpose in the office of the city or town clerk of the city or town wherein the manufactory is established, and no longer, except as hereinafter provided.'

"It was also therein provided that 'When the stockholders in a manufacturing company shall be liable, by the provisions

of this act, to pay the debts of such company, or any part thereof, their persons and property may be taken therefor, on any writ of attachment or execution issued against the company for such debt, in the same manner as on writs and executions against them for their individual debts. The person to whom said officers or stockholders may render themselves liable as aforesaid may, instead of the proceedings aforementioned, have his remedy against said officers or stockholders by a bill in equity in the Supreme Court.' [Rhode Island Laws of June Session, 1847, pp. 30, 35.]

"The foregoing provisions were substantially continued in force by chapter 128 of the revision of the statutes of the State of Rhode Island of 1851, and by chapter 142 of the revision of said statutes of 1872, and continued to be, and at all times mentioned and set forth herein were, and still are, in full force and effect as statutes of the State of Rhode Island."

The whole amount of the capital stock of the Atlantic De Laine Company was never paid in, nor a certificate filed, as required by these provisions. Hoyt was a resident of New York, and a stockholder in that company, from its incorporation until his death in May, 1874. He left a will, under which letters testamentary were issued to the defendant in New York; but it was never proved in Rhode Island, nor were letters testamentary or of administration upon his estate ever issued there.

"Tenth. No writ of attachment or execution has ever been issued against the Atlantic De Laine Company for or on account of the claim of the plaintiff upon the aforesaid promissory notes; and no suit in equity has ever been begun in the Supreme Court of Rhode Island against any of the officers or stockholders of the Atlantic De Laine Company, founded upon the plaintiff's claim herein.

"Upon the 30th day of March, 1874, the said Atlantic De Laine Company was duly adjudicated a bankrupt by the United States District Court for the District of Rhode Island."

The referee found the facts as agreed by the parties; and, against the objection and exception of the plaintiff, admitted in evidence the reports of the cases, adjudged in the Supreme

Court of Rhode Island, of *New England Bank* v. *Stockholders of Newport Factory*, 6 R. I. 154, and *Moies* v. *Sprague*, 9 R. I. 541, as proof of the law of Rhode Island, and found the following as an additional fact:

"Twelfth. Prior to the making of the aforesaid notes, it had been judicially determined by the Supreme Court of the State of Rhode Island, that court being the highest judicial tribunal of the said state, that the remedies provided in favor of creditors of corporations therein referred to against their stockholders by said act of June Session of 1847 were exclusive of, and did not include, the remedy of an action in favor of such creditor against such stockholder."

"Upon the foregoing facts," the referee reported as a conclusion of law, that the defendant was entitled to judgment. The court confirmed his report, specially found the facts as stated by him, and gave judgment for the defendant. The plaintiff sued out this writ of error.

Mr. Benjamin H. Bristow (*Mr William S. Opdyke* was with him on the brief) for plaintiff in error cited: *Hawthorne* v. *Calef*, 2 Wall. 10; *Flash* v. *Conn*, 109 U. S. 371; *Cuykendall* v. *Miles*, 10 Fed. Rep. 342; *Corning* v. *McCullough*, 1 N. Y. 47;[1] *Wiles* v. *Suydam*, 64 N. Y. 173; *Mills* v. *Scott*, 99 U. S. 25; *Bank of the United States* v. *Donnally*, 8 Pet. 361, 372; *Moies* v. *Sprague*, 9 R. I. 541, 557; *Knowlton* v. *Ackley*, 8 Cush. 93; *James* v. *Atlantic De Laine Co.*, 11 Bankr. Reg. 290; *Lowry* v. *Inman*, 46 N. Y. 119; *Pollard* v. *Bailey*, 20 Wall. 520; *Penniman's Case*, 103 U. S. 714; *Erickson* v. *Nesmith*, 15 Gray, 221;[2] *Erickson* v. *Nesmith*, 4 Allen, 233; *Railway Co.* v. *Whitton*, 13 Wall. 270; *Cowles* v. *Mercer County*, 7 Wall. 118; *Le Roy* v. *Beard*, 8 How. 451; *Davis* v. *James*, 10 Bissell, 51; *Suydam* v. *Broadnax*, 14 Pet. 67; *Union Bank* v. *Jolly*, 18 How. 503; *Hyde* v. *Stone*, 20 How. 170; *Warren* v. *Wisconsin Valley Railroad*, 6 Bissell, 425; *Rocky Mountain Bank* v. *Bliss*, 89 N. Y. 338; *Paine* v. *Stewart*, 33 Conn. 516, *Bailey* v. *Hollister*, 26 N. Y. 112; *Chase* v. *Lord*, 77 N. Y. 1; *New England Bank* v. *Stockholders of Newport Factory*, 6 R. I. 154;[3] *Bacon* v. *Pomeroy*, 104 Mass. 577, 582.

[1] *S. C.* 49 Am. Dec. 287. [2] *S. C.* 77 Am. Dec. 78. [3] *S. C.* 75 Am. Dec. 688.

Mr. William Allen Butler for defendant in error cited: *Pollard* v. *Bailey*, 20 Wall. 520; *Lowry* v. *Inman*, 46 N. Y. 119, 120; *Railway Co.* v. *Whitton*, 13 Wall. 270; *Cowles* v. *Mercer County*, 7 Wall. 118; *Moies* v. *Sprague*, 9 R. I. 541; *Fairfield* v. *Gallatin County*, 100 U. S. 47, and cases cited; *Post* v. *Supervisors*, 105 U. S. 667; *Norton* v. *Shelby County*, 118 U. S. 425; *Jessup* v. *Carnegie*, 80 N. Y. 441; *Merrick* v. *Santvoord*, 34 N. Y. 208; *Patterson* v. *Baker*, 34 How. Pr. 180; *Penniman's Case*, 11 R. I. 333; *S. C.* 103 U. S. 714; *Pennington* v. *Gibson*, 16 How. 65; *Hardmann* v. *Bowen*, 39 N. Y. 196, 199; *Fortier* v. *New Orleans Bank*, 112 U. S. 439; *Marine Bank* v. *Fulton Bank*, 2 Wall. 252.

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

This was an action at law, brought in the Circuit Court of the United States for the Southern District of New York, by a creditor of a Rhode Island manufacturing corporation, against the executor of a stockholder in that corporation, to enforce the liability which the statutes of Rhode Island impose upon stockholders in such corporations for the corporate debts.

In the court below, statutes and decisions of Rhode Island were agreed or proved and found as facts, in seeming forgetfulness of the settled rule that the Circuit Court of the United States, as well as this court on appeal or error from that court, takes judicial notice of the laws of every state of the Union. *Hanley* v. *Donoghue*, 116 U. S. 1, 6, and cases there collected. No reference was made to the statute of 1877, c. 600, to which the plaintiff has now referred, and which repeals and modifies in some respects the statutes agreed and found in the record to be still in force; and it is contended for the defendant that this court should not review a judgment on a ground which was not presented to the court below. That is doubtless the general rule. *Klein* v. *Russell*, 19 Wall. 433; *Badger* v. *Ranlett*, 106 U. S. 255. But it would be unreasonable to apply it when the effect would be to make the rights of the parties depend upon a statute which, as we know, and are judicially

bound to know, is not the statute that governs the case. And under either statute the result is the same, as will appear by a sketch of the history of the legislation and of its judicial construction, and a consideration of the principles upon which that construction rests.

The statutes of Rhode Island, upon which the case was argued and decided in the Circuit Court, were sections 1 and 14 of the manufacturing corporation act of 1847, reënacted in the Revised Statutes of 1851, c. 128, §§ 1, 19, 20, and in the General Statutes of 1872, c. 142, §§ 1, 20, 21.

By the first section of each of those statutes, the members of every manufacturing company afterwards incorporated "shall be jointly and severally liable for all debts and contracts made and entered into by such company," until the whole amount of the stock shall have been paid in, and a certificate thereof made and recorded in a certain public office; and by the other sections, when the stockholders shall be so liable to pay the debts of the company, or any part thereof, "their persons and property may be taken therefor, on any writ of attachment or execution issued against the company for such debt, in the same manner as on writs and executions against them for their individual debts;" or, the creditor may, instead of such proceedings, have his remedy against the stockholders by bill in equity.

These provisions were substantially copied from the Revised Statutes of Massachusetts of 1836, c. 38, §§ 16, 30, 31, as clearly appears on a comparison of the statute books of the two states, and as has been expressly recognized by the Supreme Court of Rhode Island. *Moies* v. *Sprague*, 9 R. I. 541, 544.

The provisions of the Revised Statutes of Massachusetts, as well as the similar provisions of the earlier statutes therein embodied and reënacted, were always construed by the Supreme Judicial Court of Massachusetts to allow the stockholders to be charged for the debts of the corporation by no other form of proceeding than that given by the statutes themselves.

This was clearly laid down, before the enactment of the statute in Rhode Island, in judgments delivered by Chief Justice Shaw, as follows: "The individual liability of stock-

holders, created by the statute of 1808, was of a particular and limited character, and could only be enforced in the manner pointed out by the statute." *Ripley* v. *Sampson* (1830), 10 Pick. 370, 372. "The construction uniformly put upon St. 1808, c. 65, § 6, has been, that it was a new remedy, given by statute, and as the mode of pursuing it was specially pointed out, that mode must be pursued; that it did not create a legal liability, to be enforced by an action." *Kelton* v. *Phillips* (1841), 3 Met. 61, 62. "This liability of an individual to satisfy an execution on a judgment to which he was not a party, and to which he had no opportunity to answer, is created and regulated by statute, and is not to be extended, by construction, beyond the plain enactments of the statute, as found by express provision or necessary implication." *Stone* v. *Wiggin* (1842), 5 Met. 316, 317. See also *Gray* v. *Coffin* (1852), 9 Cush. 192, 199.

That court accordingly held in *Ripley* v. *Sampson*, above cited, as well as in the earlier case of *Child* v. *Coffin* (1820), 17 Mass. 64, and in the later case of *Dane* v. *Dane Manufacturing Co.* (1860), 14 Gray, 488, that an execution against a corporation could not be levied on the estate of a stockholder who died before the commencement of the action; in *Kelton* v. *Phillips*, above cited, as well as in *Bangs* v. *Lincoln* (1858), 10 Gray, 600, that the statute liability of a stockholder was not a debt provable against his estate in insolvency; in *Stone* v. *Wiggin*, above cited, that the estate of a stockholder, though attached on mesne process in an action against the corporation, could not be taken in execution on the judgment in that action, without first making a demand upon the officers of the corporation for payment or satisfaction of the execution; and in *Knowlton* v. *Ackley* (1851), 8 Cush. 93, in accordance with the opinion of Chief Justice Shaw in *Kelton* v. *Phillips*, above cited, that a creditor of a corporation could not maintain an action at law against a stockholder.

In 1869, before the debt was contracted on which this action was brought, the Supreme Court of Rhode Island, in accordance with *Knowlton* v. *Ackley* and the other Massachusetts cases, above referred to, applied to the statute of Rhode Island

the rule that "when a statute creates a right or liability and prescribes a remedy, the remedy prescribed is the only remedy;" and, while leaving open the question whether the statute liability of a deceased stockholder survived in any manner at law against his estate, adjudged that at all events his estate could not be charged, either at law or in equity, except in the mode of proceeding prescribed by the statute, and therefore such a liability could not be proved before commissioners on the insolvent estate of a deceased stockholder. *Moies* v. *Sprague*, 9 R. I. 541. So in the Circuit Court of the United States for the District of Rhode Island, Judge Shepley and Judge Lowell held that the liability of a stockholder under that statute, unless liquidated and ascertained by a decree in equity, was not a debt that could be proved against his estate under the Bankrupt Act of the United States; and Judge Lowell's decision was affirmed by this court, without any contest upon that point. *James* v. *Atlantic De Laine Co.*, 11 Bankr. Reg. 390; *Garrett* v. *Sayles*, 1 Fed. Rep. 371, 377, and 110 U. S. 288.

The statute of Rhode Island of March 27, 1877, c. 600, is as follows:

"An act defining and limiting the mode of enforcing the liability of stockholders for the debts of corporations.

"SEC. 1. No person shall hereafter be imprisoned, or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder.

"SEC. 2. All proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, conducted according to the practice and course of equity, or by an action of debt upon the judgment obtained against such corporation; and in any such suit or action such stockholder may contest the validity of the claim upon which the judgment against such corporation was obtained, upon any ground upon which such corporation could have contested the same in the action in which such judgment was recovered.

"SEC. 3. All acts and parts of acts inconsistent herewith are hereby repealed.

"SEC. 4. This act shall take effect from and after the date of the passage thereof."

This statute permits the alternative remedy by suit in equity — whether before or only after recovering judgment against the corporation we need not now inquire — and modifies the previous statutes in no other respect than by abolishing the right to take the person of a stockholder for the debt of the corporation; by substituting, for the taking of his property on attachment and execution against the corporation, a new form of remedy, by action of debt against him upon a judgment obtained against the corporation; and by authorizing him, when so sued, either in equity or at law, to make any defence that the corporation might have made. As it does not undertake to annul the liability of the stockholders for the debts of the corporation, but only modifies the form of remedy and the rules of evidence, it is not doubted that it is a constitutional exercise of the power of the legislature, even as applied to debts contracted by the corporation before its enactment. *Hawthorne* v. *Calef*, 2 Wall. 10; *Penniman's Case*, 103 U. S. 714, affirming 11 R. I. 333; *Ogden* v. *Saunders*, 12 Wheat. 213, 262, 349; *Webb* v. *Den*, 17 How. 576; *Curtis* v. *Whitney*, 13 Wall. 68; *Tennessee* v. *Sneed*, 96 U. S. 69.

Under either statute of Rhode Island, the debt must be established by a judgment recovered against the corporation, before the creditor can proceed against the stockholder. The execution under the earlier laws, and the action against the stockholder under the existing statute, must be founded on that judgment. In short, it is only a judgment creditor of the corporation, who can collect a corporate debt from its stockholders, at least at law. What state of facts would be necessary to support a bill in equity by a creditor of the corporation against one or all of its stockholders is a question not before us. See *Cambridge Water Works* v. *Somerville Dyeing & Bleaching Co.*, 4 Allen, 239; *New England Bank* v. *Stockholders of Newport Factory*, 6 R. I. 154;[1] *Smith* v. *Railroad Co.*, 99 U. S. 398; *Case* v. *Beauregard*, 101 U. S. 688.

The question of the manner in which the liability of stock-

[1] *S. C.* 75 Am. Dec. 688.

holders under the statutes of the state which creates the corporation may be enforced in the courts of the United States is not a new one in this court.

In the leading case of *Pollard* v. *Bailey*, 20 Wall. 520, under a statute of the State of Alabama incorporating a bank, and providing in one section that the stockholders should "be bound respectively for all the debts of the bank in proportion to their stock holden therein," and in other sections that they might be charged by bill in equity, it was held that the remedy prescribed in these sections was the only one, and a creditor of the bank could not maintain an action at law against the stockholders in the Circuit Court of the United States; and the Chief Justice, in delivering judgment, affirmed the following principles, which have been constantly adhered to in subsequent cases: "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement." "The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute, without a remedy, may be enforced by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed." 20 Wall. 526, 527.

Pursuant to these principles, this court has repeatedly held, not only that suits, either at law or in equity, in the Circuit Court, by creditors of a corporation, to enforce the liability of stockholders under a state statute, are governed by the statute of limitations of the State; *Terry* v. *Tubman*, 92 U. S. 156; *Carrol* v. *Green*, 92 U. S. 509; *Terry* v. *Anderson*, 95 U. S. 628; but also that the question whether the remedy in the federal courts should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the State. *Mills* v. *Scott*, 99 U. S. 25; *Terry* v. *Little*, 101 U. S. 216; *Patterson* v. *Lynde*, 106 U. S. 519; *Flash* v. *Conn*, 109 U. S. 371. See also *Blair* v. *Gray*, 104 U. S. 769; *Chase* v. *Curtis*, 113 U. S. 452, 460.

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The case of *Flash* v. *Conn*, 109 U. S. 371, upon which the learned counsel for the plaintiff greatly relied, is in principle quite in line with the other cases, and was decided in favor of the plaintiff because of essential differences between it and the case at bar.

In *Flash* v. *Conn*, the statute of New York, there in question, did not direct that the stockholder should be charged by execution or action upon a judgment against the corporation, and thus in effect limit the right of proceeding against a stockholder to judgment creditors of the corporation; but it allowed any creditor, after bringing a suit against the corporation and having an execution returned unsatisfied, to bring an independent action against the stockholder upon his original liability; and the Court of Appeals of New York had decided, in *Shellington* v. *Howland*, 53 N. Y. 371, that the fact that a corporation had been adjudged bankrupt was a sufficient excuse for not proceeding against it, before suing a stockholder, under that statute. In short, this court upheld a suit in the Circuit Court of the United States in Florida, upon exactly the same conditions on which it appeared that it would have been sustained in the courts of New York.

In the case at bar, on the other hand, neither of the statutes of Rhode Island gives any action at law against the stockholder upon his original liability, or any right whatever of proceeding against him at law, except by execution or action upon a judgment recovered against the corporation. Before the passage of the Rhode Island statute of 1877, it had been determined by a decision of the Court of Appeals of New York, nearly contemporaneous with that in *Shellington* v. *Howland*, above cited, and affirmed by this court, as well as by a decision of the Supreme Judicial Court of Massachusetts, that proceedings in bankruptcy against a corporation do not dissolve it, or discharge it from its debts, or prevent any creditor from suing it for so much of his debt as remains unpaid, and recovering a judgment against it for the purpose of charging its stockholders. *Ansonia Brass & Copper Co.* v. *New Lamp Chimney Co.*, 53 N. Y. 123, and 91 U. S. 656; *Chamberlin* v. *Huguenot Manufacturing Co.*, 118 Mass. 532. And

there is no decision, in Rhode Island or elsewhere, so far as we are informed, that under such a statute, a creditor of a corporation can sue a stockholder, without first establishing, by judgment against the corporation, its liability for the debt with which it is sought to charge him.

In *Burgess* v. *Seligman*, 107 U. S. 20, the question was whether the defendant was such a holder of stock in a corporation as to be liable for its debts, and no question of the form of the remedy was presented or considered. In *Garrett* v. *Sayles*, 1 Fed. Rep. 371, and 110 U. S. 288, the remedy against stockholders was sought by bill in equity, under the Rhode Island statute, after obtaining judgment against the corporation.

In all the diversity of opinion in the courts of the different states, upon the question how far a liability, imposed upon stockholders in a corporation by the law of the state which creates it, can be pursued in a court held beyond the limits of that state, no case has been found, in which such a liability has been enforced by any court, without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the state which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the state to a greater burden than domestic stockholders.

The provision of the Rhode Island statutes, which made the stockholders of the Atlantic De Laine Company liable for its debts, was coupled with provisions prescribing the form of remedy, which still remain in force, except so far as they have been modified by the later statute of the same state. By the decisions of this court, as well as by those of the courts, both state and federal, held within the State and District of Rhode Island, and of the highest court of Massachusetts, where these provisions had their origin and their first judicial construction, this liability can be enforced only in the mode prescribed by the statutes of Rhode Island. The present suit, therefore, not being a bill in equity, or an action upon a judgment against the corporation, which are the only forms of

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remedy authorized by these statutes, but being an independent action at law upon the original liability of the stockholder, cannot be maintained, and the Circuit Court rightly so held.

Judgment affirmed.

MR. JUSTICE BLATCHFORD did not sit in this case, or take any part in its decision.

BOLLES *v.* BRIMFIELD.

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

Submitted January 6, 1887. — Decided March 7, 1887.

By the act of the legislature of Illinois incorporating the Dixon, Peoria and Hannibal Railroad Company, passed March 5, 1867, authority was given to certain cities, incorporated towns, and townships, to subscribe to its stock not exceeding $35,000. At an election duly called and held, August 3, 1868, the town of Brimfield voted to subscribe $35,000, and at the same time and place, but without legislative authority therefor, the same electors voted to make an additional subscription of $15,000. March 31, 1869, the legislature passed an act reciting that the latter sum had been voted by a majority of the legal voters in said township at said election, and provided that said election "is hereby legalized and confirmed, and is declared to be binding upon said township in the same manner as if said subscription had been made under the provisions of said charter." The township, by its proper officers, May 5, 1869, issued bonds for both the subscriptions: *Held*,

(1) At the time the bonds were issued there was no decision of the highest court of Illinois denying the power of the legislature, by subsequent enactment, to legalize a municipal subscription to railroad stock which would have been originally lawful if it had been made, in the mode in which it was made, under legislative authority previously granted.

