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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1887

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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.
STANLEY MATTHEWS, Associate Justice.
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.
———— ————, Associate Justice.

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

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(B.) Statutes of the States and Territories.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1887.

COFFEE *v.* GROOVER.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

Argued April 29, 1887. — Decided October 17, 1887.

Grants of land made by a government, in territory over which it exercises political jurisdiction *de facto*, but which does not rightfully belong to it, are invalid as against the government to which the territory rightfully belongs.

Where a disputed boundary between two states is adjusted and settled, grants previously made by either state, of lands claimed by it, and over which it exercised political jurisdiction, but which, on the adjustment of the boundary, are found to be within the territory of the other state, are void, unless confirmed by the latter state; and such confirmation cannot affect the titles of the same lands previously granted by the latter state itself.

The boundary between Georgia and Florida was long in dispute; Georgia claiming to a line called Watson's line, and exercising political jurisdiction, and making grants of land to that line; whilst Florida claimed to a line called McNeil's line, further north than Watson's. Upon running the true line, as finally agreed upon by the two states, it was found to be further north than McNeil's line: — *Held*, 1, That the grant made by Georgia of the land in dispute, which was south of McNeil's line, though made whilst Georgia exercised the powers of government *de facto* over the territory there, was nevertheless void; 2, That the confirmation by Florida of the grants made by Georgia, did not invalidate or disturb the grant of the land in dispute previously made by itself.

The history of the Florida boundary stated.

EJECTMENT for lands in Madison County, Florida. Judgment for plaintiffs, which was affirmed by the Supreme Court of the state. This writ of error was sued out to review the judgment in affirmance. The case is stated in the opinion of the court.

Mr. Angus Paterson for plaintiff in error.

Mr. C. W. Stevens for defendant in error. *Mr. S. Pasco* was with him on the brief.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action of ejectment for ninety-seven acres of land in Madison County, Florida, situated near the boundary line between that state and Georgia. The plaintiffs were James M. Groover and others, heirs at law of Charles A. Groover, and now defendants in error; the defendant was Andrew J. Coffee, the present plaintiff in error. Judgment was first rendered by the court of first instance in favor of the defendant below; but being reversed by the Supreme Court of Florida, a new trial was had, and judgment was given for the plaintiffs, and affirmed by the Supreme Court. The last judgment of the Supreme Court is brought here for review on two grounds; first, that the matter in controversy had been tried and determined by the Circuit Court of the United States for the Northern District of Florida, in favor of the defendant, Coffee, in a suit between him and the executrix of Charles A. Groover, the ancestor under whom the plaintiffs claim title; secondly, on the ground that the defendant's title to the land in controversy was claimed by him under a grant made by the United States to the State of Florida, and by the State of Florida to the defendant, which title was set aside by the state court in favor of the plaintiff's title derived under a conflicting grant from the State of Georgia.

The first ground of error is not raised on the record in such a manner as to avail the defendant. The matter of defence involved therein was set up by two pleas: first, a plea of former recovery; and, secondly, a plea to the jurisdiction

of the court. These pleas were overruled on demurrer, but for what reason is not stated. The Supreme Court of Florida, however, in its opinion, very properly says: "In ejectment all legal defences may be made under the plea of not guilty, and the special denials mentioned in the statute. McClelland's Dig. 481. Special pleas of matter affecting the legal title, or in estoppel, only encumber the record and tend to embarrassment. *Wade* v. *Doyle*, 17 Fla. 522; *Neale* v. *Spooner*, June Term, 1883 [20 Fla. 38]. They should be struck out by the court *sua sponte*, or on motion, or on demurrer, because they are not proper pleas; but a judgment sustaining a demurrer will not preclude proof, on the trial, of the facts so improperly pleaded." *Coffee* v. *Groover*, 20 Fla. 64, 78. The pleas being overruled, no attempt was made, on the trial, to set up the defence by proof of the former judgment relied on. This branch of the case, therefore, may be laid out of view.

The second ground for reversal is stated in duplicate form in the assignment of errors, as follows, to wit:

(1) "In the record and proceedings aforesaid there is manifest error, to wit: That the Supreme Court of the State of Florida in the above stated cause decided that a grant for land issued by the State of Georgia is superior to a patent issued by the United States for the same land, the said land being situate within the territorial limits of the State of Florida."

(2) "There is manifest error in this, to wit, that the Supreme Court of the State of Florida in the above stated cause, [as] by the record aforesaid it appears, held that the plaintiff in error should be ousted from certain lands embraced within the territory of the State of Florida, he holding title through the State of Florida derived from the United States, and that the defendants in error should be put in possession, they claiming under a grant issued by the State of Georgia."

By § 709 of the Revised Statutes, where the decision of the state court is against a title claimed under the Constitution, or any treaty or statute of, or a commission held, or authority exercised under, the United States, this court has jurisdiction to review the decision. We think it will sufficiently appear

from the facts of the present case, and the points of law arising thereon, that it satisfies the conditions of the section. The title claimed by the defendant rested, not only on a grant of the United States, but on a delimitation of territory under a treaty between the United States and Spain.

The case is one of conflicting grants of the same land lying near the boundary line between Georgia and Florida. The fact that the land in controversy was covered by both grants was settled by the jury. It is conceded to lie within the bounds of Florida according to the line recently agreed upon by the two States.

The occasion of conflicting grants being made was the uncertain location, at the time, of the true boundary line referred to, and the fact that Georgia claimed one line and the United States and Florida claimed another.