(2) In such case this court is at liberty to exercise its independent judgment as to the validity of such curative statutes.

(3) The act of March 31, 1869, is not in violation of the constitution of Illinois of 1848. It only gave effect to the wishes of the corporate authorities — the electors — of Brimfield, as ascertained in the customary mode.

THIS was an action at law to recover upon bonds and coupons issued by the defendant in error, a municipal corporation.

Demurrer to the declaration which was overruled. Defendant declining to answer further, the action was dismissed. The case is stated in the opinion of the court.

Mr. Thomas S. McClelland and *Mr. George A. Sanders* for plaintiffs in error.

Mr. Henry B. Hopkins and *Mr. William W. Hammond* for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

In *Anderson* v. *Santa Anna*, 116 U. S. 356, 364, we had occasion to consider the validity of so much of the act of the legislature of Illinois of February 28, 1867, in reference to municipal subscriptions to the stock of the Danville, Urbana, Bloomington and Pekin Railroad Company, as declared that where elections had been held, and a majority of the legal voters of any township or incorporated town declared in favor of a subscription to the stock of that company, "then and in that case no other election need be held, and the amount so voted for shall be subscribed" as in that act provided; further, "that such elections are hereby declared to be legal and valid," as though that act had been in force at the time thereof, and all its provisions had been complied with. An election was held in the township of Santa Anna, July 21, 1866, but there was no authority of law for its being held. It was, however, conducted in the customary mode, and the proposition for a subscription was sustained by a majority of the legal voters of the township. The subscription was made October 1, 1867, in pursuance of that vote, and of the curative act of February 28, 1867. The validity of bonds issued in payment of the subscription was disputed upon the ground that the last named act was in violation of the constitution of Illinois. We held, in accordance with numerous decisions of this court cited in the opinion, that subsequent legislative ratification of the acts of a municipal corporation, which might lawfully have been performed under legislative sanction in the first instance, was equivalent to original authority. We referred, in that case, to

United States Mortgage Co. v. *Gross*, 93 Ill. 483, 484, where the Supreme Court of Illinois said, that "unless there be a constitutional inhibition, a legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts or to ratify and confirm any act it might lawfully have authorized in the first instance."

As a municipal corporation, organized for public purposes, has, as a general rule, and as between it and the state, no privileges or powers which are not subject at all times, under the Constitution, to legislative control, and as the legislature might legally have authorized a subscription by the township of Santa Anna, with the assent of a majority of its legal voters, we adjudged that the act of February 28, 1867, to be within the constitutional power of the legislature to pass.

Does the present case come within these principles?

By the sixth section of an act of the General Assembly of Illinois, approved March 5, 1867, incorporating the Dixon, Peoria and Hannibal Railroad Company, it is provided that "the several counties in which any part of said road may hereafter be located, and the several townships in said counties which have adopted or may hereafter adopt township organizations, and the cities and incorporated towns in said counties, are hereby authorized to subscribe and take stock in said Dixon, Peoria and Hannibal Railroad Company." 2 Private Laws Ill. 1867, 604, 606. The act restricted a subscription by a county to $100,000, and a subscription by a township, city or town to $35,000.

It is admitted that at an election duly notified and held, on the 3d day of August, 1868, the town of Brimfield, by a vote of one hundred and fifty as against fifty-six, lawfully voted to subscribe $35,000 to the stock of the railroad company, and to issue its bonds therefor. At the same time and place, but without authority of law, an election was held to take the sense of the voters of the town as to an additional subscription by it of $15,000 to the stock of the same company, for which coupon bonds should be issued, payable in ten, fifteen and twenty years. This last proposition was sustained by a vote of one hundred and fifty-three as against fifty-five.

On the 31st of March, 1869, the General Assembly of Illinois passed an act declaring "that a certain election, held in the township of Brimfield, in Peoria County, on the 3d day of August, 1868, at which *a majority of the legal voters in said township*, in special town meeting, voted to subscribe for and take fifteen thousand dollars of the capital stock of the Dixon, Peoria and Hannibal Railroad Company over and above the amount authorized to be taken by the charter of said company, is hereby legalized and confirmed, and is declared to be binding upon said township, and may be collected from said township, in the same manner as if said subscription had been made under the provisions of said charter." 3 Priv. Laws Ill. 1869, 372.

Subsequently, May 5, 1869, the township, by its proper officers, issued to the company its coupon bonds for $35,000, in pursuance of the vote at the first-named election, and also its coupon bonds for $15,000, pursuant to the above vote at the same time and place, payable in ten, fifteen and twenty years as aforesaid.

The present suit is upon bonds and coupons of the latter issue. A demurrer to a special plea setting forth these facts was overruled, and, the plaintiff electing to stand by the demurrer, the action was dismissed.

From this statement of the case, it is apparent that the judgment below is inconsistent with the decision in *Anderson* v. *Santa Anna*. It is not disputed that the bonds in suit would be valid obligations of the town of Brimfield if the election of August 3, 1868, at which they were voted, had been previously authorized by statute. In other words, according to the settled doctrines of the Supreme Court of Illinois, it would have been competent for the legal voters of the town, under legislative authority for that purpose previously given — such voters being its "corporate authorities" in the meaning of the state constitution as interpreted by the highest court of Illinois — to have required the subscription to be made, and the bonds to be issued, which were in fact made and issued pursuant to the unauthorized election of August 3, 1868. The question, then, is, could the legislature, by subsequent ratification, make that legal which was originally without legal sanction, but which

it might, in the first instance, have authorized? A negative answer to this question would be in conflict with numerous decisions of this court upon the general question as to the power of a legislature to enact curative statutes, when not restrained by constitutional provisions — the last of those decisions being *Anderson* v. *Santa Anna*. We adhere to what has been heretofore said by this court upon that subject; and, in doing so, we do not infringe upon the rule that, in respect to rights arising under, and depending upon the interpretation of, the constitution and laws of a state, this and other courts of the United States will accept as controlling the established doctrines of the highest court of the state, as announced before such rights accrued. *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Carroll County* v. *Smith*, 111 U. S. 556, 563. Previous to the issuing of the bonds in suit, May 5, 1869, there had been no decision of the Supreme Court of Illinois to the effect that it was beyond the power of the legislature to enact such a statute as that of March 31, 1869, or that the legislature could not ratify and confirm such acts of a municipal corporation as would have been lawful if done under previous legislative authority. On the contrary, its decisions prior to that time, as we endeavored to show in *Anderson* v. *Santa Anna*, tended to sustain the validity, in such cases, of retroactive legislation. The first direct decision of the state court, so far as we are aware, adverse to the validity of such legislation, was *Silliman* v. *Marshall*, 61 Ill. 218, 226, determined in 1871, after the bonds in suit were issued. The cases of *People ex rel. McCagg* v. *Mayor of Chicago*, 51 Ill. 17, *People ex rel. Wilson* v. *Solomon*, 51 Ill. 37, *People ex rel. South Park Comm'rs* v. *City of Chicago*, 51 Ill. 58, *Harward* v. *St. Clair, &c., Drainage Co.*, 51 Ill. 130, and other cases of that class cited by counsel, do not touch the question before us; for they decide, in effect, nothing more than that the power to levy taxes for local purposes could be conferred only upon the corporate authorities of the municipal body to be affected thereby — the object of the constitutional provision that "the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate

purposes," being to define as well the class of municipal officers upon whom the power of taxation for local purposes might be conferred, as the purposes for which such power could be constitutionally exercised. *Quincy* v. *Cooke*, 107 U. S. 549, 554.

So that, substantially the same question is presented here that arose in *Anderson* v. *Santa Anna*. Having a clear conviction that the legislature did not transcend its power in enacting the statute of March 31, 1869, and there being, to say the least, at the time the bonds in suit were issued, no adjudication to the contrary in the Supreme Court of Illinois, we cannot surrender our judgment upon that question and overrule the settled doctrines of this court, in deference to decisions by the state court, made long after the rights of the plaintiff accrued. *Burgess* v. *Seligman*, *Carroll County* v. *Smith*, and *Anderson* v. *Santa Anna*. In holding that the legislature did not violate the constitution of the state in passing the act of March 31, 1869, we do not disregard those decisions of the state court which hold that the legislature cannot impose a debt, for local corporate purposes, upon a municipal body, against the will of its corporate authorities. For, as often held by the state court, the corporate authorities of a town like Brimfield are its legal voters, and they, at the election of August 3, 1868, gave their consent to the subscription and bonds in question. The same voters who approved the subscription of $35,000, at the same time, and by means of the same election machinery, approved an additional subscription for $15,000. There is no suggestion in the record that the votes cast for the latter subscription did not constitute a majority of all the legal voters of the town. We must presume, upon this record, that the legislature ascertained, as stated in the act in question, that such a majority had, at the election of August 3, 1868, voted for the additional subscription of $15,000; and we do not see that the subsequent ratification by the legislature of what had been done by the voters can be regarded as imposing a debt upon them against their will. The legislature simply gave effect to the wishes of the people, as expressed in the customary mode for ascertaining

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the popular will. *Grenada County Supervisors* v. *Brogden*, 112 U. S. 261, 262; *Anderson* v. *Santa Anna*, 116 U. S. 356, 364.

The judgment must be reversed and the case remanded for further proceedings consistent with this opinion. It is so ordered.

NEW ORLEANS NATIONAL BANKING ASSOCIATION *v.* LE BRETON.

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

Argued October 21, 22, 1886. — Decided March 21, 1887.

In Louisiana a holder of a first mortgage on real estate, duly executed before a notary with *pact de non alienando*, is not bound to give notice to subsequent mortgagees, or to any person but the debtor in possession, when he proceeds by executory process to obtain seizure and sale of the mortgaged property to satisfy the mortgage debt.

In Louisiana a mortgage given to secure a future balance on an open unliquidated account is valid; and the acknowledgment of the amount of the balance by the debtor, before a notary, is all that is necessary to be done under the Code, in order to ascertain it for the purposes of executory process.

In Louisiana, informalities connected with or growing out of any public sale, made by any person authorized to sell by public auction, are prescribed against by those claiming under the sale after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons.

W, owning a plantation in Louisiana, and being embarrassed, agreed with several of his creditors and with K, that W should remain in possession and work the plantation; that K should make annual advances to a stipulated amount to enable him to work it, and should receive and dispose of the crops and apply their products, first to the payment of his own account, and next to the payment of the debts of the creditors; and that for these advances and the balance on his account K should have a first mortgage on the plantation with *pact de non alienando*, and that the debts of said creditors should be secured by a mortgage subsequent to the lien to secure K's account. A second mortgage was afterwards made to K, with a like *pact*, and with an agreement, in which all joined, that it should have priority over the first mortgage. The plantation was worked at a loss, and K having made large advances, W acknowledged the amount of them before a notary, and K proceeded by executory pro-

cess to obtain a sale of the plantation, and it was sold under judicial process. In a suit brought after the lapse of eight years by one of said creditors to foreclose the creditors' mortgage, and to set aside the sale under the mortgage to K: *Held*, (1) That no notice to the creditors of the proceedings to foreclose K's mortgage was necessary; (2) That W's acknowledgment of the balance due on K's account was all the ascertainment that was required; (3) That the relation of trustee and *cestuis que trust* did not arise between K and the creditors; (4) That the creditors were guilty of laches in allowing so long time to elapse after knowledge of the sale, before commencing proceedings to disturb it.

Bill in equity to foreclose a mortgage, and to set aside a sale under a prior mortgage. The case is stated in the opinion of the court.

Mr. J. D. Rouse (with whom was *Mr. William Grant* on the brief) and *Mr. John A. Campbell* for appellants.

Mr. James McConnell for appellees submitted on his brief.

Mr. Justice Bradley delivered the opinion of the court.

The bill in this case is brought to foreclose a certain mortgage on a plantation in Terrebonne Parish, Louisiana, called the Ardoyne plantation, with the stock thereon, and to have the same sold, and the proceeds distributed amongst the parties secured by the mortgage, and to set aside, as illegal, fraudulent, and void, a former sale made by executory process at the suit of S. H. Kennedy & Co., one of the parties secured by the same instrument.

The mortgage referred to was given by notarial act on the 12th of April, 1872, by one Nolan S. Williams, to secure various creditors large amounts respectively due to them; amongst others, to secure the complainants in the bill (the appellants here) the sum of $50,606.83, with interest at eight per cent. per annum, due to the New Orleans National Banking Association, and $6856.95, with like interest, due to McComb. The mortgage contained the *pact de non alienando*. In the same instrument it was agreed that Williams should conduct and cultivate the plantation, and should receive $2000 per year for his support out of the advances to be made as hereafter stated;

and Samuel H. Kennedy, one of the appellees, for his firm of S. H. Kennedy & Co., agreed to make all necessary advances in cash and in purchase of supplies to carry on and cultivate the plantation during the existence of the mortgage, not to exceed $30,000 per year, to be evidenced by an open account to be kept by said firm between them and the plantation. To secure Kennedy & Co. for these advances, Williams, by the same instrument, mortgaged the plantation to said firm, with the like *pact de non alienando;* and it was agreed by all the parties, both mortgagor and mortgagees, (who all joined in the act,) that the mortgage granted in favor of Kennedy & Co. should have priority and rank of first mortgage over the one granted in favor of the other creditors. To further secure Kennedy & Co., Williams also mortgaged to them the crops of the plantation, and agreed to consign the same to them for sale in New Orleans, and Kennedy & Co. were to have the usual commissions and charges; and, after they were reimbursed for their advances, interest, and costs, the balance of the proceeds of the crops was to be applied by them, each year, to the debts due to the other mortgagees.

The accounts of Kennedy & Co. with the plantation for the year 1872, showed that the advances required for that year amounted to over $40,000, and that the net proceeds of the crop were less than that sum.

In anticipation of this state of things another instrument was executed before a notary by all the parties, on the 30th of December, 1872, by which it was agreed that Kennedy & Co. should advance $40,000 for that year, and $35,000 for each succeeding year, instead of $30,000, as provided by the first agreement; and to secure them for such advances, Williams mortgaged to them the plantation anew; and the other creditors agreed and consented that the new mortgage should have priority and rank of first mortgage over that granted in their favor by the act of April 12, 1872.

The accounts of the next year, 1873, showed that the proceeds of the crop were insufficient to pay Kennedy & Co.'s advances by more than $28,000; and it seemed evident that the plantation could not be carried on without serious loss to all the parties concerned.

In this condition of things Kennedy & Co. justly considered themselves authorized to proceed upon their mortgage for the collection of the amount due to them. It stood at that time upon an open account; and, on the 28th of January, 1874, they procured Williams to make an acknowledgment before a notary public of the balance due, which amounted to $28,097.36, for which he, at the same time, confessed judgment, and consented and agreed that, under said act, and the two acts of mortgages before referred to, Kennedy & Co. should have the right to seize and sell the plantation under execution process.

Thereupon, on the 31st of January, 1874, Kennedy & Co. presented a petition for executory process to the judge of the district court for the parish of Terrebonne, setting out therein the two mortgages, the fact that the plantation was incurring indebtedness every year, instead of paying anything, the amount of balance due them, and the notarial act by which Williams had admitted the amount, and confessed judgment therefor, and praying for an order of seizure and sale to be directed to the sheriff, for the purpose of satisfying their claim. Williams endorsed the petition, waiving all notices and legal delays. An order was accordingly made, and Williams having waived all formal notices, the property was advertised and sold by the sheriff on the 7th of March, 1874, and S. H. Kennedy became the purchaser for the sum of $17,435.32, the appraised value being $26,142.62.

The grounds on which the complainants seek to set this sale aside are illegality and fraud.

The illegalities alleged are, first, that the complainants and other mortgage creditors were not made parties to the proceeding and were not notified of the sale; and, secondly, that the debt, being an open account until acknowledged by Williams, was not an exigible debt under the mortgage alone, and that the seizure and sale had no validity, except in virtue of the confession of judgment made by Williams on the 31st of January, and hence could not affect the complainants who had a prior mortgage.

Neither of these objections seems to be well founded. A holder of a first mortgage, duly executed before a notary,

with *pact de non alienando*, is not bound to give notice to any person but the debtor in possession.

The Code of Practice, Art. 732, declares that: "Executory process can only be resorted to in the following cases: 1. When the creditor's right arises from an act importing a confession of judgment, and which contains a privilege or mortgage in his favor."

Art. 733: "An act is said to import a confession of judgment in matters of privilege and mortgage, when it is passed before a notary public or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage."

Art. 734: "When the creditor is in possession of such an act, he may proceed against the debtor or his heirs, by causing the property subject to the privilege or mortgage to be seized and sold, on a simple petition, and without a previous citation of the debtor, in the manner laid down in the third paragraph, second section, third chapter of the first part of this Code."

Art. 735: "In obtaining this order of seizure, it shall suffice to give three days' notice to the debtor, counting from that on which the notice is given, if he resides on the spot, adding a day for every twenty miles, between the place of his residence and the residence of the judge to whom the petition has been presented."

The Civil Code, Art. 3397 (3360), declares that "The mortgage has the following effects: 1. That the debtor cannot sell, engage or mortgage the same property to other persons, to the prejudice of the mortgage which is already made to another creditor."

These sections do not, it is true, speak of the *pact de non alienando* and its peculiar effect. This pact and its consequences were derived from the Spanish law, and were not affected by the Code, and have been firmly established in the jurisprudence of Louisiana. *Nathan* v. *Lee*, 2 Martin (N. S.) 32; *Donaldson* v. *Maurin*, 1 La. 29; and other cases cited in Hennen's Dig. Arts. Executory Process, III. (b); Mortgage, VI. (c), 6; Louque's Dig. *ib.* This rule not only applies to

subsequent purchasers from the mortgagor, but to subsequent incumbrancers. *Guesnard* v. *Soulie*, 8 La. Ann. 58. The mortgage of Kennedy & Co. contained all the requisites required for this process. It was a first mortgage by agreement of all the parties, and contained the pact in question. The fact that the complainants and other creditors had a junior mortgage by virtue of the same instrument makes no difference. They agreed to stand on the plane of second mortgagees, and must be bound by the conditions attaching to such a position. It has even been held by the Supreme Court of Louisiana that where two separate notes, drawn in favor of different individuals, were secured by the same mortgage, either mortgagee may sue to enforce his rights without a joinder of the other. *Utz* v. *Utz*, 34 La. Ann. 752. And, in another case, it was held that where there are concurrent mortgagees, one of them may proceed by executory process to foreclose the mortgage without giving special notice to the others. *Soniat* v. *Miles*, 32 La. Ann. 164. In such cases the other interested parties are entitled to their proper shares of the common proceeds. *Carite* v. *Trotot*, 105 U. S. 751, 755.

But in this case, Kennedy & Co. had not only the joint mortgage of April 12, 1872, as security for their claim, but the separate one of December 30, 1872, in which the complainants and other creditors repeated their consent that it should be a first mortgage, and have priority over theirs. We think, therefore, that there can be no doubt that Kennedy & Co. had a right to proceed by executory process without giving special notice to the other mortgagees, if they had a right to executory process at all.

The complainants, however, deny that Kennedy & Co. had any such right, because their claim stood in the form of an open, unliquidated account, and the balance had to be acknowledged by the debtor Williams before it was in a proper shape for executory proceedings. We do not think that this objection can prevail. The mortgage on its face was good for any sum not exceeding $35,000, and though this was to cover future advances, it was none the less efficacious as a mortgage to the extent of those advances, less the amount of any

credits realized from the proceeds of the crop, or otherwise The law on the subject of such mortgages is laid down in the Civil Code as follows:

Art. 3292 (3259): "A mortgage may be given for an obligation which has not yet risen into existence; as when a man grants a mortgage by way of security for indorsement which another promises to make for him."

Art. 3293 (3260): "But the right of mortgage, in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it. The fulfilment of the promise, however, shall impart to the mortgage a retrospective effect to the time of the contract."

These articles, read in connection with those previously quoted, and the express agreement of the parties, are sufficient to show that there is no foundation for the objection. As matters stood in January, 1874, all that was necessary was an ascertainment of the balance due from the plantation to Kennedy & Co.; and for this balance, to any amount less than $35,000, the mortgage was as good as if the precise sum had been named in it when it was executed. To ascertain this balance, for the purposes of executory process, all that was wanted under the Code was the acknowledgment of the debtor. Such an acknowledgment was made in solemn form before a notary, and satisfied the conditions of the law.