The plaintiffs, to maintain their title to the land in dispute, gave in evidence, on the trial, two patents from the State of Georgia to one James Groover, each bearing date the 1st day of January, 1842; one for $226\frac{2}{10}$ acres of land, described as situate in the fifteenth district of Irwin County (Georgia), and known and distinguished in the plan of said district by the number 199, and having the shape, form, and marks shown by a plat annexed; the other patent being for $250\frac{2}{10}$ acres of land, situate in the same district and county, known and distinguished by the number 200, and having the shape, form, and marks shown by a plat annexed. The plats showed that the two lots joined each other east and west, and that they were both bounded on the south by a common line called on the plats "*Florida line*"; and it was testified that the line thus marked on the plats was a line known as the "Watson line." Mesne conveyances were then given in evidence showing that said lots were conveyed by James Groover to Thomas A. Groover by deed dated December 31st, 1855; and by Thomas A. Groover to Charles A. Groover by deed dated July 8th, 1860; and it was further shown that Charles A. Groover died in 1866, and that the plaintiffs were his heirs at law. Evidence was also given tending to show that the said patentee and grantees respectively had possession of said lands under and

in conformity with their said titles until the plaintiffs were ousted by the defendant in 1876.

Evidence was further given to show that another line, called the "McNeil line," ran about 14 chains north of the Watson line and parallel thereto, and that the land in controversy lay between the said two lines, having the Watson line on the south and the McNeil line on the north. Also, that a third line, called the "Orr and Whitner line," ran still farther north than either of the aforesaid lines, which Orr and Whitner line was conceded to be the boundary line between the States of Georgia and Florida, as recently fixed by mutual agreement between the two States, by certain laws and resolutions of their respective legislatures, confirmed by act of Congress.

The plaintiffs also introduced evidence tending to show that the Watson line was formerly considered the State line between Georgia and Florida; that Georgians worked the Georgia roads to the Watson line, and Floridians worked the Florida roads to that line; that as far back as one of the witnesses could remember, he being for many years a lawyer and judge in one of the border counties of Georgia, that State had claimed and exercised jurisdiction to the Watson line, until the Orr and Whitner line was agreed upon as the boundary between the two States; that the people living north of the Watson line did jury duty and voted in Georgia; that the wills of people dying there were probated in the Georgia courts, and their estates were administered upon in those courts; that the Georgia courts took jurisdiction of offences committed as far south as the Watson line, and tried cases in which people living there were interested; that the officers of the Georgia courts executed writs as far south as that line; that persons were tried in Georgia for offences committed between that line and the Orr and Whitner line. And, on the other hand, as correctly stated by the Supreme Court of Florida in its opinion, there is nothing in the record, nor in the history of the government of the Territory or of the State of Florida, showing that the authorities of the latter exercised any of the powers of government north of the

Watson line prior to the said settlement of the boundary between the two States.

The defendant, to maintain the issue on his part, gave in evidence, first, a certified copy of a patent from the United States to the State of Florida, bearing date July 6th, 1857, issued under and in pursuance of the act approved September 28th, 1850, known as the act for granting to certain states the "swamp and overflowed lands" therein; by which patent there was granted to said State, as swamp and overflowed lands, certain designated fractional sections of land, amongst others "the whole of fractional section 29," in township 3 north, range 9 east; which fractional section was proved to be bounded on the north by McNeil's line, and to include the land in controversy. The defendant also produced in evidence a certificate of sale issued by the register of public lands for the State of Florida to one McCall and one Stripling for said fractional section 29, and other land named in said patent, which certificate bore date September 2d, 1857, and acknowledged the receipt of one hundred dollars in cash, and of certain bonds for the remainder of the purchase money of said lands, as provided by the land laws of Florida. The defendant further gave in evidence a deed from McCall and Stripling to himself, bearing date November 12th, 1858, conveying to him all the lands included in said certificate of sale, with a covenant that they were free from incumbrances; also a deed of grant and conveyance of the same lands to the defendant from the Trustees of the Internal Improvement Fund of the State of Florida — the proper authority for that purpose — which last deed bore date September 12th, 1874. The defendant, being sworn as a witness, testified that McCall and Stripling paid all the purchase money for the lands to the State; but that the certificate was lost, and he, the defendant, afterwards made proof of it, and had the Trustees of the Improvement Fund make him a deed: but that the original receipt had since been found. He also testified that he had lived near the Georgia line for over forty years and never heard of the Watson line until about ten or twelve years ago. He worked the public roads up to the McNeil line, and the

Georgians worked their roads down to the McNeil line and no further; that the McNeil line was understood by citizens living near the line in both states to be the boundary line between the two states.

The defendant also gave in evidence the testimony of one Lanier, county surveyor of Madison County, Florida, who testified that he had surveyed the lands in controversy, and gave it as his opinion that the plats of land annexed to the plaintiffs' grants did not cover the said land, not having marks thereon for ponds, swamps and streams which he found on the premises; that the Watson line at the place in controversy runs through a large swamp not shown in said plats; that, until the establishment of the Orr and Whitner line, the McNeil line was always considered as the boundary line between Georgia and Florida; that he had frequently surveyed on the Georgia line, and always surveyed to the McNeil line; that he never heard of the Watson line until the controversy that led to this suit.

The court charged the jury that if they believed from the evidence that the State of Georgia, anterior to the year 1842, considered the land in controversy within her territorial limits, and incorporated within one of her counties, over which the authorities of said State exercised the usual powers of government; and that in 1842 the Governor of Georgia granted the identical lands in controversy to James Groover; and that said James Groover conveyed the same lands to Thomas A. Groover in 1855; and that said Thomas A. Groover conveyed the same lands to Charles A. Groover in 1860; and that said Charles A. Groover was dead, and that the plaintiffs were his heirs — then they must find for the plaintiffs: — But that if the evidence failed to induce the jury to believe that the lands sued for were the same as those described in the said grants and conveyances; or that the Georgia grants included the lands to the Watson line, they must find for the defendant.

Under this charge the jury found for the plaintiffs, thus establishing the fact that Georgia, anterior to 1842, did claim jurisdiction to the Watson line, and that the lands in controversy adjoining that line were included in the grant of Georgia to James Groover in 1842.

Opinion of the Court.

The Supreme Court of Florida sustained the charge of the court below, it being in accordance with its own opinion given when the case was first before it, as reported in 19 Fla. 61. The position assumed is, that grants in a disputed territory, by a government exercising therein sovereign jurisdiction *de facto*, are valid and to be sustained, notwithstanding that, by a subsequent settlement of boundaries, the disputed territory is conceded to the other contesting sovereign. Georgia, undoubtedly, at the time of the grant to James Groover, exercised the powers of government *de facto* over the territory in which the land in controversy was situated; and it is assumed by the Supreme Court of Florida that the boundary line subsequently agreed upon, by which said land was conceded to lie in the State of Florida, was a mere arbitrary line, adopted by way of compromise, and was never acknowledged to be the true legal line established by previous treaties and laws. The argument is, that, whatever may be the law with regard to grants made by a government clearly beyond its lawful boundaries and jurisdiction, it is certain that grants made within its jurisdiction, being lawful when made, are not invalidated by a subsequent cession of the territory to another sovereign; because, in such case, the rights of sovereignty only, and not those of private property, are changed. It is then assumed that, in cases of disputed boundary, where a line is finally fixed by compromise, the portions of territory previously possessed by either of the contracting parties, and conceded by the adopted line to the other, are to be regarded and treated as ceded territory, and not as territory that always really belonged to the sovereign who gets it by the compromise. The Supreme Court of Florida, speaking of the decision of the lower court, (which it affirmed,) says: "What they did decide was, that grants by a government *de facto* of parts of a disputed territory in its possession are valid against the State which had the right, *De la Croix* v. *Chamberlain*, 12 Wheat. 599, 600; and that, when a territory is acquired by treaty, cession, or conquest, the rights of the inhabitants to property are respected and sacred. *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 749; 4 How. 591, 639; *United States* v.

Clarke, 8 Pet. 436, 445. And the principle applies to the states of this Union. *Poole* v. *Fleeger*, 11 Pet. 185, 209. In the latter case, the court says (p. 210): 'Although, in the compact, Walker's line is agreed to be in future the boundary between the two States, it is not so established as having been for the past the true and rightful boundary.' We decided this to be the rule in the present case when it was before us on the former appeal, 19 Fla. 61, and the case was tried the second time under the influence of the opinion and judgment of this court. We find no reason for modifying that judgment, and the error assigned is not sustained." *Coffee* v. *Groover*, 20 Fla. 64, 81.

Whether this view of the case thus taken by the Supreme Court of Florida is the correct one, regard being had not only to the facts found by the jury, but also to the treaties and acts of the Federal government, as well as of Georgia, in regard to the line in question; and whether the rule of law relied on by the court is a sound one, and rightly applicable to the case in hand, are the questions to be determined.

It is no doubt the received doctrine, that in cases of ceded or conquered territory, the rights of private property in lands are respected. Grants made by the former government, being rightful when made, are not usually disturbed. Allegiance is transferred from one government to the other without any subversion of property. This doctrine has been laid down very broadly on several occasions by this court, — particularly in cases arising upon grants of land made by the Spanish and other governments in Louisiana and Florida before those countries were ceded to the United States. It is true that the property rights of the people, in those cases, were protected by stipulations in the treaties of cession, as is usual in such treaties; but the court took broader ground, and held, as a general principle of international law, that a mere cession of territory only operates upon the sovereignty and jurisdiction, including the right to the public domain, and not upon the private property of individuals which had been segregated from the public domain before the cession. This principle is asserted in the cases of

United States v. *Arredondo*, 6 Pet. 691; *United States* v. *Percheman*, 7 Pet. 51, 86–89; *Delassus* v. *United States*, 9 Pet. 117; *Strother* v. *Lucas*, 12 Pet. 410, 428; *Doe* v. *Eslava*, 9 How. 421; *Jones* v. *McMasters*, 20 How. 8, 17; and *Leitensdorfer* v. *Webb*, 20 How. 176. In *United States* v. *Percheman*, Chief Justice Marshall said: "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change." 7 Pet. 86, 87.

But whilst this is the acknowledged rule in cases of ceded, and even conquered territory, with regard to titles acquired from a former sovereign who had undoubted right to create them, it does not apply (as we shall see) to cases of disputed boundary, in relation to titles created by a sovereign in possession, but not rightfully so. In the latter case, when the true boundary is ascertained, or adjusted by agreement, grants made by either sovereign beyond the limits of his rightful territory, whether he had possession, or not, (unless confirmed by proper stipulations,) fail for want of title in the grantor. This is the general rule. Circumstances may possibly exist which would make valid the grants of a government *de facto;* as, for example, where they contravene no other rights. Grants of public domain made by Napoleon as sovereign *de facto* of France, may have had a more solid basis of legality

than similar grants made by him as sovereign *de facto* of a Prussian province, derogatory to the rights of the government and King of Prussia.

As the case before us depends upon a disputed boundary between two states, it cannot be properly understood or determined without adverting to the historical facts connected with that boundary. Some of these are referred to by the Supreme Court of Florida in its opinion, but several others are necessary to be stated in order to show the circumstances under which the boundary between Georgia and Florida was finally settled, and to determine whether the assumption of the court, that the territory containing the land in controversy was ceded by Georgia to Florida, is well founded. The case, if it can be avoided, ought not to be decided upon a narrow selection of facts which might determine the question one way, before one jury, to-day, and another way, before another jury, to-morrow; but upon a broad view of all the historical events which relate to this boundary line. We shall proceed, therefore, to review these events as far as they have come to our knowledge from public documents.

In early colonial times, there were always mutual complaints of encroachment between the British provinces and the Spanish province of Florida, sometimes resulting in military conflicts; and no boundary was ever settled between them. The difficulty was finally removed by the treaty of 1763, by which Florida was ceded to Great Britain. See Treaty, Arts. VII, XX, 1 Chalmers's Collection of Treaties between Great Britain and other Powers, 473, 479. Soon after this event, on the 7th of October, 1763, King George III, by proclamation, erected governments in the newly acquired territories of Canada and the Floridas, and established the boundaries of the latter as follows, to wit: "The government of East Florida, bounded to the westward by the Gulf of Mexico and the Appilachicola River; *to the northward by a line drawn from that part of said river where the Chattahoochee and Flint rivers meet to the source of St. Mary's River*, and by the course of the said river to the Atlantic Ocean." West Florida was bounded north by the parallel of 31° north latitude, from the

Mississippi to the Chattahoochee River. See Proclamation in Amer. State Papers; 1 Pub. Lands, 36; and 1 Bioren's Laws U.S. 443. On January 20, 1764, the province of Georgia was limited to the north of the line thus prescribed for Florida. 1 Bioren's Laws, 448–9.