It is true that the other mortgagees were interested in the amount of the balance due at the end of each year, and were undoubtedly entitled to inspect the accounts which Kennedy & Co. were to keep with the plantation; but the latter were not required to render accounts to them in the ordinary sense of those terms. Their accounts were with Williams, to whom the advances were made, or with the plantation, which was the same thing; and their settlements were properly made with him; and being so made, were binding on all the parties, unless fraud or collusion could be shown. The evidence shows that Kennedy & Co. were always ready and willing to have their accounts inspected, if the other parties had desired to inspect them. This was all that the agreement implied or required. Hence the acknowledgment by Williams of the

correctness of the accounts, and of the balance due to Kennedy & Co., was a sufficient ascertainment of the amount due to them to "impart to the mortgage a retrospective effect to the time of the contract."

The fact that Williams, in addition to making an acknowledgment of the amount of the debt, also confessed judgment for it, did not deprive Kennedy & Co. of their rights under the mortgages, which themselves had the force of confessed judgments. The executory process was sued out upon them all, and had the effect due to all or any of them. The acknowledgment, it is true, was all that was needed under the law to make the mortgages exigible, and the confession of judgment was a supererogatory formality which did not affect their validity.

The complainants' case, therefore, must stand or fall upon the charge of fraud and conspiracy on the part of Kennedy & Co. and Williams. We have carefully examined the evidence in relation to this charge, and are satisfied with the conclusions reached by the Circuit Court on the subject. The main stress of the argument of the appellants on this point is laid on the want of notice to them of the executory proceedings, and the haste with which the proceedings were conducted. We have already shown that they were not entitled to notice, and the haste in the proceedings is accounted for by the fact that unless a sale were made in the early spring, the purchaser could not make a crop for that year; and, hence, the property would command a greater price at an early sale than at a later one. The evidence shows that everything was done in good faith and with all due publicity. The charge that Kennedy induced parties not to appear and bid at the sale is not substantiated by satisfactory proof; on the contrary, we think it is disproved. None of the parties interested seem to have thought the proceedings assailable either for fraud or any other cause. The sale was made March 7, 1874; Kennedy took immediate possession, and carried on the plantation. The complainant bank had suspended October 4, 1873, and went into bankruptcy. A receiver (Cockrem) was appointed October 20, 1873, and another receiver (Casey) July 1, 1874. The

latter, in his report to the comptroller, classed the claim against Williams as worthless. He, or his predecessor, must have examined into the condition of the security at the time, and must have ascertained all about the sale to Kennedy, if they were not aware of it when it took place. The receiver paid no further attention to the claim until shortly before the filing of the bill in this case, which was May 15, 1882, more than eight years after the sale took place. The notes given to the complainants had then been due over five years, and no interest or principal had ever been paid on them. Surely such an important asset of the bank, the principal of which was over $50,000, could not have been overlooked. The other second mortgagees were equally oblivious to any illegality or fraud in the sale until this suit was brought. It seems incredible that parties so deeply interested, represented as they were by vigilant and able counsel, did not in all this period discover the alleged illegalities and frauds. The proceedings incident to the sale were matter of record; the petition for executory process, the order, the acknowledgment of the debt, the appraisement of the property, the purchaser's bid, the sheriff's deed, all lay open to inspection; and no sign was ever made for more than eight years by any of these parties. They must have been satisfied with the regularity of the proceedings, and the good faith of Kennedy & Co. and Williams. Their conduct is inexplicable on any other hypothesis.

As to any irregularities in the sale, the statute of limitations of 1855, now to be found in §§ 2809 and 3392 of the Revised Statutes, and article 3543 of the Civil Code, clearly applies. This statute declares that "all informalities connected with or growing out of any public sale, made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale, after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons."

But it is alleged that the defendants, Kennedy & Co., were trustees for the complainants and the other mortgage creditors; and, therefore, that they are answerable for all profits and gains realized by Mr. Kennedy from the plantation purchased

by him. We are of opinion, however, that the relation of trustees did not arise from the agreement. Kennedy & Co. were to receive the crops and dispose of them, and if any surplus remained after reimbursing themselves for their advances and proper charges, they were to pay it over to the other mortgagees, instead of paying it to Williams. They only occupied the position of factors, legally responsible for any surplus in their hands. For this surplus, if they neglected to pay it over, they were liable in an action at law. This is a very different position from that of a trustee in the chancery sense of that term. The fact is, they never had any surplus and were never liable in any amount to the complainants, or their comortgagees.

But if we were not satisfied that the complainants have no case on the merits, we should still regard the great lapse of time which intervened between the transaction complained of and the filing of the bill for relief as a very serious obstacle to a decree in their favor. Eight years passed away before any complaint was made. The principal of the notes did not mature till April, 1877, it is true; but the interest became annually due, and none was ever paid. The ground of relief, if any existed, commenced to exist on the day of sale; and if the complainants, or the assignees, did not know of it at once, they must have known of it within a short period thereafter. There is nothing alleged as a ground of disturbing the sale, which they did not know, or which they were not put upon inquiry to ascertain within a year from the sale at most.

On the whole we are satisfied that the decree of the Circuit Court was right, and it is therefore

Affirmed.

GOODWIN *v.* FOX.

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

Submitted March 14, 1887. — Decided March 21, 1887.

The entry, on the stipulation of the parties, in a suit in equity, in which an appeal has been allowed but the record is incomplete, of an order extending the time for filing the appeal bond and the certificate of evidence, is equivalent to an order as of that date renewing the allowance of appeal in open court in the presence of both parties, and the appeal is returnable at this court as if allowed at the date of the entry of the order; but if the appeal bond in such case is not filed until after the term in which the appeal was allowed by the court, citation or its equivalent is necessary to notify the appellee that the appeal allowed in term time has not been abandoned by failure to furnish the security, and the endorsement by counsel for appellees of his approval of the appeal bond is the equivalent of such notice.

THIS was a motion to dismiss. The case is stated in the opinion of the court.

Mr. W. C. Goudy for the motion.

Mr. Charles H. Wood and *Mr. John N. Jewett* opposing.

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

The facts on which this motion rests are these:

On the 17th of February, 1877, Kate W. Fox filed a bill in equity against I. Willard Fox and Eleanor Fox to enforce a lien on certain property held by her through a deed from them, absolute on its face as security for a debt. Pending the suit she was married to Charles S. Goodwin, and Sarah E. R. Smith, wife of Charles M. Smith, in some way acquired title to a part of the mortgaged property. To the original bill some amendments were made, and answers were filed. On the 8th of December, I. Willard Fox and Eleanor Fox filed a cross-bill against Kate W. Goodwin, Charles S. Goodwin, Sarah E. R. Smith, and Charles M. Smith. To this cross-bill answers were

filed and on the issues made in the suit there was a final hearing, which resulted in a decree July 29, 1884, fixing the amount of debt due and allowing a redemption on terms specified in the decree.

The record then shows that on the 6th of August, 1884, the "complainant" came into court and prayed an appeal, which was "allowed on her filing a bond in the penal sum of one thousand dollars within sixty days from this date, with surety to be approved by the court," and the time for filing certificate of evidence was extended to October 1.

On the 29th of August, I. Willard Fox died testate, leaving Eleanor Fox, his widow, and Isaac B. Fox, Flora F. Clark, Truman G. Fox, Emily F. Beckley, Eleanor J. Fox, and Gertrude R. Fox, his heirs-at-law, all of whom were legatees and devisees under his will.

On the 29th of September an amendment of some kind was made to the decree, and on the 6th of October an order was entered in accordance with a stipulation that day filed, extending for twenty days the time for filing a certificate of evidence and a bond. On the 25th of October the court ordered an extension of eight days for filing bond, and on the 1st of November, 1884, upon a stipulation that day filed, a further extension of twenty-five days for the bond and certificate was granted. Upon the 25th of November, under a like stipulation, a further extension was granted until January 1, 1885, and on the 26th of December, 1884, until thirty days after January 1. This last order was also made upon stipulation.

On the 12th of January, 1885, the death of I. Willard Fox was suggested on the record, and his heirs made parties in his stead. The defendants were thereupon required to convey the property in accordance with the decree. On the 26th of January, the master reported the execution of the deeds, and they were confirmed. On the 31st of January, the time for filing certificate of evidence and bond was extended until March 1; afterwards, February 28, by stipulation, until March 20; then, March 19, also, by stipulation, for thirty days; and finally, by stipulation, the time for filing the certificate of

evidence was extended until May 1. On the 1st of May, the certificate of evidence was signed and filed. On the 20th of June, 1885, an appeal bond in the penal sum of $1000, executed by Kate W. Goodwin, Charles S. Goodwin, Sarah E. R. Smith, and Charles M. Smith, with J. Bradner Smith as surety, to Eleanor Fox and the above-named heirs and representatives of I. Willard Fox, was duly approved by the District Judge, and filed with the clerk. The bond, when it was approved, had on it this endorsement: "This bond, as to form and surety, is satisfactory. W. C. Goudy." Mr. Goudy was the counsel of the appellees.

The appeal was docketed in this court, October 20, 1885, but no citation was ever signed or issued. The times for holding the terms of the Circuit Court for the Northern District of Illinois are fixed by law on the first Monday of July and the third Monday of December, and there are adjourned terms held on the first Monday of October and the first Monday of March in each year.

The grounds of the motion to dismiss are, 1, that no citation has ever been issued or served; and, 2, that the appeal was not docketed here before the end of October Term, 1884.

In our opinion, the entries on the stipulation of the parties of the various orders extending the time for filing the appeal bond and certificate of evidence, were equivalent to an order at the date of each respectively, renewing the allowance of the appeal in open court in the presence of both parties. They were evidently made to keep alive the original allowance, but to give it effect as of the new date, and this because the record in its then condition was incomplete and not ready for filing in this court. Under these circumstances, the docketing of the cause here at October Term, 1885, was in time. The appeal was not actually taken until the entry of the last extension of time for filing a bond and certificate of evidence. This was March 19, 1885, too late to make it returnable at October Term, 1884.

Had the appeal bond been taken and approved by the court at the same term no citation would have been necessary, because the allowance of the appeal was, under the operation of

Counsel for Parties.

the stipulation, the same in its effect for the purpose of a citation as the allowance of an appeal in open court during the term at which the decree was rendered. But as the bond was not filed until after the term, a citation or something equivalent was necessary, as matter of procedure, to give the appellees notice that the appeal which had been allowed in term time had not been abandoned by the failure to furnish the security before the adjournment. *Dodge* v. *Knowles*, 114 U. S. 430; *Hewitt* v. *Filbert*, 116 U. S. 143. In the present case the endorsement by the counsel for the appellees of his approval of the bond was the equivalent of such a notice, and there was no necessity for a citation in form.

The motion is denied.

LEATHER MANUFACTURERS' BANK *v.* COOPER.

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

Submitted March 7, 1887. — Decided March 21, 1887.

Since the act of July 12, 1882, c. 290, took effect, a suit by or against National Banks cannot be removed from a state court to a Circuit Court of the United States, unless a similar suit by or against a state bank in like situation with the National Bank could be so removed.

A case does not arise under the laws of the United States simply because this court has decided in another suit the questions of law which are involved.

A case is not removable because a colorable assignment has been made to give a state court exclusive jurisdiction. *Provident Savings Society* v. *Ford*, 114 U. S. 635, and *Oakley* v. *Goodnow*, 118 U. S. 43, on this point affirmed.

This writ of error was sued out to review an order of the Circuit Court remanding the cause to the state court from which it had been removed.

Mr. Charles M. Da Costa and *Mr. Noel B. Sanborn* for plaintiff in error.

Mr. John M. Bowers for defendant in error.

Opinion of the Court.

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

This is a writ of error, brought under § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, for the review of an order of the Circuit Court remanding a suit which had been removed from the Supreme Court of the county and state of New York. The suit was begun June 1, 1886, by William B. Cooper, Jr., a citizen of New York, against the Leather Manufacturers' National Bank to recover a balance of account due from the bank to the firm of Ashburner & Co., which had been assigned to him. The bank was originally organized under the National Banking Act, c. 106, 13 Stat. 99, on the 27th of May, 1865, and its corporate existence was extended May 27, 1885, under the act of July 12, 1882, c. 290, 22 Stat. 162. Its place of business is in the city of New York, in the state of New York.

Section 4 of the act of July 12, 1882, is as follows:

SEC. 4. "That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: *Provided, however*, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun: and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

On the 23d of September, 1886, the bank presented its petition to the state court for the removal of the suit to the Circuit Court of the United States for the Southern District of

New York under the act of March 3, 1875, on the ground of its being a national bank, and consequently the suit was one arising under the laws of the United States. The cause was duly entered in the Circuit Court October 4, 1886, and, on the 9th of the same month, Cooper moved that it be remanded. This motion was granted October 22, because § 4 of the act of July 12, 1882, had taken away from national banks the right of removing suits under the act of 1875 on the ground of their being Federal corporations. To reverse that order this writ of error was brought.

The act of 1882 repeals in express terms "all laws and parts of laws of the United States" inconsistent with its provisions, and enacts that jurisdiction for suits thereafter brought by or against national banks, with few exceptions, "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States" doing business where the national bank "may be doing business when such suits may be begun." This was evidently intended to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States. The first national banking act, that of February 25, 1863, c. 58, 12 Stat. 681, provided, in § 59, that suits by and against banks organized thereunder might be brought in any "circuit, district, or territorial court of the United States held within the district in which such association may be established." By the act of June 3, 1864, c. 106, § 57, 13 Stat. 116, there was added to this, "or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." Both these provisions were carried into § 5198 of the Revised Statutes by the amendatory act of February 18, 1875, c. 80, 18 Stat. 320.

The removal of this class of cases from a state court to a Circuit Court was first provided for by the act of March 3, 1875, in that clause of § 2 which relates to suits "arising under the Constitution or laws of the United States," as construed in the *Pacific Railroad Removal Cases*, 115 U. S. 1. Thus the Federal and state courts had concurrent jurisdiction for suits

brought by or against national banks, and a suit of that character begun in a state court could be removed by either party to a Circuit Court of the United States, if the value of the matter in dispute exceeded five hundred dollars, because, as a national bank is a Federal corporation, a suit by or against it is necessarily a suit arising under the laws of the United States. But the act of 1882 provided in clear and unmistakable terms that the courts of the United States should not have *jurisdiction* of such suits thereafter brought, save in a few classes of cases, unless they would have jurisdiction under like circumstances of suits by or against a state bank doing business in the same state with the national bank. The provision is not that no such suit shall be brought by or against such a national bank in a Federal court, but that a Federal court shall not have jurisdiction. This clearly implies that such a suit can neither be brought nor removed there, for jurisdiction of such suits has been taken away, unless a similar suit could be entertained by the same court by or against a state bank in like situation with the national bank. Consequently, so long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation. A national bank was by that statute placed before the law in this respect the same as a bank not organized under the laws of the United States.

A suggestion was made in argument that the case is one arising under the laws of the United States, for the reason that the cause of action is identical with that sued on in *Leather Manufacturers' National Bank* v. *Morgan*, 117 U. S. 96, decided by this court at the last term, and in which the principles of law which govern the rights of the parties were determined. Nothing of the kind, however, appears in the record, and if it did it would not authorize a removal. This is not that suit, and a case does not arise under the laws of the United States simply because this court, or any other Federal court, has decided in another suit the questions of law which are involved.

A case is not removable because a colorable assignment has been made to give a state court exclusive jurisdiction. *Provi-*

Statement of Facts.

dent Savings Society v. *Ford*, 114 U. S. 635, followed in *Oakley* v. *Goodnow*, 118 U. S. 43.

The order to remand is affirmed.

MR. JUSTICE BLATCHFORD did not take part in the decision of this case.

EX PARTE HARDING.

ORIGINAL.

Submitted March 16, 1887. — Decided March 21, 1887.

Ex parte Wilson, 114 U. S. 417, affirmed on the point that this court cannot discharge on habeas corpus a person imprisoned under the sentence of a Circuit or District Court, in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold the prisoner under sentence.

A territorial court is not deprived of its jurisdiction to try a person indicted for a criminal offence by the fact that an alien sat on the grand jury that found the indictment, under a provision of a territorial statute permitting it.

The denial of compulsory process to enable a person charged with crime to obtain witnesses at the trial in the court below, does not invalidate the judgment.

THE following motion was made in this case:

Now comes the petitioner, by his counsel, and moves this honorable court for leave to file petition praying for the issue of the writ of habeas corpus and for certiorari, and submits thereon the accompanying brief.

And it appearing that said petitioner is now under sentence of death, and his counsel being advised that execution of such sentence is fixed for the 25th day of March, instant, the speedy action of this honorable court in the premises is earnestly prayed.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
J. K. TOOLE,
Counsel for Petitioner.

Opinion of the Court.

The petition accompanying the motion contained the following averments.

That the grounds and facts upon which your petitioner relies, and did rely, upon the trial of the said cause, are:

First. That your petitioner is deprived of his liberty, and is about to be deprived of his life, without due process of law, as guaranteed by Article V, Amendments to the Constitution of the United States, in this: That the indictment upon which defendant was prosecuted, tried, convicted, and sentenced was not found by a legal grand jury of the Territory and District wherein the said crime was alleged to have been committed; that said grand jury was not composed wholly of citizens of the United States — the peers of your petitioner; that one of the grand jurors of the grand jury, which found and returned the said pretended indictment, was an alien; therefore the said indictment was and is absolutely null and void.

Second. That the act of the Territory of Montana entitled "An Act Defining the Qualifications of Jurors," Session Laws Montana Territory, p. 57, 1881, under and by virtue of which said grand jury was selected and impanelled, is in derogation of Article VI of the Amendments to the Constitution of the United States, and of the laws of the United States in such case provided, in this: That said act authorized any male person of lawful age, other than a citizen of the United States, as competent to serve on said grand jury.

Third. That, at the pretended trial of your petitioner, he, said petitioner, was denied by said court his rights under Article VI of the Amendments to the Constitution of the United States, in this: He was by said court deprived of his right to have compulsory process for obtaining witnesses in his favor.

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

This motion is denied. This court has no jurisdiction for the discharge on habeas corpus of a person imprisoned under the sentence of a territorial court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no

authority to hold him under the sentence. *Ex parte Wilson*, 114 U. S. 417, 420, and the cases there cited. The fact that a law of the territory allowed an alien who had declared his intention to become a citizen of the United States to sit on a grand jury, and that an alien did in fact sit on the jury that found the indictment against this petitioner, did not deprive the court of its jurisdiction for his trial under the indictment. The objection, if it be one, goes only to the regularity of the proceedings, not to the jurisdiction of the court. The same is true of the allegation in the petition that the petitioner was denied his right to have compulsory process for obtaining witnesses in his favor. For such errors or irregularities, if they exist, a judgment is not void, and a writ of habeas corpus gives this court no authority for their correction.

Motion denied.

APPENDIX.

I.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

ORDERED, That the following section be added to Rule 10:

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk, under Rule 24, section 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

Promulgated March 28, 1887.

II.

COMPARISON OF THE JUDICIARY ACTS OF MARCH 3, 1875, AND MARCH 3, 1887.

The provisions of the act of March 3, 1875, and those of the act of March 3, 1887, are shown below in parallel columns, those parts of sections 1, 2, and 3 of the former act which do not appear in the latter act, and those parts of the latter act, amending sections 1, 2, and 3 of the former act, which do not appear in the former act, being in *italic:*

CHAP. 137.	PUBLIC — NO. 159.
AN ACT TO DETERMINE THE JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES, AND TO REGULATE THE REMOVAL OF CAUSES FROM STATE COURTS, AND FOR OTHER PURPOSES. — Approved March 3d, 1875 (18 Stat. 470).	AN ACT TO AMEND THE ACT OF CONGRESS APPROVED MARCH THIRD, EIGHTEEN HUNDRED AND SEVENTY-FIVE, ENTITLED "AN ACT TO DETERMINE THE JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES AND TO REGULATE THE REMOVAL OF CAUSES FROM STATE COURTS, AND FOR OTHER PURPOSES," AND TO FURTHER REGULATE THE JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES, AND FOR OTHER PURPOSES. — Approved March 3, 1887.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,	*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first section of an act entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," approved March third,

That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of *five hundred* dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a *controversy* between citizens of different States

or a *controversy* between citizens of the same state claiming lands under grants of different states, or a *controversy* between citizens of a state and foreign states, citizens, or subjects;

and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law,

eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of *interest and* costs, the sum or value of *two thousand* dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which *controversary* the United States are plaintiffs or petitioners, or in which there shall be a *controversary* between citizens of different states, *in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid*,

or a *controversary* between citizens of the same state, claiming lands under grants of different states, or a *controversary* between citizens of a state and foreign states, citizens, or subjects, *in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid*,

and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and

and concurrent jurisdiction with the district courts of the crimes and offences cognizable *therein*. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process *or* proceeding in any other district than that whereof he is an inhabitant, *or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided;*

nor shall any circuit or district court have cognizance of any suit *founded on contract* in favor of *an* assignee, unless *a* suit might have been prosecuted in such court to recover *thereon* if no assignment had been made, *except in cases of promissory notes negotiable by the law merchant and bills of exchange.*

And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

SEC. 2. That any suit of a

concurrent jurisdiction with the district courts of the crimes and offences cognizable *by them*. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process *of* proceeding in any other district than that whereof he is an inhabitant; *but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant;*

nor shall any circuit or district court have cognizance of any suit *except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action* in favor of *any* assignee, *or of any subsequent holder of such instrument be payable to bearer and be not made by any corporation*, unless *such* suit might have been prosecuted in such court to recover *the said contents* if no assignment *or transfer* had been made; and the circuit courts shall also have appellate jurisdiction from the district courts, under the regulations and restrictions prescribed by law."