The above defined line, from the junction of the Chattahoochee and Flint rivers to the source of the St. Mary's, has from 1763 to the present time been the recognized boundary line between Georgia and Florida. The land in controversy is situated about midway between its extremities.

By the definitive treaty of peace with Great Britain in 1783 the line above described was adopted as the southern boundary line of the United States, and the Floridas were at the same time, by another treaty, ceded to Spain. See Treaties and Conventions between the United States and Other Powers, Washington, 1873, pp. 315, 316; 2 Chalmers's, 232 — Treaties of 1783. By the treaty of October 27th, 1795, between the United States and Spain, this boundary was confirmed, and it was provided that a commissioner and a surveyor should be appointed by each party to meet at Natchez within six months from the ratification of the treaty, and proceed to run and mark the boundary line, and make plats and keep journals of their proceedings, which should be considered as part of the treaty. Our Government appointed Andrew Ellicott, Esq., as commissioner, in May, 1796, and a surveyor to assist him, and they proceeded to Natchez, and after much procrastination on the part of the Spanish authorities, a Captain Stephen Minor was appointed on the part of Spain, and the joint commissioners of the two countries, in 1798 and 1799, ran and marked the boundary line from the Mississippi to the Chattahoochee, and determined the geographical position of the junction of the Chattahoochee and Flint rivers to be in N. latitude 30° 42′ 42.8″ and W. longitude 84° 53′ 15″. The hostility of the Creek Indians prevented them from running the line east of the Chattahoochee; but they sailed around the coast of Florida, and up the river St. Mary's, and fixed upon the eastern terminus of the straight line prescribed in the treaties at the head of the St. Mary's, where it issues from

the Okefenoke Swamp, and erected a mound of earth to designate the spot. This was in February, 1800. The mound is still in existence, and is called Ellicott's Mound, and appears on all the principal maps of that part of the country. The commissioners, supposing that the true head of the river was located in the swamp, agreed that it should be considered as distant two miles northeast from the mound, and that in running the boundary line from the Chattahoochee it should be run to the north of the mound, and not nearer to it than one mile. The point fixed upon as the head of the St. Mary's was determined by observations to be in N. latitude 30° 21′ 30½″, W. longitude 82° 15′ 45″. The distance by straight line, or great circle, from the junction of the Chattahoochee and Flint rivers to the head of the St. Mary's, was calculated at $155\frac{2}{10}$ miles, and the initial course, for running the line from each terminus, was given, with the proper corrections to be made at intervals in order to follow the great circle. The commissioners signed a joint report of their proceedings, and transmitted the same to their respective governments. All these particulars are set forth in Mr. Ellicott's journal, and are matters of public history. See Ellicott's Journal: Philadelphia, 1803.

It thus appears that, by authority of the United States and Spain, the termini of the line in question were fixed and settled in February, 1800. It only remained for any competent surveyor to follow the directions of the commissioners in order to trace the actual boundary line on the ground.

The country in the region traversed by this line was occupied, in the early part of the century, by the nation of Creek Indians, and there was no immediate demand for having it run and marked. And as, under the Constitution, no state could enter into a treaty with the Indians, it became the interest of Georgia to make some arrangement with the Government of the United States to take measures for the gradual removal of Indian occupancy. A convention was accordingly entered into between Georgia and the United States, on the 24th of April, 1802, by which the former ceded to the latter all her territory between the Chattahoochee and

the Mississippi rivers, and the United States ceded to Georgia all their right to any public lands south of Tennessee and the Carolinas, and east of the Chattahoochee, not within the proper boundaries of any state; and agreed to extinguish the Indian title within the State of Georgia as early as could be peaceably done. (See Agreement, 1 Bioren's L. 488.) In pursuance of this agreement the title of the Creek Nation was extinguished throughout most of the southern part of the state by the treaties made with the nation in 1802, 1805, and 1814. 7 Stat. 68, 96, 120.

The State being now desirous of disposing of her lands and introducing settlers thereon, naturally turned her attention to the question of the true location of the boundary line between her own territory and that of the Spanish province of Florida. Some person, professing to be better posted than others as to the topography of the country about the head of St. Mary's River, asserted that the commissioners, Ellicott and Minor, in seeking its source, had ascended the wrong branch — namely, the north branch; whereas the true St. Mary's, or main stream, came from the west and took its source many miles further south than the point fixed upon by them. The legislature of Georgia took up the matter, and in December, 1818, the Senate passed a resolution requesting the Governor to appoint proper persons to proceed, without delay, to ascertain the true head of St. Mary's river; and if it should appear that the mound thrown up by Ellicott and Minor was not at the place set forth in the treaty with Spain, that they make a special report of the facts, and that the Governor communicate the same to the President of the United States, with a request that the lines might be run agreeably to the true intent and meaning of the treaty. Ex. Doc. No. 77, 1 Sess. 23d Cong., pp. 11, 86.

In pursuance of this request the Governor appointed three eminent engineers, Generals Floyd, Thompson and Blackspear, to make the examination suggested, and immediately, by a letter dated February 17, 1819, communicated the fact to the Executive Government at Washington. The engineers made a careful reconnaissance of the country about the head streams

of the St. Mary's, accompanied by the person who had made the supposed discovery, and became satisfied that his information was at fault, and reported that, after a careful examination, they found the head of the river to agree with the report made by Mr. Ellicott. This result was also communicated to the Executive at Washington; and thus ended, for the time being, the claim on the part of Georgia to have the eastern terminus of the boundary line readjusted and changed. Soon after this proceeding, in 1819, the state employed one J. C. Watson to run and mark the line. This is the origin of the line called Watson's line; and to this line the State laid out its counties and townships, surveyed its public lands, and made grants to settlers. But it nowhere appears that this line ran to Ellicott's mound, or near to it: on the contrary, it would seem from other conceded facts, that it ran considerably south of it. As we have already seen, the lands in controversy in the present case adjoin this line, being situated on the north side of it.