"SEC. 2. That any suit of a

civil nature, at law or in equity, now pending or hereafter brought in any state court *where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, either party may remove said suit into* the circuit court of the United States for the proper district.

And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them,

civil nature, at law or in equity, *arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may* now *be* pending, or *which may* hereafter *be* brought, in any state court, *may be removed by the defendant or defendants therein to* the circuit court of the United States for the proper district *any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being non residents of that state;* and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then

then either one or more of the *plaintiffs or* defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

[See section 639, subdivision Third, of the Revised Statutes of the United States.]

either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein. At any

time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the circuit court shall, on application of the other party examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

[See the last paragraph of section 5 of the act of March 3, 1875, chap. 137, 18 Stat. 472.]

That section three of said act be, and the same is hereby, amended so as to read as follows:

SEC. 3. That whenever *either* party, *or any one or more of the*

"SEC. 3. That whenever *any* party entitled to remove any

plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section

shall desire to remove such suit from a state court to the circuit court of the United States, he *or they* may make and file a petition in such suit in such state court *before or at the term at which said cause could be first tried and before the trial thereof*,

for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court on the first day of its then next session, a copy of the record in such suit, and for paying all the costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for *there* appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, *and any bail that may*

suit mentioned in the next preceding section,

except in such cases as are provided for in the last clause of said section,

may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court *at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff*,

for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for *their* appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such such suit

have been originally taken shall be discharged; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of *five hundred* dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim, and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his *power* or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of

and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner, as if it had been originally commenced in the said circuit court; and if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of *two thousand* dollars, exclusive of *interest and* costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under

the party moving for such information may then, on petition and bond as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim, *and the trial of issues of fact in the circuit courts shall, in all suits except those of equity and admiralty and maritime jurisdiction, be by jury.*

such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated, as aforesaid as the ground of his or their claim."

The following are the further sections of the act of March 3, 1887:

SEC. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

SEC. 4. That all national banking associations established under

the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

SEC. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of Congress of which this act is an amendment, or in the act of Congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil or legal rights."

SEC. 6. That the last paragraph of section five of the act of Congress, approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed: *Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act.

SEC. 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member.

INDEX.

ACCORD AND SATISFACTION.

The payment, after an adverse decree in the appellate court, of an agreed sum in compromise and settlement of his liability, by a surety on an appeal bond to the attorney of record in the suit, fully authorized by his principal to make the settlement and compromise, and a written receipt, signed by the attorney as attorney of record, stating that the money is paid "in full satisfaction of the decree rendered against" the surety, constitute an accord and satisfaction which can be set up in an action against the surety on the appeal bond; and proof that the proposition for compromise was made by defendant and accepted by plaintiff in the original suit, with the expectation that the litigation would be terminated, and that, notwithstanding this, other parties had taken a further appeal to this court to which the surety was not a party, is not admissible to vary the force of the satisfaction. *Boffinger* v. *Tuyes*, 198.

ACKNOWLEDGMENT.

See DEED, 1, 2.

ACTION.

See CORPORATION, 3, 4.

ACTION ON THE CASE.

See MALICIOUS PROSECUTION.

ADMIRALTY.

1. If a vessel in tow by one steam-tug collides on navigable waters with a vessel in tow by another steam-tug and is injured, and the two tugs are libelled in one proceeding in admiralty to recover damages for the injuries sustained, the burden of proof is on the libellant to establish negligence against each tug separately; and admissions in the answer on the part of one tug cannot be used against the other tug to relieve the injured vessel of this burden. *The L. P. Dayton*, 337.
2. The rule which presumes fault in case of a collision against a vessel in motion in favor of one at anchor, does not apply to the case of a vessel moved by a steam-tug colliding with another vessel moved by another steam-tug. *Ib.*
3. If a vessel towed by a steam-tug, colliding with a vessel towed by another steam-tug, libels the other steam-tug, its rights in the suit and its standing in court will be the same which its own steam-tug would

have had, in case the collision had been directly with her; but if it libels its own steam-tug, the latter is responsible, under its contract of towage, only for the results happening from the want of ordinary care on its part. *Ib.*

4. The relative position of the steam-tug of the other tow to the appellant and its tug, before and up to the instant before the accident, and its action during that time, were not such as to constitute a violation of Rev. Stat. § 4233, rule 19, that "if two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." *Ib.*

APPEAL.

The entry, on the stipulation of the parties, in a suit in equity, in which an appeal has been allowed but the record is incomplete, of an order extending the time for filing the appeal bond and the certificate of evidence, is equivalent to an order as of that date renewing the allowance of appeal in open court in the presence of both parties, and the appeal is returnable at this court as if allowed at the date of the entry of the order; but if the appeal bond in such case is not filed until after the term in which the appeal was allowed by the court, citation or its equivalent is necessary to notify the appellee that the appeal allowed in term time has not been abandoned by failure to furnish the security, and the endorsement by counsel for appellees of his approval of the appeal bond is the equivalent of such notice. *Goodwin* v. *Fox*, 775.

See APPEAL BOND; JURISDICTION, A, 4; LOCAL LAW, 18, 19; PARTIES. JUDGMENT, 4;

APPEAL BOND.

An injunction bond in an action in the District Court of the United States for the District of Louisiana conditioned that the obligors "will well and truly pay the" obligee, "defendant in said injunction, all such damages as he may recover against us, in case it should be decided that the said writ of injunction was wrongfully issued," which bond was made under an order of court, "that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from the effects of said injunction" is a sufficient compliance with the order of the court, and when construed with reference to the rule prevailing in the Federal courts (contrary to that prevailing in the state courts of Louisiana), that without a bond and in the absence of malice no damages can be recovered in such case, means that the obligors will pay such damages as the obligee may recover against them in a suit on the bond itself, whether incurred before or after the giving of the bond. *Meyers* v. *Block*, 206.

See APPEAL.

ARMY.

See MARINE CORPS.

ASSIGNMENT.

See BANK.
HUSBAND AND WIFE, 1, 2.

ASSUMPSIT.

1. In an action for goods sold and delivered, tried in the Circuit Court of the United States in Pennsylvania, the defendant under a plea of "payment with leave," and by way of recoupment, may prove damages resulting to him from a breach of warranty, or from a fraudulent representation of the seller that the goods were of a certain quality or fit for a certain purpose. *Dushane* v. *Benedict*, 630.
2. Under the statute of Pennsylvania of 1705, which allows the defendant, in an action upon a contract, to set off any matter of contract, and to recover judgment thereon against the plaintiff, upon proving that the plaintiff owes him more than he owes the plaintiff, the defendant in an action for goods sold and delivered, may set off a claim in the nature of assumpsit upon a warranty; but not a claim for a fraudulent representation, or other claim sounding in tort only. *Ib.*

ATTACHMENT.

See GARNISHEE.

BAILMENT.

1. At common law, a factor has no power to pledge, whether he is intrusted with the possession of the goods, or with the bill of lading or other symbol of property. *Allen* v. *St. Louis Bank*, 20.
2. A usage of trade for banks to take pledges from factors, as security for the payment of the general balance of account between them, of goods known to be held by them as factors, is unlawful. *Ib.*
3. An unauthorized pledge by a factor, of goods owned by a partnership of which he is a member, to secure the payment of his own debt to one who knows him as a factor only, is invalid against the partnership. *Ib.*
4. If a factor, to whom the owner of goods has made a negotiable promissory note and consigned the goods under an agreement between them that the proceeds of the goods when sold shall be applied to the payment of the note, indorses the note and pledges the goods to secure the payment of advances made to him by one who knows him to be a factor and to hold the goods as such, the pledgee is bound to apply the proceeds of the goods to the payment of the note, and the maker may set up this obligation in defence of an action by the pledgee on the note. *Ib.*

BANK.

Without deciding the mooted question whether a check or draft of a person on a bank in which he has deposits operates as an equitable assignment of the fund so on deposit to the holder of the check to the amount of it, it is clear that such check or draft does not bind the

fund in the hands of the bank until it has notice of the draft or check by presentation for payment, or otherwise: until then, other checks drawn afterward may be paid, or other assignments of the fund, or part of it, may secure priority by giving prior notice. *Laclede Bank* v. *Schuler*, 511.

BANKRUPTCY.

See EQUITY PLEADING, 1;
HUSBAND AND WIFE, 1.

BELGIUM.

See TREATY.

BELLIGERENT RIGHTS AND POWERS.

See CLAIMS AGAINST THE UNITED STATES, 4, 5.

BOND.

See APPEAL BOND.

CALIFORNIA SCHOOL LAND.

1. Lands listed to California as indemnity school lands, and patented by the state, are not open to preëmption settlement while in possession of the patentee. *Durand* v. *Martin*, 366.
2. The act of March 1, 1877, 19 Stat. 267, "relating to indemnity school lands in the state of California," was a full and complete ratification by Congress, according to its terms, of the lists of indemnity school selections which had been before that time certified to the state of California, by the United States as indemnity school selections, no matter how defective or insufficient such certificates might originally have been, if the lands included in the lists were not any of those mentioned in § 4, and if they had not been taken up in good faith by a homestead or preëmption settler prior to the date of the certificate. *Ib.*

CASES AFFIRMED OR APPROVED.

1. *Blair* v. *Cuming County*, 111 U. S. 363, affirmed. *Nemaha County* v. *Frank*, 41.
2. *Davenport* v. *Dodge County*, 105 U. S. 237, affirmed. *Nemaha County* v. *Frank*, 41.
3. *New Orleans Water Works* v. *Rivers*, 115 U. S. 674, affirmed. *St. Tammany Water Works* v. *New Orleans Water Works*, 64.
4. *Oakley* v. *Goodnow*, 118 U. S. 43, affirmed. *Leather Manufacturers' Bank* v. *Cooper*, 778.
5. *Phipps* v *Sedgwick*, 95 U. S. 3, affirmed. *Huntington* v. *Saunders*, 78.
6. *Provident Savings Society* v. *Ford*, 114 U. S. 635, affirmed. *Leather Manufacturers' Bank* v. *Cooper*, 778.
7. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, affirmed and applied. *Corson* v. *Maryland*, 502.
8. *Trust Co.* v. *Sedgwick*, 97 U. S. 304, affirmed. *Huntington* v. *Saunders*, 78.

9. *United States* v. *Reese*, 92 U. S. 214, affirmed and applied. *Baldwin* v. *Franks*, 678.
10. *United States* v. *Taylor*, 104 U. S. 216, affirmed. *United States* v. *Cooper*, 124.
11. The court restates what was decided in *Winchester* v. *Heiskell*, 119 U. S. 450, and, on petition for rehearing, adheres to it. *Winchester* v. *Heiskell*, 273.
12. *Christian Union* v. *Yount*, 101 U. S. 352, commented upon, explained, and affirmed. *Gilmer* v. *Stone*, 586.

CASES DISTINGUISHED.

1. *Bein* v. *Heath*, 12 How. 168, distinguished. *Meyers* v. *Block*, 206.
2. *Louisiana* v. *Jumel*, 107 U. S. 711, distinguished. *Rolston* v. *Missouri Fund Commissioners*, 390.
3. *Packet Co.* v. *Keokuk*, 95 U. S. 80, distinguished. *Baldwin* v. *Franks*, 678.
4. *Presser* v. *Illinois*, 116 U. S. 252, distinguished. *Baldwin* v. *Franks*, 678.

CHATTEL MORTGAGE.

1. In Michigan, when a chattel mortgage is attacked as fraudulent against subsequent creditors or mortgagees in good faith, by reason of the mortgagor being permitted to remain in possession and to prosecute his business in the ordinary way, it is the province of the jury to determine whether such fraud is proved; but when the evidence is overwhelming, and leaves no room for doubt as to what the fact is, the court may give the jury a peremptory instruction covering the issue. *People's Savings Bank* v. *Bates*, 556.
2. In Michigan a creditor at large cannot attack a chattel mortgage made by the debtor, except through some judicial process, whereby he acquires an interest in the property; as by levy of attachment or execution. *Ib.*
3. In Michigan the mortgagee in a chattel mortgage, given to secure a preëxisting debt, is not a "mortgagee in good faith," within the intent of the statute of that state which provides that every such mortgage "which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed" in the place or places indicated in the act. *Ib.*
4. The doctrine that the *bona fide* holder for value of negotiable paper, transferred as security for an antecedent debt merely, and without other circumstances, is unaffected by equities or defences between prior parties of which he had no notice, does not apply to instruments conveying real or personal property as security, in consideration only of preëxisting indebtedness. *Ib.*

CHECK.

See BANK.

CIRCUIT COURT OF THE UNITED STATES.

See JURISDICTION, A, 3; B.

CITATION.

See APPEAL.

CITIZEN.

See STATUTE, B, 1.

CIVIL LAW.

See LANDLORD AND TENANT. STATUTE, A, 5.

CLAIMS AGAINST THE UNITED STATES.

1. It is not decided (1) whether after settlement of an account at the Treasury it can be reopened by the accounting officers on the ground of error arising only from mistake of law; nor (2) whether errors in accounts with the United States, stated closed and settled by payment, can be corrected otherwise than by regular judicial proceedings instituted by the United States. *United States* v. *Philbrick*, 52.
2. Contracts between the United States and a mail contractor, one for mail station service, and the other for mail messenger service, construed in reference to payment for extra service. *United States* v. *Otis*, 115.
3. Certain real property in Tennessee having been sold for direct taxes, under the act of Congress of August 5, 1861, and the surplus of the moneys received, after payment of the taxes and charges having been deposited in the Treasury; *Held*, that the owner of the property, prior to his application for the surplus had no claim therefor which could be enforced by suit against the United States; and that the statute of limitations began to run against it only from the date of his application. *United States* v. *Taylor*, 104 U. S. 216, on this point affirmed. *United States* v. *Cooper*, 124.
4. The United States are not responsible for the injury or destruction of private property caused by their military operations during the late civil war; nor are private parties chargeable for works constructed on their property by the United States to facilitate such operations. *United States* v. *Pacific Railroad*, 227.
5. Where bridges on the line of a railroad were destroyed during the civil war by either of the contending forces, their subsequent rebuilding by the United States as a measure of military necessity, without the request of, or any contract with, the owner of the railroad, imposes no liability upon such owner. *Ib.*

See SALARY, 1.

CLERKS OF COURTS OF THE UNITED STATES.

See FEES.

COAHUILA AND TEXAS LAND GRANTS.

See TEXAS LAND GRANTS.

COHABITING WITH MORE THAN ONE WOMAN.

See CRIMINAL LAW.

COLLISION.

See ADMIRALTY.

CONFLICT OF LAW.

See JURISDICTION, A, 3;
LOCAL LAW, 1;
MUNICIPAL BOND, 2.

CONSPIRACY.

See CONSTITUTIONAL LAW, A, 10, 11;
STATUTE, B, 1, 2, 3.

CONSTITUTIONAL LAW.

A. OF THE UNITED STATES.

1. On similar facts, with reference to the same corporate grant, *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674, is affirmed to the point that a legislative grant of an exclusive right to supply water to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation, and against provisions in state constitutions, to impair it. *St. Tammany Water Works* v. *New Orleans Water Works*, 64.

2. A statute of a state which provides that in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the state it is allowed in such cases only eight peremptory challenges, does not deny the equal protection of the laws to a person accused and tried for murder in a city containing over 100,000 inhabitants; and does not violate the provision of the Fourteenth Amendment to the Constitution. *Hayes* v. *Missouri*, 68.

3. It is within the constitutional power of Congress to enact laws to provide for the punishment of the offences of counterfeiting notes of a foreign bank or corporation, or having in possession a plate from which may be printed counterfeits of the notes of a foreign bank or corporation; and it is not necessary to allege in an indictment for such an offence, or to show, that the notes of such a bank or corporation are notes of money or issue of a foreign government, sovereign, or power; nor is it necessary to allege that the offence is "an offence against the Law of Nations." *United States* v. *Arjona*, 479.

4. The United States being bound to protect a right secured by the Law of Nations to another nation or its people, Congress has the constitutional power to enact laws for that purpose; but this does not prevent a state from enacting laws to punish the same act when it may be an offence against the authority of the state as well as that of the United States. *Ib.*

5. Chapter 96, § 16, Stats. Tennessee, 1881, enacting that "all drummers and all persons not having a regular licensed house of business in the Taxing District 'of Shelby County,' offering for sale, or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee, the sum of $10 per week, or $25 per month for such privilege," applies to persons soliciting the sale of goods on behalf of individuals or firms doing business in another state; and, so far as it applies to them, it is a regulation of commerce among the states, and violates the provision of the Constitution of the United States, which grants to Congress the power to make such regulations. *Robbins* v. *Shelby County Taxing District*, 489.

6. Interstate commerce cannot be taxed at all by a state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. *Ib.*

7. The power granted to Congress, to regulate commerce among the states, being exclusive when the subjects are national in their character, or admit only of one uniform system of regulation, the failure of Congress to exercise that power in any case, is an expression of its will that the subject shall be left free from restrictions or impositions upon it by the several states. *Ib.*

8. A state may enact laws which in practice operate to affect commerce among the states — as by providing, in the legitimate exercise of its police power and general jurisdiction, for the security and comfort of persons and the protection of property; by establishing and regulating channels for commercial facilities; by the passage of inspection laws and laws to restrict the sale of articles injurious to health and morals; by the imposition of taxes upon avocations within its borders not interfering with foreign or interstate commerce or employment, or with business exercised under authority of the Constitution of the United States; and in other ways indicated in the opinion of the court, subject in all cases to the limitations therein defined; but the statute of the State of Tennessee, considered in this opinion, is not such a law. *Ib.*

9. The Code of Maryland provided that "no person or corporation other than the grower, maker, or manufacturer, shall barter or sell, or otherwise dispose of, or shall offer for sale any goods, chattels, wares, or merchandise within the state, without first obtaining a license in the manner herein prescribed"; that the application for the license should state on oath "the amount of said applicant's stock of goods, wares, and merchandise generally kept on hand by him, or the concern in

which he is engaged, at the principal season of sale; or if said applicant shall not have previously engaged in such trade or business, the amount of such stock he expects to keep as aforesaid"; and it graduated the rate to be paid for the license according to the sworn statement of the applicant's stock in trade, at the principal season of sale, ranging from $15 to $150. A, a citizen and resident of New York, was indicted under this statute for offering to sell by sample in Baltimore, without first obtaining a license, goods for a New York firm to be shipped by them directly to the purchaser in Baltimore. *Held*, that these enactments in the Code, as applied to A, violated that provision of the Constitution of the United States which grants to Congress the power to make regulations of commerce among the states. *Corson* v. *Maryland*, 502.

10. Congress has power, under the Constitution, to provide for the punishment of persons guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by the treaty of November 17, 1880; but Congress has not made such provision in § 5519, Rev. Stat., or in § 5508, or in § 5336. *Baldwin* v. *Franks*, 678.

11. Section 5519, Rev. Stat., is unconstitutional as a provision for the punishment of a conspiracy, within a state, to deprive an alien of rights guaranteed to him therein by a treaty of the United States: whether it can be enforced in a territory, against persons conspiring there with that object, is not now decided. *Ib.*

12. To give effect to the rule that when part of a statute is constitutional and part is unconstitutional, that which is constitutional will, if possible, be enforced, and that which is unconstitutional will be rejected, the two parts must be capable of separation, so that each can be read by itself; limitation by construction is not separation. *Ib.*

See JURISDICTION, B, 6.

B. OF A STATE.

1. The statute of Arkansas of March 31, 1883, § 46, which directs the board of railroad commissioners not to include the embankments, tunnels, cuts, ties, trestles, or bridges of railroads in the schedule of the property of railroad companies, prepared by them for the purpose of assessment of taxes, is in conflict with the provisions in the constitution of the state of 1874, relating to the assessment and taxation of property within the state; but the unconstitutional part being separable from the remainder, the latter continues valid. *Huntington* v. *Worthen*, 97.

2. The provisions of the constitution of the State of Missouri which went into effect November 30, 1865, relating to the lien held by the state upon any railroad, or to the release of the indebtedness of any corporation to the state, do not prevent the state authorities from complying with the requirements of the acts of February 20, 1865, and

March 25, 1881, respecting the lien upon the Hannibal and St. Joseph Railroad and the debt of that company to the state, when the company has performed the acts required by the Statutes to be done upon its part. *Rolston* v. *Missouri Fund Commissioner*, 390.

3. The provision in the state constitution of Missouri of 1865, that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within the state" applies to stock issued for constructing branches of the St. Joseph and Iowa Railroad in that state under the provisions of the statute of March 21, 1868, "to aid in the building of branch railroads in the State of Missouri"; and the provision in the charter of that railroad company, enacted in 1857, that its stock should be exempt from taxation for state and county purposes does not apply to the stock issued for branches constructed under the act of 1868. *Chicago, Burlington &c. Railroad* v. *Guffey*, 569.

4. The charter of East St. Louis in Illinois, which went into effect March 26, 1869, authorized it to borrow money not exceeding $100,000, and limited its power of special taxation to pay interest and provide a sinking fund to three mills on the dollar of the assessment. The constitution of Illinois which took effect August 8, 1870, forbade municipal corporations in the state from incurring indebtedness to an amount exceeding five per cent. on the value of the taxable property, including existing debt, and required them to provide for the collection of an annual tax sufficient to pay the interest on the debt as it falls due and to pay and discharge the principal within twenty years from the time of its contraction. The city of East St. Louis was in debt when this constitution took effect, and contracted other obligations after that time, but not in excess of the amount named in the charter, and imposed a tax of three mills to meet the debt as required by the charter, but failed for a series of years to collect a tax as directed by the constitution. On an application for mandamus to compel the collection of the latter tax, *Held*, that the constitution removed from the charter the limitation upon the power of the council to tax for the payment of any bonded indebtedness which might thereafter be incurred, and imposed upon the corporation the duty of collecting sufficient to pay the interest as it fell due, and the principal within twenty years, and that it was within the discretion of the court whether to order a single levy to meet all past due obligations under this head, or more than one levy if only one appeared to be oppressive. *East St. Louis* v. *Amy*, 600.

See LOCAL LAW, 15, 16;

RAILROAD, 1;

TEXAS LAND GRANTS, 12.

CONSUL.

See TREATY.

CONTRACT.

See ACCORD AND SATISFACTION;
CLAIMS AGAINST THE UNITED STATES, 2;
CORPORATION, 1, 2;
INSURANCE;
PROMISSORY NOTE.

CORPORATION.

1. The president of a manufacturing corporation who is also its superintendent, having general authority to contract by parol contract without the corporate seal for making and delivering its manufactured goods, has like authority, unless the power is withdrawn, to authorize the termination and release of such a contract. *Indianapolis Rolling Mill* v. *St. Louis & Wichita Railroad*, 256.
2. A board of directors of a corporation to whom the president of the company communicates his execution of a contract on the part of the corporation, which is within its corporate powers but unauthorized by the board, will be presumed to ratify his act unless it dissents within a reasonable time; and a delay in the disaffirmance of six months after knowledge of the act is an unreasonable delay. *Ib.*
3. Where the statutes of the state which creates a corporation, making the stockholders liable for the corporate debts, provide a special remedy, the liability of a stockholder can be enforced in no manner in another court of the United States. *Fourth National Bank* v. *Francklyn*, 747.
4. Under the statutes of Rhode Island, making the stockholders of a manufacturing corporation liable for its debts until its capital stock has been paid in and a certificate thereof recorded; and originally providing that the property of stockholders might be taken on writ of attachment or execution issued against the corporation, or the creditor might have his remedy against the stockholders by bill in equity; and since modified by enacting that all proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, or by action of debt on the judgment obtained against the corporation; a creditor of a Rhode Island corporation cannot bring an action at law against the executor of a stockholder in the Circuit Court of the United States in New York, without having obtained a judgment against the corporation, even if the corporation has been adjudged bankrupt. *Ib.*

See EQUITY, 1;
LOCAL LAW, 17.

COSTS.

See JURISDICTION, B, 4;
MORTGAGE.

COUNTER CLAIM.

See JURISDICTION, B, 9.

COUNTERFEITING.

See CONSTITUTIONAL LAW, A, 3, 4;
LAW OF NATIONS.

COURT AND JURY.

1. If the evidence produced in a criminal action be of such a convincing character that the jurors would unhesitatingly be governed by it in the weighty and important matters of life, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty which attends all human evidence. Therefore, a charge to the jury that if, after an impartial comparison and consideration of all the evidence, they can truthfully say that they have an abiding conviction of the defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, is not erroneous. *Hopt* v. *Utah*, 430.
2. An allusion, in the final argument to the jury by the counsel for the prosecution, to the case as having been many times brought before the tribunals, is not a ground for reversing a judgment under the statute of Utah, which declares that on a new trial the "former verdict cannot be used or referred to either in evidence or argument." *Ib.*

See CHATTEL MORTGAGE, 1;
ERROR.

CRIMES.

See LOCAL LAW, 1; TREATY.

CRIMINAL LAW.

1. The offence of cohabiting with more than one woman, created by § 3 of the act of Congress of March 22, 1882, c. 47, 22 Stat. 31, is a continuous offence, and not one consisting of an isolated act. *In re Snow*, 274.
2. S. was convicted separately in a District Court of the Territory of Utah, on three indictments under that section, covering together a continuous period of time, each covering a different part, but the three parts being continuous, the indictments being found at the same time, by the same grand jury, on one oath and one examination, of the same witnesses, covering the whole continuous time. One judgment was entered on the three convictions. It first imposed a term of imprisonment and a fine. It next imposed two further successive terms of imprisonment, each to begin at the expiration of the last preceding sentence and judgment, with two further fines. It set forth the time embraced by each indictment and specified each of the three punishments as being imposed in respect of a specified one of the indictments. On a petition to a District Court of the Territory, by the defendant, for a writ of *habeas corpus*, setting forth that he had been imprisoned under the judgment for more than the term first imposed, and had paid the fine first imposed, and that the other two punish-

ments were in excess of the authority of the trial court, the writ was refused. On appeal to this court, *Held*, (1) There was but one entire offence for the continuous time. (2) The trial court had no jurisdiction to inflict a punishment in respect of more than one of the convictions. (3) As the want of jurisdiction appeared on the face of the proceedings, the defendant could be released from imprisonment on a *habeas corpus*. (4) The order and judgment of the court below must be reversed, and the case be remanded to that court, with a direction to grant the writ of *habeas corpus* prayed for. *Ib.*

See CONSTITUTIONAL LAW, A, 10, 11; COURT AND JURY; EVIDENCE, 3; INDICTMENT; JUROR, 2; STATUTE, B, 1, 2, 3.

CUSTOMS DUTIES.

1. Wool of the third class was dutiable under § 1 of the act of March 2, 1867, c. 197, 14 Stat. 560, at three cents per pound, if its value at the last port or place whence exported into the United States, excluding charges in such port, was twelve cents or less per pound; and at six cents per pound, if such value exceeded twelve cents per pound. On January 5, 1874, such wool, bought in Russia, in October, 1873, the actual cost of which, exclusive of charges, was below twelve cents per pound, at the time and place of exportation, was entered at the custom-house at the port of New York, at an invoice value stated in Russian silver roubles. The collector computed the rouble at 77.17 cents, under the authority of a proclamation to that effect made by the Secretary of the Treasury in December, 1873, in pursuance of an estimation of the value of the rouble for the year 1874, made by the director of the mint, as required by the act of March 3, 1873, c. 268, 17 Stat. 602. Prior to that act the value of the rouble had been fixed by statute at seventy-five cents. If the rouble had been computed at seventy-five cents, the invoice value of the wool would have been less than twelve cents per pound. Computing it at 77.17 cents raised such invoice value above twelve cents per pound. The collector exacted a duty of six cents per pound. In an action to recover back the excess of duty over three cents per pound, *Held*, (1) The effect of the act of 1873 was to repeal the prior statute; (2) the requirement of § 7 of the act of March 3, 1865, c. 80, 13 Stat. 493, forbade the assessment of duty on an amount less than the invoice or entered value; (3) the collector was, therefore, required to compute the rouble at 77 17 cents, although the cost of the goods, computing the rouble at seventy-five cents, was twelve cents or less per pound. *Heinemann* v. *Arthur*, 82.
2. Construing together §§ 2931 and 3011 of the Revised Statutes, the decision of the Secretary of the Treasury, on an appeal from a collector of customs, as to the rate and amount of duties, is not final and conclusive, except in a case where, after a protest and appeal, a payment of duties is made in order to obtain possession of goods, and then a

suit is not brought to recover back the duties within the times and under the limitations prescribed by § 2931. *United States* v. *Schlesinger*, 109.

3. Such decision is not final, in a suit brought by the United States against an importer, where, on entering goods, he paid the estimated duties, and the goods were delivered to him, and on a reliquidation of the entry further duties were assessed, and he duly protested, and appealed to the Secretary, who sustained the action of the collector, the suit being brought to recover such further duties. *Ib.*
4. In such suit the defendant may show, as a defence, that the further duties were illegally assessed. *Ib.*
5. Webbing made of india-rubber, wool, and cotton, and known as "wool elastic webbing," is not subject to duty as webbing made of wool, or of which wool is a component material, at fifty cents per pound and in addition thereto fifty per cent. ad valorem; but as webbing composed wholly or in part of india-rubber, at thirty-five per cent. ad valorem. *Beard* v. *Nichols*, 260.
6. Punchings and clippings of wrought iron boiler plates and of wrought sheet iron, left after the completion of the process of the manufacture of the boiler plates into boilers, and of the ends of bridge-rods and beams of wrought iron, cut off to bring the rods and beams to the required length and to remove imperfections, were in "actual use," within the meaning of the statute, in the manufacture of those respective things, and on importation into the United States are subject to duty as "wrought scrap iron." *Schlesinger* v. *Beard*, 264.

DAMAGES.

See ASSUMPSIT, 1, 2;
EVIDENCE, 9.

DEED.

1. A deed, dated May 26, 1856, by C. L., grantor, described as "sister and heir-at-law of H. M.," and as "of the county of St. Clair and state of Michigan," which conveyed to the grantee a tract of land in Illinois, and was signed and sealed by C. L. and by W. L., the name of W. L. not appearing in the granting clause of the deed, and which was acknowledged May 27, 1856, by said "C. L. and W. L. her husband," *held* sufficient to pass said title of husband and wife, under the statute of Illinois of February 22, 1847, then in force, respecting the conveyance of lands or real estate situate in Illinois by a *feme covert* not residing within the state, and respecting her joining with her husband in the execution of the deed. *Schley* v. *Pullman Car Company*, 575.
2. A magistrate's certificate, attached to a deed of land in Illinois, that on the 27th of May, 1856, personally came C. L. and W. L., her husband, "known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed," is equivalent to stating that they came before the officer, and were per-

sonally known to him to be the real persons who subscribed the deed, and in this respect complied with the requirements of the statutes of Illinois then in force. *Ib.*

3. An officer's certificate of the acknowledgment on the 27th May, 1856, of a deed of land in Illinois by a married woman, showing her privy examination separate and apart from her husband, and which shows that she, "fully understanding the contents of the foregoing instrument, acknowledged," &c., is a sufficient compliance with the statutes of the state in force at that time respecting the communicating the contents of such a deed to her. *Ib.*

DIVISION OF OPINION.

The question whether either of the counts in an indictment charges an offence under the laws of the United States, is too vague and general to be certified in a Certificate of Division of Opinion. *United States* v. *Northway*, 327.

See JURISDICTION, A, 1.

EJECTMENT.

See EVIDENCE, 5, 6, 7, 8;
LOCAL LAW, 6, 11, 12, 14.

EQUITY.

1. The city of Quincy, Illinois, in 1877 contracted with an Illinois corporation to supply it with gas for four years. Disputes arose, payments were in arrear, and in May, 1881, the city notified the company that it would be no longer bound by the contract. A, a citizen of Alabama, on the 13th August, 1885, filed a bill in equity in the Circuit Court of the United States for the Southern District of Illinois, setting forth that the company had a claim against the city recoverable at law, that he had at different times tried to induce the directors to enforce it, that he was, and for more than four years had been, a stockholder in the company, that he had not succeeded in inducing the directors to institute suit, that his last request was made August 1, 1885, and that the claims were about to be barred by the statute of limitations, and he asked for a mandamus to compel the payment of the company's debt. The respondent demurred. This court sustains the demurrer, on the ground that the real contest being between two Illinois corporations, the proper remedy was an action at law by one of those corporations against the other upon the contract, and that A has not, by the averments in his bill, brought himself within the directions prescribed by Equity Rule 94, 104 U. S. ix–x, respecting suits brought by stockholders in a corporation against the corporation and other parties, founded on rights which might be properly asserted by the corporation. *Quincy* v. *Steel*, 241.

2. At the hearing upon a plea in equity and a general replication, no fact is in issue but the truth of the matter pleaded. *Farley* v. *Kittson*, 303.

3. A bill in equity to enforce a contract between the plaintiff and the defendants to purchase for their joint benefit the bonds, secured by mortgages, of two railroads, of one of which the plaintiff was receiver, and of the other general manager under the trustees in the mortgage, alleged that he performed the agreement on his part; that the defendants purchased the bonds through an agent of the bondholders, and afterwards purchased the railroads under decrees of foreclosure, and entered into possession and made large profits, and refused to account to the plaintiff for his share; and that the plaintiff, pleading the negotiations for the purchase of the bonds, informed the agent of the bondholders of his interest, and at all times answered to the best of his knowledge and ability all inquiries of the bondholders or their agent, or of the trustees or any person interested in the property, and always acted honestly and in good faith towards all such persons. The defendants filed a plea, averring that neither the agent nor the bondholders had any notice of the plaintiff's interest until after the sale of the railroads under the decrees of foreclosure, and that the agreement sued on was a breach of his trusts as receiver and as manager, and did not entitle him to relief in equity. A general replication was filed, and at the hearing the truth of the fact averred in the plea was disproved. *Held*, that the plea must be overruled, and the defendants ordered to answer the bill. *Ib.*

4. A court of equity will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them. *Speidel* v. *Henrici*, 377.

5. If a bill in equity shows upon its face that the plaintiff, by reason of lapse of time and of his own laches, is not entitled to relief, the objection may be taken by demurrer. *Ib.*

6. A bill in equity against persons holding a fund avowedly in trust for the common benefit of the members of a voluntary association, living together as a community and subject to its regulations, cannot, whether the trust is lawful or unlawful, be maintained by one who has left the community, and for fifty years afterwards taken no step to claim any interest in the fund. *Ib.*

See EQUITY PLEADING;
LIMITATION, STATUTES OF, 1, 4, 5;
PATENT FOR INVENTION, 2.

EQUITY PLEADING.

1. A bill in equity against husband and wife by the assignees in bankruptcy of the husband, which alleges that the husband before the bankruptcy transferred a large amount of personal property in the form of bonds, stocks, &c., to the wife for the purpose of concealing the same from his creditors, and delaying, hindering, and defrauding them, and in contemplation of bankruptcy, and which does not describe the property, but avers inability to do so, and which waives

answer under oath and asks as relief for a transfer to the assignee of the property in whatever form it may exist, as assets of the bankrupt, sets forth no case for relief in equity, and should be dismissed on demurrer. *Huntington* v. *Saunders*, 78.

2. Objections to the equity of the plaintiff's claim, as stated in his bill, cannot be taken by plea. *Farley* v. *Kittson*, 303.

3. A plea in equity, though under oath, and negativing a material averment in the bill, is no evidence in the defendant's favor. *Ib.*

See EQUITY, 2, 3, 4, 5;
PATENT FOR INVENTION, 2.

ESTOPPEL.

See JUDGMENT, 1.

ERROR.

The refusal of the court to instruct the jury, at the close of the plaintiff's evidence, that he is not entitled to recover, cannot be assigned for error, if the defendant afterwards introduces evidence. *Accident Ins. Co.* v. *Crandal*, 527.

EVIDENCE.

1. In an action by an attorney to recover for services rendered in defending a suit for the foreclosure of a mortgage upon a tract of land near a large town, and in preventing the foreclosure, and in bringing about a favorable sale of the property, evidence as to the character of the land and its possible value as a future suburb of the town is admissible. *Forsyth* v. *Doolittle*, 73.

2. As the length of hypothetical statements presented to a witness to ascertain his opinion upon any matter, growing out of the facts supposed, necessarily depends upon the simple or complicated character of the transactions recited, and upon the number of particulars which must be considered for the formation of the opinion desired, it must in a great degree be left to the discretion of the court; and in this case that discretion was properly exercised. *Ib.*

3. Evidence, or what purports to be evidence, in a criminal case, printed in a newspaper, is "a statement in a public journal" within the meaning of the act of Utah declaring that no person shall be disqualified as a juror by reason of his having formed or expressed an opinion upon the matter or cause to be submitted to him, "founded upon public rumor, statements in public journals, or common notoriety, provided it appear to the court, upon his declaration under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him." *Hopt* v. *Utah*, 430.

4. The opinion of a physician, after making a post-mortem examination of the deceased, who came to his death by a blow inflicted upon his head, as to the direction from which the blow was delivered, is admissible in evidence. *Ib.*

5. Defendants in ejectment having produced a regular chain of title under a deed from a grandson of the original owner of a lot in Rhode Island, including the land in controversy, which was executed in 1768 and recorded soon afterwards in the land records of the town in which it was situated; and having shown that the ancestors in title paid the taxes on said lot for twenty years preceding 1805, and that afterward, up to the trial of the action in 1882, a period of seventy-seven years, they or their ancestors in title had uninterruptedly paid the taxes on the lot; and having shown an entry in 1835 by their ancestor upon the lot under a deed, for the purpose of quarrying a ledge of rock running through it, and the quarrying of the ledge with occasional intervals from 1846 to the commencement of this action in 1874, a period of twenty-eight years, the said entry being made with claim of title to the whole lot. *Held*, in an action brought by the heirs of the devisee of the original proprietor, under a will executed in 1749, and probated in 1756, none of whom had made any claim to the premises for three-quarters of a century after the death of the original proprietor, under whose will they now assert title, nor paid taxes on the property, nor after that time ever taken possession of the premises or paid taxes upon them, that the jury might presume a deed to the grandson from the original proprietor, or from his devisee, to quiet the possession of the defendants claiming under such grandson; and that in making such presumption the jury were not to be restricted to consideration of what they fairly supposed actually occurred, but to what may have occurred, and seems requisite to quiet title in the possessors. It is sufficient that the evidence leads to the conclusion, that the deed might have been executed, and that its execution would be a solution of difficulties arising from its non-execution. *Fletcher* v. *Fuller*, 534.

6. Though a presumption of a deed may be rebutted by proof of facts inconsistent with its supposed existence, yet, where no such facts are shown, and the things done and the things omitted, with regard to the property in controversy, by the respective parties for long periods of time after the execution of the supposed conveyance can be explained satisfactorily only upon the hypothesis of its existence, the jury may be instructed that it is their duty to presume such a conveyance, and thus quiet the possession. *Ib.*

7. Though as a general rule, it is only where the possession has been actual, open, and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land, that the presumption of a deed can be invoked; yet that presumption may properly be invoked where a proprietary right has been exercised beyond such statutory period, although the exclusive possession of the whole property, to which the right is asserted, may have been occasionally interrupted during such period if, in addition to the actual possession, there have been other open acts of ownership. *Ib.*

8. The assessment of taxes on an entire parcel of real estate to the person in possession under claim of title, and to his ancestors and privies in

estate, for over a hundred years, is powerful evidence of a claim of right to the whole lot; and, taken in connection with the exclusive working of a quarry on the estate for more than twenty years under claim of title to the whole tract, by virtue of conveyances in which it was described, may authorize a jury to infer continuous possession of the whole, notwithstanding a temporary and occasional intrusion by others upon a different part of the tract, which did not interfere with the work. *Ib.*

9. If rags sold as clean and free from infection, and fit to be manufactured into paper, are proved to have been infected with the small-pox, and to have caused it to break out in the buyer's paper-mill, whereby some of the workmen died, others were disabled from working, and the buyer paid certain sums to support those so disabled, and was obliged to run his mill short-handed, and lost a considerable part of a profitable trade; and the seller testifies that he bought the rags in a region where he knew the small-pox was epidemic, from any and all dealers, not knowing where they were collected, and that they were assorted and baled up under his instructions; and falsely testifies that the rags sold had been baled up in his warehouse for a year before, and had no disinfectants in them; this is sufficient evidence to be submitted to a jury of a breach of warranty or a fraudulent representation on the part of the seller, and of damages to the buyer. But the court may properly decline to permit the buyer to testify in general terms what he estimates the amounts of his damages to be, without stating the items of damage, or any facts upon which his opinion is based. *Dushane* v. *Benedict*, 630.