Florida was ceded to the United States in 1819, and possession of the territory was taken by General Jackson in July, 1821. In 1825, the Surveyor General of the Government for the Territory of Florida, preparatory to a survey of the public lands therein, caused the boundary line between Georgia and Florida to be run out and marked by D. F. McNeil, a deputy surveyor, and the line so run was called *McNeil's line.* At the point in controversy, which (as before said) is about midway between the two extremities of the straight line called for by the treaty, it ran, according to the testimony, 14 chains to the north of Watson's line; but how near it approached Ellicott's mound at the eastern extremity does not appear. The government surveys in Florida were made to bound on this line; and, of course, overlapped, more or less, the Georgia surveys and grants extending to Watson's line.

The State of Georgia, about this period, perhaps in consequence of the location of McNeil's line, by a communication of her Governor to the Government of the United States, requested that joint measures should be undertaken for a mutual and final settlement of the boundary. The matter

being referred to Congress, an act was passed on the 4th of May, 1826, by which the President was authorized, in conjunction with the constituted authorities of the State of Georgia, to cause to be run and distinctly marked the line dividing the Territory of Florida from the State of Georgia, from the junction of the rivers Chattahoochee and Flint, to the head of St. Mary's River; and for that purpose, to appoint a commissioner or surveyor, or both: "*Provided*, that the line so to be run and marked shall be run straight from the junction of said rivers Chattahoochee and Flint, to the point designated as the head of St. Mary's River by the commissioners appointed under the third article of the treaty" [with Spain made October 27th, 1795]. 4 Stat. 157. This act, it will be seen, adopted the eastern terminus of the line as settled by Ellicott and Minor.

The President thereupon appointed ex-Governor Thomas M. Randolph, of Virginia, as commissioner under the act, and the Executive of Georgia appointed Thomas Spalding; and the commissioners entered upon their joint duties in February, 1827, and appointed John McBride as their common surveyor. They continued their operations for over two months; but the Georgia commissioner having, as he supposed, notwithstanding the report of the commissioners of 1819, discovered that the western branch of the St. Mary's River was the largest and longest stream, and, therefore, the true river, the Governor of the State suddenly brought the survey to a close by recalling the assent of Georgia and withdrawing the powers of her commissioner. Ex. Doc. 77, 1st Sess. 23d Cong., pp. 31, 97.

From this time onward, for many years, a controversy was carried on between Georgia, on the one side, and the United States and Florida, on the other, with regard to this boundary line; Georgia contending that the line should be run to Lake Randolph, the head of the western or southern branch of the St. Mary's, and the United States and Florida contending that it should run to the head of the northern branch, as settled and determined by the commissioners, Ellicott and Minor, under the treaty. Ib., and Ex. Doc. 152, 1st Sess. 23d Cong.

In 1845 Florida was admitted into the Union as a state,

embracing all the territories of East and West Florida, as ceded by Spain to the United States by the treaty of 1819. 5 Stat. 742, 743. Renewed efforts were soon afterwards made by Florida and Georgia to effect a settlement of the boundary, but without success.

In 1850 the State of Florida filed a bill in this court against the State of Georgia, to procure a determination of the controversy. In December Term, 1854, the Attorney General was allowed to intervene on the part of the United States. *Florida* v. *Georgia*, 17 How. 478. Evidence was taken by the parties, but in consequence of the war, and the final settlement of the controversy by mutual agreement, the cause was never brought to a hearing.

In 1857 the governors of the two states had a conference which resulted in an agreement by which Georgia relinquished her pretensions to have the eastern terminus of the line changed, and the termini fixed by the commissioners, Ellicott and Minor, were substantially adopted. The following resolutions and enactments of the legislatures of the two states will show the course of the negotiation, and the terms of the arrangement finally concluded between them.

On the 24th of December, 1857, the following resolution was adopted by the Legislature of Georgia, to wit:

"Whereas in the matter of controversy now pending in the Supreme Court of the United States, between the State of Florida and the State of Georgia, touching the boundary line of the two States, we deem it of much importance that this protracted and expensive litigation should cease; and whereas, with a view to the settlement of the question, a negotiation has been progressing between the late Executives of the aforesaid States, the result of which was an agreement to adopt the terminal points of the present recognized line as the true terminal points of the boundary line to be re-surveyed, corrected and marked, provided it is shown by either party, that the present line is incorrect, the agreement aforesaid being made subject to the ratification of the legislatures of the two States.

"*Resolved*, 1st, That we do hereby ratify the action of the

late Executive of this State, in accepting the proposition of the Governor of Florida, to adopt the terminal points of the present recognized line as the true terminal points of the boundary line, and will regard, adopt, and act upon the present line, as run and recognized between those points, as the settled boundary of the two States, or will so recognize and adopt any other line between those points which may be ascertained and established on a re-survey and re-marking of the boundary, provided said boundary correction is made by virtue of law, and by joint action of the States aforesaid.

"2d. *Be it further resolved by the authority aforesaid*, That should it be deemed essential or important by either State to have the boundary line between the terminal points of the present recognized boundary re-surveyed and re-marked, the Governor of this State is hereby authorized to appoint a competent surveyor, to join any such surveyor appointed on the part of Florida, to run out and mark distinctly such a line from one to the other terminal point herein indicated, to be known as the line and settled boundary between the two States, the surveyor on the part of Georgia to be paid such compensation as may be determined on by the present or any future legislature.

"3d. *And be it further resolved*, That the Governor of this State shall, so soon as the same shall have passed both branches of the present General Assembly, transmit a certified copy to the Governor of Florida.

"Approved December 24th, 1857." Laws, 1857, Georgia, 326.

This resolution was responded to by the Legislature of Florida on the 12th of January, 1859, by passing a resolution in precisely the same terms, *mutatis mutandis;* and on the 15th of the same month an act was passed by the Legislature of Florida for bringing into market, as soon as the line should be settled, all state lands bordering thereon, that had not been disposed of, giving to the occupants, whose right was not disputed, five months to purchase the lands occupied by them at their appraised valuation.