10. The testimony of witnesses, not shown to be experts, that the infected condition of rags was the cause of a breaking out of the small-pox is incompetent. *Ib.*

See ADMIRALTY, 1, 2, 3; PATENT FOR INVENTION, 2; LOCAL LAW, 4, 12, 14; TEXAS LAND GRANTS, 1, 3, 6, 9.

EXCEPTION.

1. A bill of exceptions should not contain the whole charge of the court to the jury, but should only state distinctly the several matters of law excepted to. *Phœnix Life Ins. Co.* v. *Raddin*, 183.

2. A bill of exceptions cannot be sustained to an instruction or to a refusal to instruct in matter of law, without showing that there was evidence to which the instruction given or refused was applicable. *Ib.*

See JURISDICTION, A, 1.

EXECUTIVE DEPARTMENT.

See NAVY.

EXECUTIVE REGULATION.

The authority of the head of an Executive Department to issue orders and regulations under directions of the President to have the force of

law is subject to the condition that they conflict with no act of Congress; and an order by the Secretary of the Navy that a service shall not be a sea service which Congress has directed shall be a sea service is invalid. *United States* v. *Symonds*, 46; *United States* v. *Bishop*, 51.

EXECUTOR AND ADMINISTRATOR.

A clause in a will gave to C the interest of $4000 for life, "the said sum" of $4000 to be equally divided, at C's death, between M, S, and J, or so many of them as should then be living. The will appointed P executor for New York, and G and D executors for Michigan. G and D, before the death of C, executed a paper and recorded it in Michigan, by which they, as executors, "set apart for the benefit of" C and "to be held" by them "in trust for the purpose of paying" said interest, and, upon the death of C, "for distribution" among M, S, and J, a bond and mortgage for $4000, on land in Michigan, given to the testator in his lifetime, which was overdue seventeen months when the paper was executed. None of the legatees assented to this proceeding or ratified it or waived their rights, nor was it authorized by any order of any court. C having died without the full interest on the $4000 having been paid to him, his administrator, and M, S, and J, filed a bill in equity in Michigan against G and D, as executors, praying for an accounting and for the payment of the legacies. The executors set up as a defence that the bond and mortgage were the sole fund for the payment of the legacy, and that the general estate was not liable for it; *Held*, that the paper was revocable at any time, and did not amount to the decisive and irrevocable act which must exist to have the effect to transmute the property. *Sherman* v. *Jerome*, 319.

See LIMITATION, STATUTES OF, 2, 3.

FACTOR.

See BAILMENT.

FEES.

It was the custom in the United States courts in Massachusetts, from 1839 to December, 1884, known and approved by the judges, for the clerk to charge $3 as fees in naturalization proceedings. The clerk of the District Court never included those fees in his returns. That fact was known to the judges to whom his accounts were semiannually exhibited, and by whom they were passed without objection in that particular. Relying on that custom, and believing that those fees formed no part of the emoluments to be returned, the clerk of the District Court appointed in 1879 did not include those fees in his accounts. This was known to the district judge when he examined and certified the accounts, and his accounts so made out, to July, 1884, were examined and adjusted by the accounting officers of the Treasury. Under a

rule made by the District Court in 1855, the clerk had charged and received the $3 as a gross sum, for examining, in advance of their presentation to the court, the application papers, and reporting to the court whether they were in conformity with law; and had made no division for specific services, according to any items of the fee bill in §§ 823 *et seq.* of the Revised Statutes. In a suit brought in December, 1844, on the official bond of the clerk, against him and his surety, to recover the amount of the naturalization fees; *Held*, that the provision in § 823, taken from § 1 of the act of February 26, 1853, c. 80 (10 Stat. 161), that the fees to clerks shall be "taxed and allowed, applies, *prima facie*, to taxable fees and costs in ordinary suits between party and party, prosecuted in a court; and there is no specification of naturalization matters in fees of clerks. *United States* v. *Hill*, 169.

FINAL DECREE.

See JUDGMENT, 4.

FORTUITOUS EVENT.

See LANDLORD AND TENANT, 2.

FRAUD.

See CHATTEL MORTGAGE;
LIMITATION, STATUTES OF, 1;
EQUITY PLEADING, 1.

FRAUDULENT REPRESENTATIONS.

See ASSUMPSIT;
EVIDENCE, 9, 10.

GARNISHEE.

A garnishee has a right to set up any defence against the attachment process which he could have done against the debtor in the principal action; and if the debtor be insolvent, and owes the garnishee on a note not due for which he has no sufficient security, he is not bound to risk the loss of his debt in answer to the garnishee process. *Schuler* v. *Israel*, 506.

HABEAS CORPUS.

See JURISDICTION, A, 4, 6; B, 1;
CRIMINAL LAW, 2.

HUSBAND AND WIFE.

1. While a creditor who finds specific property of his debtor in the hands of the debtor's wife to whom it had been assigned by the debtor before bankruptcy may follow it and have it appropriated to the payment of his debt, a judgment *in personam* for its value cannot be taken against her in case the property itself cannot be found. *Huntington* v. *Saunders*, 78.
2. In a suit in equity by a wife against a life insurance company and her

husband, in the Circuit Court of the United States in Kentucky, to recover, as assignee of her husband by a written assignment, the amount insured by a policy issued by the company in favor of the husband and his assigns, on the life of a debtor of his, for $20,000, the husband having, after the date of such assignment and before the death of the debtor, delivered the policy to the company, with a written assignment by him to it, indorsed on the policy of "all right and title to the within policy," and expressing a consideration of $4000, and received the $4000, the Circuit Court having dismissed the bill, this court, on appeal, affirmed the decree, on the ground that the assignment to the wife was not satisfactorily proved to have been made or delivered before the transaction between the husband and the company. *Roberts* v. *Phœnix Life Ins. Co.*, 86.

See DEED, 1, 2, 3;
EQUITY PLEADING, 1.

INDICTMENT.

1. The question whether either of the counts in an indictment charges an offence under the laws of the United States, is too vague and general to be certified in a Certificate of Division of Opinion. *United States* v. *Northway*, 327.
2. An indictment charging that the defendant, "as president and agent" of a national bank, did the acts forbidden by Rev. Stat. § 5209, does not vitiate the counts in which he is so described. *Ib.*
3. In an indictment, under Rev. Stat. § 5209, for wilfully misapplying the funds of a national bank, it is not necessary to charge that the moneys and funds alleged to have been misapplied had been previously intrusted to the defendant; since a wilful and criminal misapplication of the funds of the association may be made by its officer or agent without having previously received them into his manual possession. *Ib.*
4. In charging, in an indictment, the president of a bank with aiding and abetting its cashier in the misapplication of the funds of the bank, it is not necessary to aver that he then and there knew that the person so aided and abetted was the cashier. *Ib.*
5. An indictment which charges in substance that the defendant was president and agent of a certain national bank theretofore duly organized and established, and then existing and doing business, under the laws of the United States, and that, being such president and agent, he did then and there "wilfully and unlawfully and with intent to injure the said national banking association, and without the knowledge and consent thereof, abstract and convert to his own use certain moneys and funds of the property of the said association of the amount and value," &c., sufficiently describes and identifies the crime of abstracting the funds of the bank created by Rev. Stat. § 5209. *Ib.*
6. An indictment which charges that the defendant "was then and there president and agent of a certain national banking association, to wit:

[naming the association] theretofore duly organized and established, and then existing and doing business at [naming the place] under the laws of the United States," sufficiently states that that bank was organized under the national banking act, or to carry on the business of banking under a law of the United States. *Ib.*

See CRIMINAL LAW, 2.

INEVITABLE ACCIDENT.

See LANDLORD AND TENANT, 2.

INFORMER.

See INTERNAL REVENUE.

INSURANCE.

1. Answers to questions propounded by insurers in an application for life insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly complied with, are to be construed as representations, as to which substantial truth in everything material to the risk, is all that is required of the applicant. *Phœnix Life Ins. Co.* v. *Raddin*, 183.
2. When upon the face of an application for life insurance, a direct question of the insurers appears to be not answered at all, or to be imperfectly answered, the issue of the policy without further inquiry is a waiver of the want or imperfection of the answer, and renders the omission to answer more fully immaterial. *Ib.*
3. A policy of life insurance stated that it was issued and accepted by the assured upon certain express conditions, one of which was that "if any of the declarations or statements made in the application for the policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void." The application contained a number of printed questions "to be answered by the person whose life is proposed to be insured," and "declared that the above are fair and true answers to the foregoing questions," and that it was agreed by the applicant "that this application shall form the basis of the contract for insurance," "and that any untrue or fraudulent answers, or any suppression of facts" should avoid the policy. One of those questions was: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies?" To this question the applicant answered, "$10,000, Equitable Life Assurance Society." A policy of that society was in fact the only other existing insurance. *Held:* that the answers were not warranties, but representations; and that the issue of a policy without further inquiry, was a waiver of the right of the insurers to require further answers as to the particulars mentioned in this question, and estopped them to set up that the omission, though intentional, to disclose unsuccessful applications for additional insurance was material and avoided the policy. *Ib.*

4. The acceptance by insurers of payment of a premium, after they know that there has been a breach of a condition of the policy, is a waiver of the right to avoid the policy for that breach. *Ib.*

5. Where the declaration in an action on a policy of insurance alleges that the consideration of the contract was the payment of a certain premium at once, and of future annual premiums, and the policy given in evidence is expressed to be made "in consideration of the representations made in the application for the policy" and of the sums paid and to be paid for premiums, and this application contains no promise or agreement of the assured, there is no variance. *Ib.*

6. A policy of insurance against "bodily injuries, effected through external, accidental and violent means," and occasioning death or complete disability to do business; provided that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries;" covers a death by hanging one's self while insane. *Accident Ins. Co.* v. *Crandal*, 527.

7. Statements in an application for a policy of insurance, expressing the applicant's understanding of what will be the effect of the insurance, cannot control the legal construction of the policy afterwards issued and accepted, although the application warrants the facts stated therein to be true, and the policy is expressed to be made "in consideration of the warranties made in the application." *Ib.*

See HUSBAND AND WIFE, 2;
NEGLIGENCE.

INTEREST.

See RAILROAD, 1;
SUBROGATION.

INTERNAL REVENUE.

On the 29th April, 1871, A gave notice to a collector of internal revenue of frauds upon the revenue by a railroad company, whereby it had become liable to penalties. In consequence of this information, an action was commenced for the recovery of the penalties, which resulted in a compromise in June, 1874, and the payment of a sum by the company in discharge of its liability. A applied for the informer's share of this sum under the provisions of § 179, act of June 30, 1864, 13 Stat. 305, as amended by the act of July 13, 1866, 14 Stat. 145. It was conceded that A was the informer as claimed, and that he was entitled to the amount claimed, if the duty and power to make the payment were not taken away by § 39 of the act of June 6, 1872, 17 Stat. 256, repealing those previous provisions. Payment was refused at the treasury, whereupon claimant brought suit in the Court of Claims, and obtained judgment for the recovery of his claim. On appeal this court affirms that judgment by a divided court. *United States* v. *Ramsay*, 214.

INTERNATIONAL LAW.

See LAW OF NATIONS;
LOCAL LAW, 1;
TREATY.

INTERSTATE COMMERCE.

See CONSTITUTIONAL LAW, A, 6, 7, 8, 9.

JUDGMENT.

1. A judgment entered upon motion of defendant's attorney of record that "it appearing that the subject-matter in this suit has been adjusted and settled by the parties, it is therefore ordered that this cause be, and the same is, hereby dismissed," is a judgment on the merits, final in form and nature, and is a bar to a subsequent suit against the defendant for the same cause of action. This rule also prevails in Nevada by statute. Gen. Stat. Nevada, 1885, § 3173. *United States* v. *Parker*, 89.
2. The difference between a *retraxit* and a non-suit pointed out. *Ib.*
3. A judgment recovered in one court may be pleaded as a defence to a suit on the same cause of action pending in another, when by law the cause of action is merged in the judgment. *Schuler* v. *Israel*, 506.
4. The question of what is a final decree, from which an appeal can be taken, considered. *Porter* v. *Pittsburg Bessemer Steel Co.*, 649.
5. The denial of compulsory process to enable a person charged with crime to obtain witnesses at the trial in the court below, does not invalidate the judgment. *Ex parte Harding*, 782.

See CORPORATION, 4;
JURISDICTION A, 3;
PROBABLE CAUSE, 2.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. In an action in which a jury has been waived in writing, and the judgment of the Circuit Court is for more than $5000, the question whether the facts set forth in a special finding of the court are sufficient in law to support the judgment may be reviewed on writ of error, without any bill of exceptions or Certificate of Division of Opinion. *Allen* v. *St. Louis Bank*, 20.
2. An averment in a motion for a new trial (contained in a record, brought up in error from a state court) that a statute of the state upon which the suit was based is "unconstitutional and void," may apply to the constitution of the state, and, taken by itself, raises no question for decision below, which this court can review in error. *Kansas Endowment Association* v. *Kansas*, 103.
3. The judgments and decrees of the Circuit Courts of the United States, sitting in a particular state, are to be accorded in the courts of that

state, whether as the foundation of an action, or of a defence, either by plea or in proof, such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority; and whether such due effect has been given by a state court to a judgment or decree of a court of the United States is a Federal question within the jurisdiction of this court, on a writ of error to the Supreme Court of the State. *Crescent City Co.* v. *Butchers' Union Co.*, 141.

4. Where a District Court in the Territory of Utah refuses to issue a writ of *habeas corpus* involving the question of personal freedom, an appeal lies to this court from its order and judgment of refusal. *In re Snow*, 274.

5. An action at law in a state court of California by A against B, to recover the value of a crop raised on land occupied by B who claims as preëmptor, adversely to A, claiming under the state, by B's labor and at B's expense, does not involve the title to the land, and the issue presents no Federal question. *Martin* v. *Thompson*, 376.

6. *Ex parte Wilson*, 114 U. S. 417, affirmed on the point that this court cannot discharge on *habeas corpus* a person imprisoned under the sentence of a Circuit or District Court, in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold the prisoner under sentence. *Ex parte Harding*, 782.

See LOCAL LAW, 5.

B. JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES.

1. A Circuit Court of the United States has jurisdiction to issue a writ of *habeas corpus* to determine whether one of the crew of a foreign vessel in a port of the United States, who is in the custody of the state authorities, charged with the commission of a crime, within the port, against the laws of the state, is exempt from local jurisdiction under the provisions of a treaty between the United States and the foreign nation to which the vessel belongs. *Wildenhus's Case*, 1.

2. The parties in this case on both sides being all citizens of Louisiana, it is held that the facts as stated in the opinion of the court show no real and substantial dispute or controversy arising under the Constitution or laws of the United States, so as to authorize the removal of the case from the state court of Louisiana, to the Circuit Court of the United States. *Gibbs* v. *Crandall*, 105.

3. An averment that the complainant in a bill of equity "resides" in a state is not an averment that he is a citizen of the state, so as to give a Circuit Court of the United States jurisdiction over the subject-matter by reason of citizenship of the parties. *Everhart* v. *Huntsville College*, 223.

4. When the jurisdiction of a Circuit Court depends upon the citizenship of the parties, and that court takes jurisdiction and renders judgment, and the record in this court in error or on appeal fails to show the

requisite citizenship, the judgment will be reversed and the case remanded by this court on its own motion, and the party in default adjudged to pay costs here. *Ib.*

5. An order drawn upon a county treasurer by county officials in favor of A or order unindorsed, and a like order in favor of A, both assigned by A to B for a valuable consideration, constitute no cause of action in B's favor on which B can maintain an action in a Circuit Court of the United States on the ground of citizenship, if A could not maintain the action there on the same ground; and if, in such action in B's favor A's necessary qualification of citizenship does not affirmatively appear in the record in this court, the writ of error will be dismissed whether the question of jurisdiction be made or not, and plaintiff in error adjudged to pay costs in this court. *King Bridge Co.* v. *Otoe County*, 225.
6. This suit is brought to compel state officers to do what a statute of the state requires them to do, and is not a suit against the state, but against the officers. *Rolston* v. *Missouri Fund Commissioners*, 390.
7. A Circuit Court of the United States cannot acquire jurisdiction, by removal from a state court, under § 2 of the act of March 3, 1875, c. 137 (18 Stat. 470) of an original proceeding to obtain a mandamus against the treasurer or the board of supervisors of a city, to compel them to take action, in accordance with a statute of the state, to pay the interest or principal of bonds issued by the city. *Rosenbaum* v. *Bauer*, 450.
8. Section 716 of the Revised Statutes, giving power to a Circuit Court to issue all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law, construed in connection with §§ 1 and 2 of the act of 1875, operates to prevent the issuing by the Circuit Court of a writ of mandamus, except in aid of a jurisdiction previously acquired by that court. *Ib.*
9. In an action to recover less than $5000, in which the defendant asks for judgment upon a counterclaim for more than that sum, and the Circuit Court renders a general judgment for the plaintiff, a writ of error sued out by the defendant is within the jurisdiction of this court, under the act of February 15, 1875, c. 77, § 3. *Dushane* v. *Benedict*, 630.

See TREATY.

C. OF TERRITORIAL COURTS.

A territorial court is not deprived of its jurisdiction to try a person indicted for a criminal offence by the fact that an alien sat on the grand jury that found the indictment, under a provision of a territorial statute permitting it. *Ex parte Harding*, 782.

See CRIMINAL LAW, 2.

D. OF STATE COURTS.

See TREATY.

JUROR.

1. The judgment of the court as to the competency of the juror upon his declaration under oath or otherwise, as above, is conclusive. *Hopt* v. *Utah*, 430.
2. When a challenge by a defendant in a criminal action to a juror, for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant, and excused, and an impartial and competent juror is obtained in his place, no injury is done to the defendant, if until the jury is completed he has other peremptory challenges which he can use. *Ib.*

See CONSTITUTIONAL LAW, A, 2;
EVIDENCE, 3.

LACHES.

See EQUITY, 4, 5;
LOCAL LAW, 23 (4).

LANDLORD AND TENANT.

1. The Civil Code of Louisiana, following the civil law of Rome, Spain, and France, and differing from the common law, regards a lease for years as a mere transfer of the thing leased; and holds the landlord bound, without any express covenant, to keep it in repair and otherwise fit for the use for which it is leased, even when the want of repair or the unfitness is caused by an inevitable accident; and if he does not do so, authorizes the tenant to have the lease annulled or the rent abated. *Viterbo* v. *Friedlander*, 707.
2. The breaking of a crevasse in the levees by the waters of the Mississippi River is a fortuitous or unforeseen event, within the meaning of the Civil Code of Louisiana; and if in consequence thereof a sugar plantation, leased for five years, with the buildings, mules, and implements necessary for the cultivation of sugar-cane, and with the growing crop of cane (which the lessee agrees to cut and plant as seed cane, and, by way of reimbursing the lessor for it, to leave a certain amount of growing cane on the plantation at the end of the lease), is overflowed for three months, all the cane destroyed, the canals and ditches necessary for drainage filled up, the bridges swept away, and a deposit from three to six inches deep left over the whole ground, making it necessary, in order to cultivate it as a sugar plantation the following year, to spend large sums of money to dig out canals and ditches, repair bridges, and buy seed cane, the plantation is partially destroyed, or ceases to be fit for the use for which it was leased, within the meaning of articles 2697 (2667) and 2699 (2669) of that code, and the lessee is entitled to have the lease annulled; notwithstanding the provision of article 2743 (2719) that the tenant of a predial estate cannot claim an abatement of rent for a destruction of a whole or part of his crop by inevitable accidents, unless they are of such a nature that they could not have been foreseen by either party when the lease was made. *Ib.*

LATENT AMBIGUITY.

See WILL.

LAW OF NATIONS.

The counterfeiting of foreign securities, whether national or corporate, which have been put out under sanction of public authority at home — especially the counterfeiting of bank notes and bank bills — is an offence against the Law of Nations. *United States* v. *Arjona*, 479.