As one, or both, of the parties desired to have a re-survey

made between the terminal points, the State of Georgia appointed George F. Orr and the State of Florida B. F. Whitner, surveyors, to run and mark the line accordingly. They commenced their work in 1859, and it is referred to in the subsequent acts and resolutions.

An act was passed by the legislature of Georgia on the 16th of December, 1859, referring to the fact that the joint surveyors were running their first trial line, and agreeing to adopt it as conclusive, if Florida would do the same; *provided* that, on the eastern terminus, it did not depart exceeding one-fourth of a mile from Ellicott's mound; but that if it was not accepted by Florida, and if, therefore, a new line would have to be run so as to get a straight line from the mouth of Flint River to Ellicott's mound, that then, the line thus designated and marked by the surveyors, should be the permanent boundary between the two states. The act also proposed the passage of laws to quiet the titles of *bona fide* holders of lands under grants of either Georgia or the United States. The response made by the legislature of Florida to this proposition was the passage of an act on the 22d of December, 1859, substantially adopting the proposition made by Georgia, declaring "That the line now being run by B. F. Whitner, Jr., on the part of Florida, and G. J. Orr, on the part of Georgia, be and the same is hereby recognized and declared to be the permanent boundary line between the two states, so soon as the same shall be permanently marked by said surveyors: *Provided*, that said line, at its eastern terminus, does not depart from, or miss, Ellicott's mound more than one-fourth of a mile or 20 chains;" and declaring, secondly, "that the titles of *bona fide* holders of land under any grant from the State of Georgia, which land may fall within this state by the foregoing line, are hereby confirmed and conveyed to said holders, so far as any right may accrue to this state: *Provided*, nothing herein shall apply to lands to which citizens of this state may claim title south of what is known as the McNeil line."

It turned out that the line run by Orr and Whitner ran even farther north than the McNeil line; but it came within the stipulated distance from Ellicott's mound — namely, with-

in a quarter of a mile — in fact, within 37 links, or less than 25 feet, north of the mound. (See Code of Georgia, 1868, § 19.) This was more favorable to Georgia than the line agreed on by Ellicott and Minor, which was to run at least one mile north of the mound.

On the 14th of December, 1860, the Legislature of Georgia, probably considering that its last proposition was not fully accepted, passed a resolution, directing the Governor to reopen negotiations with the authorities of Florida in regard to the boundary line, and to urge its adjustment so as to protect the rights of citizenship and the titles of lands held under grants from Georgia; and, if practicable, so as to retain and keep the fractional lots sold by Georgia within the jurisdiction of the state. In response to this resolution, the Legislature of Florida, on the 8th of February, 1861, passed the following resolution, to wit: "*Whereas* [by] an act approved by the Governor 22d December, 1859, it was by the General Assembly enacted that the line then being run by B. F. Whitner, Jr., on the part of Florida, [and] G. J. Orr, on the part of Georgia, should be, and was thereby, recognized and declared to be the permanent boundary line between the States of Georgia and Florida as soon as the same should be permanently marked by said surveyors: *Provided*, the said line at its eastern terminus did not depart from or miss Ellicott's mound more than one-fourth of a mile, or twenty chains; *and whereas*, the said line has been run and marked by said surveyors on the part of the two states, the eastern terminus of which, so run and marked, is within the distance prescribed in said proviso: Therefore, *Resolved*, That the line run and marked by B. F. Whitner, Jr., on the part of Florida, and G. J. Orr, on the part of Georgia, be, and the same is hereby declared to be, the permanent boundary line between the two States of Georgia and Florida, and that the Governor be, and he is hereby, requested to issue his proclamation that the said line, so run and marked, has been and is declared to be the permanent boundary line between the two states: *Provided*, the State of Georgia shall have on its part declared the said line to be the boundary between that state and Florida. *Be*

it further resolved, That the Governor be requested to forward a copy of these resolutions to the Governor of Georgia, with a request that similar steps be taken by Georgia, so that the question of boundary may be finally settled." Bush's Digest, 103; McClelland's Digest, 952.

By a long and argumentative resolution, passed by the Legislature of Georgia on the 11th of December, 1861, after stating the respective positions taken by the two states, it was proposed as follows: "The General Assembly, to avoid further dispute, proposes to her sister state, Florida, that what is denominated the Watson line (which will leave in the limits of this state the fractional lots of land heretofore sold under an act of her legislature) shall be adopted as the boundary line. The settlement upon this basis will not interfere with the rights of citizenship, as claimed by the citizens of either state." Florida made no answer to this proposition.

Finally, by a resolution passed on the 13th of December, 1866, the Legislature of Georgia, referring to the act of 16th December, 1859, and recognizing the fact that the Orr and Whitner line, as run, did not depart exceeding one-fourth of a mile from Ellicott's mound, and referring also to the action of the Florida legislature of February 8th, 1861, adopted the Orr and Whitner line as "the permanent boundary line between the States of Georgia and Florida." And this agreement, thus finally arrived at by the two states, was recognized and confirmed by an act of Congress approved April 9th, 1872, entitled "An act to settle and quiet the title to lands along the line between the States of Georgia and Florida," by which it was declared "that the titles to all lands lying south of the line dividing the States of Georgia and Florida, known as the Orr and Whitner line, lately established as the true boundary between said states, and north of the line run by Georgia, known as the Watson line, being all the lands lying between said lines, be, and the same are hereby, confirmed, so far as the United States has title thereto, in the present owners deriving titles from the State of Georgia."