See CONSTITUTIONAL LAW, A, 3, 4.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See WILL.

LETTERS TESTAMENTARY.

See LIMITATION, STATUTES OF, 2, 3.

LIFE INSURANCE.

See INSURANCE.

LIMITATION, STATUTES OF.

1. When relief is asked in equity in courts of the United States on the ground of fraud, time will not run in favor of defendant until discovery of the fraud, or until, with reasonable diligence, it might have been discovered; and this rule is not affected in the state of New York by the provisions of § 382 of the code of that state as amended in 1877 in so far as they may be construed to modify it. *Kirby* v. *Lake Shore & Southern Michigan Railroad*, 130.
2. A statute of a state which provides that "the time which shall have elapsed between the death of any person and the granting of letters testamentary or of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters shall not be deemed any part of the time limited by any law for the commencement of actions by executors or administrators," does not give the party claiming the benefit of its provisions both periods of six months therein mentioned, but only such time, not exceeding six months, as elapsed after the death of the testator or intestate, before the granting of letters, and the additional time of six months after the granting of letters. *Ib.*
3. In a state where ancillary letters are authorized to be issued on a will proved in another state, on depositing in the office of the probating court a certified copy of the will and its probate, the executor cannot prevent the state statute of limitations from running against him in a Circuit Court of the United States sitting within the state, by unreasonable delay in taking out ancillary letters. *Ib.*

4. The general rule that express trusts are not within the statute of limitations does not apply to a trust openly disavowed by the trustee with the knowledge of the cestui que trust. *Speidel* v. *Henrici*, 377.
5. Implied trusts are barred by lapse of time. *Ib.*

See CLAIMS AGAINST THE UNITED STATES, 3;
EQUITY, 4, 5, 6.

LOCAL LAW.

1. Unless exempted by treaty, a foreign merchant vessel, entering a port of the United States for purposes of trade, is subject to the local law, and the local courts may punish for crimes committed upon the vessel, within the port, by one foreigner upon another foreigner. *Wildenhus's Case*, 1.
2. The statute of Missouri of March 4, 1869, gives no validity to a transfer, without indorsement in writing, of a bill of lading or warehouse receipt. *Allen* v. *St. Louis Bank*, 20.
3. The statute of Missouri of March 28, 1874, making the pledge of goods by a factor, without the written authority of the owner, a criminal offence, does not render such a pledge valid as between the owner and the pledgee. *Ib.*
4. In Illinois when a declaration in an action at law alleges a joint liability of two defendants, a plea in bar which does not traverse this allegation admits it, and makes the declarations of one defendant not served with process evidence against the other who has appeared and answered. *Forsyth* v. *Doolittle*, 73.
5. According to the law and practice of Louisiana, the Supreme Court of that state, in cases brought before it by appeal from inferior courts, determines the matter in controversy, as presented by the record, both as to fact and law, without regard to the particular rulings of the courts below, and its opinion, showing the grounds of its judgment, constitutes part of the record to be reviewed in this court, upon writ of error, when the question for determination is whether the Supreme Court of the state decided a Federal question, necessary to the decision of the case, without respect to the rulings of the inferior state court. *Crescent City Co.* v. *Butchers' Union Co.*, 141.
6. It appearing by the record in this court that the verdict at the trial of an action of ejectment in the Circuit Court of the United States sitting in Florida did not state the quantity of the estate or describe the land, the judgment was reversed and the cause remanded for a new trial. *Pensacola Ice Co.* v. *Perry*, 318.
7. Following the decisions of the Supreme Court of Kentucky, this court holds that the justices of the peace of Muhlenburg County, in that state, do not form a necessary part of the county court when levying a tax to satisfy a judgment against the county, under § 9 of the Act of the Legislature of Kentucky, of February 24, 1868, amending the charter of the Elizabethtown and Paducah Railroad Company. *Meriwether* v. *Muhlenburg County Court*, 354.

8. The State of Missouri having loaned its credit to the Hannibal and St. Joseph Railroad Company for $3,000,000, upon a first lien of the road and property of the company, the legislature on the 20th February, 1865, authorized that company to mortgage its road and property to trustees to secure an issue of bonds to that amount, and further enacted that whenever those trustees should "pay into the treasury of the state a sum of money equal in amount to all indebtedness due or owing by said company to the state, and all liabilities incurred by the state by reason of having issued her bonds and loaned the same to said company as a loan of the credit of the state, together with all interest that has and may at the time when such payment shall be made have accrued and remain unpaid by said company, and such fact shall have been certified to the governor of the state by the treasurer," the governor should "make over, assign, and convey to the trustees aforesaid all the first liens and mortgages now held by the state." The act further required the state treasurer to receive of the trustees in payment of the $3,000,000 any outstanding bonds of the state, bearing not less than six per cent. interest, or any of the unpaid coupons thereof at their par value. *Held*, that this meant that if payment was made in money, and not in state bonds or coupons, it must be of an amount equal to the face value of the bonds issued to the company and the accrued interest thereon to the time of payment, together with such further sum, if any, as would be necessary to enable the state to cancel then, or within a reasonable time thereafter, $3,000,000 of its outstanding liabilities, bearing interest at the rate of six per cent. per annum. *Rolston* v. *Missouri Fund Commissioners*, 390.

9. The act of the General Assembly of Missouri of March 26, 1881, to provide for the transfer to the sinking fund of surplus money in the treasury, recognized the act of February 20, 1865, providing for the reduction of the state indebtedness, and constituted an agreement, on the part of the state, that all moneys paid into the treasury by the railroad company should be put into the state debt sinking fund, and that all option bonds should be called in and paid as soon as it could lawfully be done; and the use of the money so paid in taking up six per cent. bonds of the state operated to discharge the company from liability for the payment of either the principal or interest of an equal amount of the bonds which had been issued for its benefit. *Ib.*

10. The provisions of the Constitution of the State of Missouri which went into effect November 30, 1865, relating to the lien held by the state upon any railroad, or to the release of the indebtedness of any corporation to the state, do not prevent the state authorities from complying with the requirements of the acts of February 20, 1865, and March 25, 1881, respecting the lien upon the Hannibal and St. Joseph Railroad and the debt of that company to the state, when the company has performed the acts required by the statutes to be done upon its part. *Ib.*

11. In Pennsylvania a warrant and survey, and payment of the purchase

money, confer a legal estate as against all but the Commonwealth, together with a legal right of entry which will support ejectment; and this action of ejectment may be maintained by the owner who paid the purchase money, without any conveyance from the person in whose name the application was made and the warrant issued. *Herron* v. *Dates*, 464.

12. The plaintiff in an action of ejectment in Pennsylvania, to prove title, offered in evidence certified copies of (1) an application numbered 12,969, in the names of six separate persons for six separate tracts of four hundred acres each, adjoining lands of A; (2) of old purchase voucher, dated November 26, 1793, also numbered 12,969, in the same names, with like quantities of land also adjoining lands of A; (3) of old purchase blotter dated June 14, 1794, also numbered 12,969, at the side of which were written the words: "A gen'l rec't wrote," and in the body of which, after the number and date and the name of A, were the words "6 W'r'ts of 400 a's Am't, 2400 a's 50*s* p. c't p'd specie ch. £60 = =. Fees 60*s*. p'd, rem'r charge of 168 D's. Rec't d'd." *Held*, (1) That these documents were competent evidence to prove the payment of the money and by whom it was paid; (2) that the money for the six tracts was all paid in full by A; (3) that he was the owner of the warrant by virtue thereof; (4) that notwithstanding the differences between the date of the application and warrant (November 16, 1793), and the date of the receipt of the purchase money (June 14, 1794), the issue of the warrant was, in view of the settled practice in Pennsylvania, evidence of the payment of the purchase money sufficient to establish *prima facie* a legal title in A, which was not liable to be overcome by a subsequent patent from the Commonwealth, purporting on its face, but not otherwise proved, to be connected with the warrant and survey, and under which no claim of title had been asserted for more than seventy-five years. *Ib.*

13. When the Orphan's Court in Pennsylvania has jurisdiction of a subject matter, its orders, judgments, and decrees therein cannot be impeached collaterally. *Ib.*

14. The plaintiff in ejectment in Pennsylvania having proved title to the premises by establishing a warrant and survey and payment of the purchase money perfected by return of the deputy surveyor into the land office, evidence on the part of the defendant of a subsequent patent from the Commonwealth, with no proof of its connection with the warrant and survey except recitals to that effect in it, is inadmissible. *Ib.*

15. The act of the legislature of Kentucky of January 30, 1878, respecting the compromise and settlement of the county of Carter with its creditors is not in conflict with the provision in the constitution of the State that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title." *Carter County* v. *Senton*, 517.

16. Carter County in Kentucky under legislative authority subscribed to

the capital stock of a railroad company, and issued its negotiable coupon bonds in payment of the subscription. Subsequently Boyd and Elliott counties were created, in each of which were included townships which formed part of Carter County when the subscription was made and the bonds issued, and in each case legislative provision was made for the continuation of the liability of the persons and property set off to the new counties on the subscription. Default being made in the payment of interest, an act was passed in 1878 authorizing the County Court of Carter County to compromise and settle with the holders of the bonds on behalf of Carter County, and on behalf of the parts of the other counties taken from Carter County, and a compromise was made under which new bonds of Carter County and of those parts of each of the other counties taken from Carter County were issued. Default being made in the payment of interest due on these latter bonds, a holder of the coupons brought suit against Carter County to recover on them. *Held:* (1) That the legislature had authority under the constitution of Kentucky to authorize the County Court of Carter County to bind those parts of the counties of Boyd and Elliott taken from Carter County; (2) that under the act of 1878 the County Court of Carter County was authorized to contract for the issue of negotiable bonds of the county and of the parts of the county in order to retire the old negotiable bonds of the county; (3) that in the suit to recover upon the coupons of the new bonds, it was not necessary to make the parts of Boyd and Elliott counties, which had been parts of Carter County, parties to the suit. *Ib.*

17. The restriction upon the right of a congregation, formed for religious purposes, to receive "land not exceeding in quantity . . . ten acres," which is imposed by § 42 of the act of the legislature of Illinois of April 18, 1872, applies to congregations incorporated for the object named in § 35 of that act, viz.: "the purpose of religious worship;" and does not affect foreign benevolent or mission societies incorporated either with the objects named in the incorporation of the Board of Foreign Missions of the Presbyterian Church in the United States, or with the objects named in the incorporation of the Board of Home Missions of that church, although both organizations are important agencies in the general religious work of that church. *Gilmer* v. *Stone*, 586.

18. A statute of Washington Territory enacts that "a part of several coparties may appeal or prosecute a writ of error; but in such case they must serve notice thereof upon all the other parties." One of two defendants in a cause served upon the other written notice, entitled in the cause, that he would, on a day therein named, "file a notice of appeal and stay bond and appeal said cause," and added, "You are herewith requested to join in said appeal." The other defendant answered in writing, "I hereby accept service of the above notice," "and decline to join in an appeal in said cause." *Held*, that this was an exact and

effectual compliance with the provision of the statute. *Ex parte Parker*, 737.

19. A statute of Washington Territory relating to appeals provides that "in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the Supreme Court, and shall be so certified, not by transcript, but in the original form: but a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant. In an appeal in equity the appellant requested the clerk to "transmit to the Supreme Court all the papers filed in this cause except subpœnas as by law provided." The cause had been referred to a referee, who had returned with his report and finding, five packages, numbered 1, 2, 3, 4, and 5, with a certificate that it was "the evidence written down before me and taken in said action, and that the same, with the documentary evidence returned herewith by me into court, constitutes the evidence submitted to and taken by me in said action." The clerk of the court transmitted these packages to the Supreme Court with a certificate that "the letters, papers, and exhibits herewith transmitted and numbered . . . are all the papers, letters, and evidence introduced in said cause before said referee, and by him deposited with the clerk of said court," and further certified that the transcript on appeal was a "full, true, and correct transcript of so much of the record . . . as I am by statute and directions of attorneys in said cause required to transmit to the Supreme Court." *Held*, that the certificates showed that the transcript contained all the evidence introduced by the parties on the trial below, and that the appeal had been duly taken and perfected. *Ib.*

20. In Louisiana a holder of a first mortgage on real estate, duly executed before a notary with *pact de non alienando*, is not bound to give notice to subsequent mortgagees, or to any person but the debtor in possession, when he proceeds by executory process to obtain seizure and sale of the mortgaged property to satisfy the mortgage debt. *New Orleans Banking Association* v. *Le Breton*, 765.

21. In Louisiana a mortgage given to secure a future balance on an open unliquidated account is valid; and the acknowledgment of the amount of the balance by the debtor, before a notary, is all that is necessary to be done under the code, in order to ascertain it for the purposes of executory process. *Ib.*

22. In Louisiana informalities connected with or growing out of any public sale, made by any person authorized to sell by public auction, are prescribed against by those claiming under the sale after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons. *Ib.*

23. W, owning a plantation in Louisiana, and being embarrassed, agreed with several of his creditors and with K, that W should remain in possession and work the plantation; that K should make annual ad-

vances to a stipulated amount to enable him to work it, and should receive and dispose of the crops and apply their products, first to the payment of his own account, and next to the payment of the debts of the creditors; and that for these advances and the balance on his account K should have a first mortgage on the plantation with *pact de non alienando*, and the debts of said creditors should be secured by a mortgage subsequent to the lien to secure K's account. A second mortgage was afterwards made to K, with a like *pact*, and with an agreement, in which all joined, that it should have priority over the first mortgage. The plantation was worked at a loss, and K having made large advances, W acknowledged the amount of them before a notary, and K proceeded by executory process to obtain a sale of the plantation, and it was sold under judicial process. In a suit brought after the lapse of eight years by one of said creditors to foreclose the creditor's mortgage, and to set aside the sale under the mortgage to K: *Held*, (1) That no notice to the creditors of the proceedings to foreclose K's mortgage was necessary; (2) That W's acknowledgment of the balance due on K's account was all the ascertainment that was required; (3) That the relation of trustee and *cestuis que trust* did not arise between K and the creditors; (4) That the creditors were guilty of laches in allowing so long time to elapse after knowledge of the sale, before commencing proceedings to disturb it. *Ib.*

See CHATTEL MORTGAGE, 1, 2, 3;
CONSTITUTIONAL LAW, A, 2, 3, 4;
CORPORATION, 4;
DEED, 1, 2, 3;
JUDGMENT, 1;
LANDLORD AND TENANT;
LIMITATION, STATUTES OF, 1, 2, 3;
MALICIOUS PROSECUTION;
PLEADING;
STATUTE, A, 5;
TREATY.

LONGEVITY PAY.

1. Under that claim in the act of March 3, 1883, 22 Stat. 473, which provides for crediting an officer of the navy with his time of service in the regular or volunteer army or navy, or both, in the same manner as if all the service "had been continuous, and in the regular navy in the lowest grade, having graduated pay held by" him "since last entering the service," officers are entitled to be credited as of the lowest grade with graduated pay held by them after reëntering the service, and not as of a still lower grade in which they may actually have served, but to which no graduated pay was attached. *United States* v. *Rockwell*, 60.

2. Service by an officer of the navy as an enlisted man in the marine corps is to be credited to him in calculating his longevity pay under the act of March 3, 1883, 22 Stat. 472, 473, c. 97. *United States* v. *Dunn*, 249.

MALICIOUS PROSECUTION.

In Louisiana, an action for malicious prosecution is founded on the principles, and is subject to the defences, established by the common law;

and in order to sustain it, it is necessary to show: (1) that the suit had terminated unfavorably to the prosecutor; (2) that in bringing it the prosecutor had acted without probable cause; (3) that he was actuated by legal malice, that is, by improper or sinister motives; and that these three elements concur. *Crescent City Co.* v. *Butchers' Union Co.*, 141.

See PROBABLE CAUSE, 1, 2.

MANDAMUS.

The writ of mandamus properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof; but it will not lie to correct alleged error occurring in the exercise of its judicial discretion while acting within its jurisdiction. In this case it is ordered that it be issued. *Ex parte Parker*, 737.

See JURISDICTION, B, 7, 8.

MARINE CORPS.

The marine corps is a military body, primarily belonging to the navy, and under control of the Naval Department, with liability to be ordered to service in connection with the army, and in that case under the command of army officers. *United States* v. *Dunn*, 249.

See LONGEVITY PAY.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MEXICAN LAND GRANTS.

See TEXAS LAND GRANTS.

MILITARY NECESSITY.

See CLAIMS AGAINST THE UNITED STATES.

MOIETY.

See INTERNAL REVENUE.

MORTGAGE.

In a suit for foreclosing a mortgage, it appearing that a receiver has been appointed of the mortgaged premises, and that the mortgagor, appellant, is unable to pay the cost of printing the record on appeal, and that there are rents and profits in the receivers' hands collected during the pendency of the suit, the court orders the receiver to pay to the clerk the sum estimated to be necessary to complete the cost of printing the record. *Grant* v. *Phœnix Life Ins. Co.*, 271.

See CHATTEL MORTGAGE, 4;
EVIDENCE, 1;
LOCAL LAW, 19, 21, 22, 23;
RAILROAD, 1, 2, 3;
TRUST.

MOTION TO DISMISS.

If the other appellants oppose a motion, made by one of several appellants, to dismiss an appeal on the ground that since it was taken the Supreme Court of a state has enjoined all the appellants from enforcing the claims which form the subject matter of the appeal, it will be denied. *Marsh* v. *Shepard*, 595.

MUNICIPAL BOND.

1. It has been settled by this court in *Davenport* v. *Dodge County*, 105 U. S. 237, and *Blair* v. *Cuming County*, 111 U. S. 363, that coupons like those sued on in this case are obligations of the county, and that an action may be maintained against the county upon them. *Nemaha County* v. *Frank*, 41.

2. By the act of the legislature of Illinois incorporating the Dixon, Peoria and Hannibal Railroad Company, passed March 5, 1867, authority was given to certain cities, incorporated towns, and townships, to subscribe to its stock not exceeding $35,000. At an election duly called and held, August 3, 1868, the town of Brimfield voted to subscribe $35,000, and at the same time and place, but without legislative authority therefor, the same electors voted to make an additional subscription of $15,000. March 31, 1869, the legislature passed an act reciting that the latter sum had been voted by a majority of the legal voters in said township at said election, and provided that said election "is hereby legalized and confirmed, and is declared to be binding upon said township in the same manner as if said subscription had been made under the provisions of said charter." The township, by its proper officers, May 5, 1869, issued bonds for both the subscriptions: *Held*, (1) At the time the bonds were issued there was no decision of the highest court of Illinois denying the power of the legislature, by subsequent enactment, to legalize a municipal subscription to railroad stock which would have been originally lawful if it had been made, in the mode in which it was made, under legislative authority previously granted. (2) In such case this court is at liberty to exercise its independent judgment as to the validity of such curative statutes. (3) The act of March 31, 1869, is not in violation of the constitution of Illinois of 1848. It only gave effect to the wishes of the corporate authorities — the electors — of Brimfield, as ascertained in the customary mode. *Bolles* v. *Brimfield*, 759.

See CONSTITUTIONAL LAW, B, 4;
LOCAL LAW, 16.

MUNICIPAL CORPORATION.

See MUNICIPAL BOND.

NATIONAL BANK.

See INDICTMENT, 2, 3, 4, 5, 6;
REMOVAL OF CAUSES, 2.

NATURALIZATION FEES.

See FEES.

NAVY.

Before the passage of the act of March 3, 1835, forbidding it, 4 Stat. 757, it was lawful for the Secretary of the Navy to make allowances out of appropriations in gross to officers of the navy beyond their regular pay, for quarters, furniture, lights, fuel, &c., and the repeal of that act by the act of April 17, 1866, 14 Stat. 33, restored the right to make such allowances; and such as were made by him and were settled at the Treasury Department, between the date when the latter act went into effect and the passage of the act of February 25, 1871, 16 Stat. 431, were made in accordance with the executive construction of the statutes respecting the navy and the Navy Department prior to 1835, and this court will not at this late day question their validity. *United States* v. *Philbrick*, 52.

See LONGEVITY PAY;
MARINE CORPS;
SALARY, 1.

NEGLIGENCE.

In a suit in equity by an insurance company against a transportation company, and the transferee of its property, to recover the amount paid by the insurance company, as insurer of goods alleged to have been lost, in transportation, by the negligence of the transportation company: *Held*, without passing on any other question, that negligence was not proved, and that the loss happened by perils excepted in the contract of transportation. *Hibernia Ins. Co.* v. *St. Louis Transportation Co.*, 166.

NEGOTIABLE PAPER.

See CHATTEL MORTGAGE, 4.

NONSUIT.

See JUDGMENT, 2.

OFFICER.

See SALARY, 2, 3.

ORPHANS' COURT.

See LOCAL LAW, 3.

PACT DE NON ALIENANDO.

See LOCAL LAW, 19.

PARTIES.

A respondent to a bill in equity in a state court, who allows a decree *pro confesso* to be taken against him in the lower state court, and is not a party to the appeal of the Supreme Court of the state, nor to the petition for a writ of error to this court, cannot make himself a party here

against the objections of other respondents, who appeared and contested the cause in the state courts, and sued out the writ of error to this court. *Marsh* v. *Nichols*, 598.

See LOCAL LAW, 16 (3).

PARTNERSHIP.

See BAILMENT, 3.

PATENT FOR INVENTION.

1. In view of the state of the art, claim 4 of letters-patent No. 190,368, granted to Asa Quincy Reynolds, May 1, 1877, for an "improvement in automatic fruit-driers," namely, "4. In combination with a fruit-drier, the outer wall of which is made up of the frames of the several trays, as explained, a suspending device, operating substantially as described, and supporting said drier from a point in or on the lowermost tray thereof, for the objects named," is not infringed by an apparatus constructed in accordance with the description in letters-patent No. 221,056, granted to George S. Grier, October 28, 1879, for an "improvement in fruit-driers." *Grier* v. *Wilt*, 412.
2. In a suit in equity for the infringement of letters-patent, prior letters-patent, though not set up in the answer, are receivable in evidence to show the state of the art, and to aid in the construction of the claim of the patent sued on, though not to invalidate that claim on the ground of want of novelty, when properly construed. *Ib.*
3. The reissued letters-patent No. 2355, dated September 11, 1866, granted to the Tucker Manufacturing Company as assignee of Hiram Tucker, for an improved process of bronzing or coloring iron, and No. 2356, of like date and grantee, for the product resulting from that process, are in fact for but one invention, and the new article of manufacture called Tucker bronze is a product which results from the use of the process described in the patent, and not one which may be produced in any other way: and they are not infringed by the manufacture, by the defendants, by the different process used by them, of an article which cannot be distinguished, by mere inspection, from Tucker bronze, *Plummer* v. *Sargent*, 442.

PENALTY.

See INTERNAL REVENUE.

PETITION FOR REHEARING.

See CASES AFFIRMED, 11.

PLEADING.

As pleadings in Nevada are required to be construed in a sense to support the cause of action or defence, and as facts in the record not fully set forth in defendant's plea clearly show that the cause of action sued on in this case is the cause of action in the judgment pleaded in bar: *Held*, that the defendant's plea sufficiently avers all the facts necessary to constitute the former judgment a bar to this action. *United States* v. *Parker*, 89.

See ASSUMPSIT, 2;
EQUITY PLEADING;
INSURANCE, 5;
JURISDICTION, A, 2;
LOCAL LAW, 4;
PRACTICE, 2.

PLEDGE.

See BAILMENT;
LOCAL LAW, 3.

POSSESSION.

See EVIDENCE, 5, 7, 8.

PRACTICE.

1. This court, on reversing a judgment of the Circuit Court for the plaintiff on a special finding which ascertains all the facts of the case, will order judgment for the defendant without further trial. *Allen* v. *St. Louis Bank*, 20.
2. When the defendant in an action at law denies each and every allegation in the declaration, and puts the plaintiff on his proof, it is not error to order stricken from the answer special defences which may be set up under this general denial. *Nemaha County* v. *Frank*, 41.
3. An irregular act of practice by an attorney of record rebuked. *Schley* v. *Pullman Car Company*, 575.

See APPEAL;
CASES AFFIRMED;
ERROR;
EXCEPTION;
JURISDICTION, A, 1;
LOCAL LAW, 18, 19;
MORTGAGE.

PRESUMPTION.

See EVIDENCE, 5, 6, 7, 8.

PRINCIPAL AND AGENT.

See BAILMENT.

PROBABLE CAUSE.

1. The question of probable cause is a question of law, where the facts are undisputed; and the judgment of the court, in favor of the plaintiff, is conclusive proof of probable cause for the prosecution of the suit alleged to be malicious, notwithstanding its subsequent reversal by an appellate court, unless it is shown to have been obtained by means of fraud. This rule seems to reconcile the apparent contradiction in the authorities, is well grounded in reason, fair and just to the parties, and consistent with the principle on which the action for malicious prosecution is founded. *Crescent City Co.* v. *Butchers' Union Co.*, 141.
2. The decree of the Circuit Court of the United States, relied on by the plaintiff in error in this case, as a defence, was sufficient evidence of probable cause for the prosecution of the suit, notwithstanding its reversal, on appeal, by this court. It does not detract from its effect that in another previous suit, between the plaintiff in error and

another defendant, the Supreme Court of Louisiana had decided the questions of law on which alone his right depended adversely to him. *Ib.*

See MALICIOUS PROSECUTION.

PROMISSORY NOTE.

An agreement by the payee of a promissory note to release the maker from the payment of the principal on the payment, in advance each year, until payee's death, of interest at a rate above the legal rate, is no defence in a suit by the payee's executor, without proof of such payment until his death. *Harmon* v. *Adams*, 363.

See BAILMENT, 4;
GARNISHEE.

PUBLIC LAND.

See CALIFORNIA SCHOOL LAND;
TEXAS LAND GRANTS.

RAILROAD.

1. The provision in the constitution of Arkansas of 1874 that "no private corporation shall issue stock or bonds except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void" does not prevent the carrying out of an agreement between mortgage bondholders of an embarrassed railroad company in that state by which it was agreed that trustees should buy in the mortgaged property on foreclosure, and convey it to a new company to be organized by the bondholders which should issue new mortgage bonds to pay the expenses of the sale, and other new mortgage bonds to be taken by the bondholders in lieu of their old bonds, and full paid-up stock subject to the mortgage debt, to be delivered to and held by the bondholders without any payment of money; and the bonds issued under such an agreement are not subject to the provisions of § 5, 488 Rev. Stat. Ark., Mansfield's Digest, page 1057, respecting the legal rate of interest for certain classes of railroad securities. *Memphis & Little Rock Railroad* v. *Dow*, 287.
2. Trustees under a mortgage from a railroad company with covenants of warranty are entitled to protect the trust property against a forced sale under a prior incumbrance, and upon the payment of that incumbrance to have the benefit of its lien as against the company, and to be reimbursed the amount so paid by them with legal interest. *Ib.*
3. In this case unsecured floating debts, due by a railroad company for construction, were, in the absence of a statutory provision, held not to be a lien on the railroad superior to the lien of a valid mortgage on it, duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value. *Porter* v. *Pittsburg Bessemer Steel Co.*, 649.

See EQUITY, 3.

REBELLION.

See CLAIMS AGAINST THE UNITED STATES, 4, 5.

RECEIVER.

See MORTGAGE.

RECOUPMENT.

See ASSUMPSIT, 1.

RELIGIOUS CORPORATION.

See LOCAL LAW, 17.

REMOVAL OF CAUSES.

1. An application for the removal of a case from a state court, filed not only after the trial had begun, but when it had progressed far enough to get a verdict of the jury subject only to the decision of the court on questions presented by a demurrer to the evidence, is clearly too late. *Bank of Maysville* v. *Claypole*, 268.
2. Since the act of July 12, 1882, c. 290, took effect, a suit by or against national banks cannot be removed from a state court to a circuit court of the United States, unless a similar suit by or against a state bank in like situation with the national bank could be so removed. *Leather Manufacturers' Bank* v. *Cooper*, 778.
3. A case does not arise under the laws of the United States simply because this court has decided in another suit the questions of law which are involved. *Ib.*
4. A case is not removable because a colorable assignment has been made to give a state court exclusive jurisdiction. *Ib.*

REPEAL.

See CUSTOMS DUTIES, 1;
STATUTE, A, 1.

RETRAXIT.

See JUDGMENT, 2.

RULES.

See EQUITY, 1.

SALARY.

1. The sea-pay given to officers of the navy by Rev. Stat. § 1556 may be earned by services performed under orders of the Navy Department in a vessel employed, by authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high sea. *United States* v. *Symonds*, 46; *United States* v. *Bishop*, 51.
2. A clerk in the office of the President of the United States, who is also appointed to be the clerk of a committee of Congress, and who

performs the duties of both positions, is entitled to receive the compensation appropriated and allowed by law for each. *United States* v. *Saunders*, 126.

3. Sections 1763, 1764, and 1765 of the Revised Statutes have no application to the case of two distinct offices, places, or employments, each with its own duties and compensation, but both held by one person at the same time. *Ib.*

See LONGEVITY PAY.

SEA-PAY.

See SALARY.

SET-OFF.

See ASSUMPSIT, 2.

SHIPS AND SHIPPING.

See ADMIRALTY;
LOCAL LAW, 1;
TREATY.

STATUTE.

A. CONSTRUCTION OF STATUTES.

1. Prior to the enactment in the act of February 25, 1871, 16 Stat. 431, now Rev. Stat. § 12, that "whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived unless it shall be expressly so provided," it was the general rule of law that the repeal of a repealing act restored the law as it was before the passage of the latter act without formal words for that purpose, unless otherwise provided either in the repealing act or by some general statute. *United States* v. *Philbrick*, 52.

2. The contemporaneous construction of a statute by the Executive Department charged with its execution is entitled to great weight, and ought not to be overturned unless clearly erroneous. *Ib.*

3. A statute being of doubtful construction as to what fees were to be returned, the interpretation of it by judges, heads of departments, and accounting officers, contemporaneous and continuous, was one on which the obligors in the bond had a right to rely, and, it not being clearly erroneous, it will not now be overturned. *United States* v. *Hill*, 169.

4. When the title of a statute of a state clearly and distinctly expresses the whole object of the legislature in the enactment, and there is nothing in the body of the act which is not germane to what is there expressed, the act sufficiently complies with a requirement in the constitution of the state that no law "shall relate to more than one subject, and that shall be expressed in the title;" although some provisions in the act respecting details in the execution of the purpose of the legislature may not be expressed in the title. *Carter County* v. *Sinton*, 517.

5. In construing those articles of the Civil Code of Louisiana, which were originally enacted both in French and in English, the French text may be taken into consideration for the purpose of clearing up obscurities or ambiguities in the English text. *Viterbo* v. *Friedlander*, 707.

See CONSTITUTIONAL LAW, A, 2, 12;
CUSTOMS DUTIES, 1 (1), 2;
NAVY.

B. STATUTES OF THE UNITED STATES.

1. In describing the defence against a citizen of the United States for which punishment is provided by Rev. Stat. § 5508, the word "citizen" is used in its political sense, with the same meaning which it has in the Fourteenth Amendment to the Constitution; and not as being synonymous with "resident," "inhabitant," or "person." *Baldwin* v. *Franks*, 678.
2. To constitute the offence described in the first clause of Rev. Stat. § 5336, it is not enough that a law of the United States is violated, but there must be a forcible resistance to a positive assertion of their authority as a government. *Ib.*
3. To constitute an offence under the second clause Rev. Stat. § 5336 there must be a forcible resistance to the authority of the United States while they are endeavoring to carry their laws into execution. *Ib.*

See ADMIRALTY, 4;
CALIFORNIA SCHOOL LANDS, 2;
CLAIMS AGAINST THE UNITED STATES, 3;
CONSTITUTIONAL LAW, A, 10, 11;
CRIMINAL LAW, 1;
CUSTOMS DUTIES;
FEES;
INDICTMENT, 2, 3, 5;
INTERNAL REVENUE;
JURISDICTION, B, 7, 8, 9;
LONGEVITY PAY;
NAVY;
REMOVAL OF CAUSES, 2;
SALARY, 1, 3;
STATUTE, A, 1.

C. STATUTES OF STATES AND TERRITORIES.

Arkansas. *See* CONSTITUTIONAL LAW, B, 1;
RAILROAD, 1.

Illinois. *See* CONSTITUTIONAL LAW, B, 4;
DEED, 1, 2, 3;
LOCAL LAW, 17;
MUNICIPAL BOND, 2.

Kentucky. *See* LOCAL LAW, 7, 15, 16.

Louisiana. *See* LANDLORD AND TENANT.

Maryland. *See* CONSTITUTIONAL LAW, A, 9.

Missouri. *See* CONSTITUTIONAL LAW, B, 2, 3;
LOCAL LAW, 2, 3, 8, 9, 10.

Nevada. *See* JUDGMENT, 1.

New York. *See* LIMITATION, STATUTES OF, 1.

Rhode Island. *See* CORPORATION, 4.

Tennessee. *See* CONSTITUTIONAL LAW, A, 5, 8.
Texas. *See* TEXAS LAND GRANTS, 11, 12.
Washington. *See* LOCAL LAW, 18, 19.

D. FOREIGN STATUTES.

See TEXAS LAND GRANTS.

STEAM TUG.

See ADMIRALTY, 1, 2, 3, 4.

STOCKHOLDERS' LIABILITY.

See CORPORATION, 4.

SUBROGATION.

Trustees under a mortgage from a railroad company with covenants of warranty are entitled to protect the trust property against a forced sale under a prior incumbrance, and upon the payment of that incumbrance to have the benefit of its lien as against the company, and to be reimbursed the amount so paid by them with legal interest: but the rate to be allowed is to be determined by the law in force at the time of the subrogation. *Memphis & Little Rock Railroad* v. *Dow*, 287.

TAX AND TAXATION.

Immunity from taxation by the state will not be recognized, unless granted in terms too plain to be mistaken. *Chicago, Burlington, &c., Railroad* v. *Guffey*, 569.

See CONSTITUTIONAL LAW, A, 5, 6, 9; B, 1, 2, 3, 4;
CLAIMS AGAINST THE UNITED STATES, 3.

TEXAS LAND GRANTS.

1. The Congress of Coahuila and Texas on the 28th April, 1832, passed a law respecting the grant of public lands. One Gonzales applied for a grant under this law, and, on the 16th October, 1832, the governor made the grant of the land in dispute, under which the plaintiffs claim, in the customary form for such grants. A commissioner was appointed to give possessory title to the tract, and on the 18th April, 1834, he delivered to the grantee at Dolores formal possession of the tract and executed and delivered a formal "testimonio" thereof. On the 26th March, 1834, the Congress of Coahuila and Texas at Monclova repealed the act of April 28, 1832. The laws of the Mexican states did not then take effect in any part of the country until promulgated there. There was no evidence of the promulgation of the repealing act at Dolores, but there was presumptive evidence tending to show that on the 3d May, 1836, it had not been promulgated there. *Held:* that under all the circumstances, and in view of the distance of Dolores from Monclova, the presumption was that the repealing act had not been promulgated when the commissioner extended the title to Gonzales. *Gonzales* v. *Ross*, 606.

2. The act of the Congress of Coahuila and Texas of March 26, 1834, creating a new system of disposing of the public lands, did not abrogate the grants and sales which had been made under the act of April 28, 1832, nor abolish the office and function of commissioners necessary for extending such grants. *Ib.*
3. From the notorious public history of the colony of Beales and Grant, and from other notorious facts which are stated in the opinion of the court, it is *Held*, that the governor in the grant to Gonzales, which is the subject matter of this suit, intended to designate and did designate the commissioner of the neighboring enterprise as the officer to locate the grant and deliver possession to the grantee, and that his official acts therein, having been accepted and acquiesced in by the government, must be considered as valid, even if done by him only as commissioner *de facto*. *Ib.*
4. The public officer who extended the lands in dispute must be presumed to have extended them in the proper department, and this presumptive conclusion of law is made certain in fact by examining the laws referred to in the opinion of the court. *Ib.*
5. In 1834 the state of Coahuila and the department of Monclova extended eastwardly at least as far as the river Nueces. *Ib.*
6. As all favorable presumptions will be made against the forfeiture of a grant, and as it will be presumed, unless the contrary be shown, that a public officer acted in accordance with law and his instructions, and as the government acquiesced in the commissioner's acts in extending the grant in dispute and no attempt had been made to revoke them or to assert a forfeiture: *Held*, that he had authority to extend the title, and his acts must be considered valid. *Ib.*
7. The testimonio in this case sufficiently connects itself with the original grant and the subsequent steps taken under it: it is not necessary that it should be attached to it by a physical connection. *Ib.*
8. The grant in this case gave power and authority to the commissioner to extend it, and no further order was necessary. *Ib.*
9. The extension of the title of the grantee by the commissioner in a Mexican grant completed the title, without patent or other act of the govment, and notwithstanding the imposition of conditions subsequent; and the non-performance of such conditions subsequent constituted no objection to the admission of plaintiff's evidence to show such extension. *Ib.*
10. If a forfeiture of a Mexican land grant from non-payment or condition subsequent can be availed of by a private person at all, it can only be after he has shown some right to the land in himself by virtue of a subsequent purchase or grant from the sovereignty of the soil. *Ib.*
11. Prior to the adoption of the constitution of 1876 the laws of Texas did not require that a title under a Mexican grant should be registered in the county or deposited among the archives of the land office, in order to give it vitality; and it was only void as against third persons acquiring title from the sovereignty of the soil, not having notice of it. *Ib.*

12. Defences against Spanish and Mexican titles in Texas under Art. XIII of the constitution of Texas of 1876 constitute no objection to the admission of evidence in support of such titles. *Quære*, as to the effect of the provisions in that article prohibiting the future registration of titles, or the depositing of them in the land office. *Ib.*

TREASURY SETTLEMENT.

See CLAIMS AGAINST THE UNITED STATES, 1.

TREATY.

Article XI of the Convention between Belgium and the United States of March 9, 1880, 21 Stat. 781, conferring power upon Belgian consuls in the United States to take cognizance of differences between captains, officers, and crews of Belgian merchant vessels which are in ports of the United States, and providing that the local authorities shall not interfere except when a disorder arises of such a nature as to disturb tranquillity or public order on shore or in the port, does not apply to a case of felonious homicide committed on board of a Belgian merchant vessel in a port of the United States, and does not deprive the local authorities of the port of jurisdiction over such a crime so committed by one Belgian upon the person of another Belgian, both belonging to the crew of the vessel. *Wildenhus's Case*, 1.

See JURISDICTION, B, 1;
LOCAL LAW, 1.

TRUST.

A mortgage of a railroad and of lands granted by Congress to aid in its construction, to trustees which directs the trustees to apply moneys arising from the sale of the lands to the payment of the coupons attached to the bonds secured by the mortgage, also authorizes them to purchase therewith over-due coupons which have been cut from those bonds and have been deposited with the trustees of the mortgage for the purpose of securing scrip issued to the holders of those coupons, with the object of extending the payment of the amount due on them beyond the time of payment named in them. *Little Rock & Fort Smith Railway* v. *Huntington*, 160.

See EQUITY, 3;
LIMITATION, STATUTES OF, 4, 5;
SUBROGATION.

UNFORESEEN EVENT.

See LANDLORD AND TENANT, 2.

UNITED STATES.

See CLAIMS AGAINST THE UNITED STATES.

USAGE.

See BAILMENT, 2.

VARIANCE.

See INSURANCE, 5.

VERDICT.

See LOCAL LAW, 6.

WAIVER.

See INSURANCE, 2, 3, 4.

WARRANTY.

See ASSUMPSIT, 1, 2;
EVIDENCE, 9;
INSURANCE, 1, 3.

WILL.

A, a resident in Irish Grove, Illinois, died there, leaving a will by which, after bequeathing his library to the Presbyterian church of Irish Grove, and $500 for the erection of another Presbyterian church in Illinois, and $50 to be paid on the minister's salary of the Presbyterian church of Irish Grove for 1884, and some other bequests, he bequeathed and devised the remainder of his estate "to be equally divided between the board of foreign and the board of home missions." The Presbyterian Church in the United States of America has a corporate "Board of Foreign Missions" and a corporate "Board of Home Missions;" but it was agreed by counsel that several other religious bodies in the United States have similar organizations, for the same purposes. *Held*, that there was a latent ambiguity in the will respecting the object of the residuary gift, which ambiguity could be removed by extrinsic evidence; and that the evidence introduced on that point, taken in connection with the other bequests in the will for the benefit of Presbyterian churches, showed that the testator, in making the residuary gift, had in his mind the Board of Foreign Missions and the Board of Home Missions of the Presbyterian Church of the United States of America, of which he was a member and an officer. *Gilmer* v. *Stone*, 586.

See EXECUTOR AND ADMINISTRATOR.

WITNESS.

See EVIDENCE, 10.

WRIT OF ERROR.

See JURISDICTION, A, 1.