This historical review is sufficient, it seems to us, to show that the agreement come to by the two states was not in fact,

and cannot be construed as, a cession of territory on the part of Georgia. It was simply the correction of the boundary line. Georgia had inadvertently extended her jurisdiction to a line run by her surveyor too far south. The agreement recited in the resolution of December 24th, 1857, "to adopt the terminal points of the present recognized line as the true terminal points of the boundary line," carried out by a re-survey of such line from one of its terminal points to a point sufficiently near the other to satisfy both parties, must be construed to be the carrying out of an intent to settle and establish the true line between the two states, and not an intent to adopt a line different from the true one, with a cession of the territory cut off by it. Two lines had been contended for. Florida and the United States contended for the line established by the joint commission under the treaty with Spain; Georgia, for a different line, having a widely different terminus at its eastern extremity. Each claimed that its line was the true one. Georgia finally yielded the point, and accepted the commissioners' line. This was tantamount to an acknowledgment that it was the true line. We do not say that the result would have been different if the parties had adopted a compromise line — as, for example, the Watson line, which was proposed by Georgia. When a boundary is in dispute the adoption of a line by compromise may be considered as an agreement that the adopted line is the true line, or that it shall be considered as the true line. Where territories are coterminous, they must have a common boundary. That boundary, whether ascertained by astronomical observations, or discovery of old monuments, or mutual agreement of the parties, is to be regarded and treated as if it had always been known as the true line. The present case, at all events, can only be regarded as one in which the boundary line finally agreed to was always the true line, even though, and even when, a different line (Watson's) was temporarily adopted by Georgia, and acquiesced in by Florida.

Then what becomes of the titles granted by Georgia outside of that line, or south of it? She had no title there herself. Could she confer title by the mere exercise *de facto* of juris-

diction and government there — such exercise being in derogation of the successive rights of Spain, the United States, and Florida? What authority can be found to justify such a pretension? It is the common usage, it is true, in mutual adjustments of disputed boundaries, to stipulate that private titles shall not be disturbed. Such stipulations are dictated by a humane consideration for those who have innocently invested their fortunes on the faith of the good title of their government. In the present case, as we have seen, the titles granted by Georgia were confirmed both by Florida and by the United States, so far as either had any right or title to be affected. But those confirmations cannot avail the plaintiffs in the present case; for the United States had parted with all their interest in the lands in controversy, by a grant to Florida in July, 1857; and Florida had disposed of all her interest therein by a regular sale in September of the same year. Neither the United States nor Florida, therefore, had any interest remaining, when the confirmatory acts were passed, which they could transfer by release or confirmation, or in any other mode.

The case, then, stands upon the original validity of the Georgia grants; and the question may well be asked, how does a land holder who obtains title from a sovereign that has none, stand in any better position than one who obtains title from an individual that has none? Georgia had no title to the land. Previous and subsequent historical events abundantly show this. Her grants have nothing to rest on but her actual possession of the disputed territory and her exercise of government *de facto* therein. The question is, whether this is sufficient.

The general subject is not a new one in the jurisprudence of this court. Before the treaty of amity and limits made with Spain in 1795, that government had claimed and occupied, as a part of West Florida, a large extent of country on the east side of the Mississippi, to the north of north latitude 31° — including a large portion of the present State of Mississippi. This claim was based on an extension of the province of West Florida to the northward by the Government of Great Britain

prior to the Revolutionary war. See 1 Bioren's Laws U. S., pp. 449–453; 2 Pitkin's Hist. U. S., 434–6. It was abandoned by the treaty referred to, and the parallel of 31° was adopted as the boundary line between the territories of the United States and those of Spain. But prior to that treaty the Spanish authorities had made grants of land in the territory referred to. This court invariably held those grants, not confirmed by our Government, to be invalid, on the ground that the territory did not belong to Spain, though she occupied it and claimed to own it. This point is decided in *Henderson* v. *Poindexter*, 12 Wheat. 530; followed by *Hickey* v. *Stewart*, 3 How. 750; *Robinson* v. *Minor*, 10 How. 627; and other cases. In *Henderson* v. *Poindexter*, Chief Justice Marshall carefully examined the question of the right of Spain to the territory, and showed that it was untenable, and strenuously argued that the treaty of 1795 was an acknowledgment on the part of Spain that she had no such right; — or, why did she give it up? The idea of a grant deriving any validity from national occupancy, and government *de facto* over the territory, was not even hinted at, although Mr. Webster and Mr. Coxe argued the cause for the party claiming under the Spanish grant. The view taken by this court on the subject was accurately expressed by Mr. Justice McLean, in delivering the opinion in *Robinson* v. *Minor*, 10 How. 643, where he says: "The treaty with Spain established [*i.e.* settled] a disputed boundary; there was no cession of territory. The jurisdiction exercised by Spain over the country north of the 31st degree of north latitude was not claimed or occupied by force of arms against an adversary power; but it was a naked possession, under a misapprehension of right. In such a case, Georgia, within whose sovereignty the country was situated, was not bound to recognize the grants or other evidence of title by the Spanish government."

The same view was taken by the court with regard to the grants made by Spain in the disputed territory of West Florida after the cession of Louisiana to the United States in 1803. Spain had held possession of Louisiana and the Floridas; but, by the secret treaty of St. Ildefonso, made in 1800, had ceded

Louisiana to France, "with the same extent that it now has in the hands of Spain, and that it had when France possessed it;" and, in 1803, France ceded it to the United States in the same terms. But as formerly possessed by France, Louisiana included West Florida as far as to the river Perdido, and our government claimed to the same extent. Spain, with a good deal of plausibility, contended that West Florida, extending from the Mississippi to the Perdido, was held as a distinct province by Great Britain prior to 1783, and was not embraced in the cession, and refused to surrender it, and kept possession of it in the exercise of full sovereignty until 1810, when the United States took forcible possession of it. Here was another case of disputed boundary. The United States claimed the river Perdido; Spain, the rivers Mississippi and Iberville, as the true boundary between Louisiana and the Floridas; and the latter was in possession of the disputed territory, exercising all the powers of government therein from 1803 to 1810. During this period the Spanish governors made many grants of land in the territory, which often came before this court for adjudication; and the decision was invariably against their validity.

The first case in which the question arose was that of *Foster* v. *Neilson*, 2 Pet. 253, in which the grant was made in 1804, for land in the district of Feliciana, east of the Mississippi. The principal questions argued were, first, the true interpretation of the treaties of 1800 and 1803, as to what territory was ceded to the United States; and, secondly, the effect of the confirmation of Spanish grants contained in the treaty of 1819. Mr. Coxe, it is true, took the ground that the acts of a sovereign power over territory it has ceded are lawful until possession has been transferred, and, therefore, that the grants of Spain whilst still in possession and exercising the powers of government *de facto* should be held to be valid. Mr. Webster, who was on the same side with Mr. Coxe, did not allude to this argument, and the court took no notice of it, but placed its decision on the ground that, by the true construction of the treaties, Louisiana included West Florida to the Perdido, and, therefore, that the territory in question did not belong to

Spain when the grant was made, and so the grant was invalid; but that if this were not a clear proposition (and the court admitted that it was a question of doubtful construction), the judiciary would nevertheless follow the action of the political department of the government, charged with the management of its foreign affairs, which had always contended for the line of the Perdido, and had finally taken full possession of the country.

The case of *Foster* v. *Neilson* was followed in the subsequent cases of *Garcia* v. *Lee*, 12 Pet. 511; *United States* v. *Reynes*, 9 How. 127; *United States* v. *D'Auterive*, 10 How. 609; *United States* v. *Philadelphia & New Orleans*, 11 How. 609; *Montault* v. *United States*, 12 How. 47; *United States* v. *Castant*, 12 How. 437; all of which are referred to, and the history of the controversy is given, in *United States* v. *Lynde*, 11 Wall. 632.

It may, however, be said that the decision in these cases was controlled by the act of Congress approved March 26th, 1804, 2 Stat. 283, 287, the 14th section of which declared void all grants for lands within the territories ceded by the French Republic to the United States by the treaty of 30th April, 1803, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown, government or nation of Spain; saving, however, the titles of actual settlers, acquired before December 20th, 1803.

It is doubtless true that this act did have a controlling influence in the cases referred to; but the court discussed the question upon general principles also, and no hint is dropped that the existence of a government *de facto* would have any influence on the decision.

In *Garcia* v. *Lee*, Chief Justice Taney expressly argues that, in a case of disputed boundary, titles must stand or fall with the right of the government creating them. His language is: "Indeed, when it is once admitted that the boundary line, according to the American construction of the treaty, is to be treated as the true one in the courts of the United States, it would seem to follow as a necessary consequence, that the grant now before the court, which was made by the Spanish

authorities within the limit of the territory which then belonged to the United States, must be null and void; unless it has been confirmed by the United States by treaty or otherwise. It is obvious that one nation cannot grant away the territory of another; and if a proposition so evident needed confirmation, it will be found in the case of *Poole* v. *Fleeger*, 11 Pet. 210. In that case there had been a disputed boundary between two States, and the parties claimed the same land under grants from different States. The boundary line had been ascertained by compact between the States after the grants were made. And in deciding between the claimants in that case the court said: 'In this view of the matter it is perfectly clear that the grants made by North Carolina and Tennessee, under which the defendant claimed, were not rightfully made, because they were originally beyond her territorial boundary; and that the grant under which the claimants claim was rightfully made, because it was within the territorial boundary of Virginia.' And again, 'If the States of North Carolina and Tennessee could not rightfully grant the land in question, and the States of Virginia and Kentucky could, the invalidity of the grants of the former arises, not from any violation of the obligation of the grant, but from an intrinsic defect of title in the States.'"

The case of *Poole* v. *Fleeger*, 11 Pet. 185, quoted by Chief Justice Taney, is much to the purpose. The northern boundary of North Carolina (including Tennessee) was fixed by the charter of 1665, and by the constitutions of that State and Virginia, adopted in 1776, on the parallel of 36° 30′ north latitude. In 1779 an attempted survey of the line was made by commissioners of the two States, who failed to agree; but a line run by Dr. Walker, one of the commissioners, was practically used as the boundary of jurisdiction. It was afterwards found to be too far north by several miles, and a line was run on the true parallel by Professor Matthews, of Transylvania University. Tennessee laid out her counties and exercised all sovereign jurisdiction up to the Walker line, and both North Carolina and Tennessee made grants of land up to that line and north of the true parallel. On the other

hand, Kentucky made grants south of that line and up to Matthews' line. In 1820, Kentucky and Tennessee agreed to adopt Walker's line as the boundary of the two States; but it was stipulated that all private rights and interests of land between the two lines, theretofore derived from either State, should be considered as rightfully emanating therefrom; but all vacant and unappropriated lands within those limits were declared to belong to Kentucky and subject to her disposal. No provision was made for cases of conflicting grants of the same land made by Virginia or Kentucky, on one side, and by North Carolina or Tennessee, on the other. The case before the court was one of that kind, the plaintiffs claiming under a Virginia warrant and a grant made by Kentucky in pursuance thereof, in 1796; the defendants claiming the same land under North Carolina grants made in 1786, 1792, 1797, and Tennessee grants of subsequent years; and the lands in controversy being situated between the two lines before mentioned. This court held that the parallel of 36° 30′ was always the true line until altered by agreement of the two States in 1820, and that the grants made by North Carolina and Tennessee, north of that line, were void, and that the Virginia and Kentucky grants were good, notwithstanding the actual occupation of the disputed territory by Tennessee. The adoption of Walker's line in 1820 was held to have changed the true and original boundary only for the purpose of future jurisdiction. Evidence of the previous exercise of jurisdiction by Tennessee up to Walker's line was not allowed to affect the question of title; although the defendants proved that North Carolina and Tennessee had claimed to Walker's line as the true line from the time it was run to the time of the treaty or agreement of 1820; that the county lines of Tennessee were Walker's line on the north; that in her legislative, judicial and military capacity, Tennessee always claimed possession and acted up to said line as the northern boundary of the State; that process was executed, criminal acts were punished, taxes were paid, militia was enrolled, and all other acts done in subordination to the laws and government of Tennessee up to that line; and corresponding jurisdiction was exercised by Kentucky to the same line on the other side.

Opinion of the Court.

Here was a case of mistaken boundary, and when the error was discovered, the States concerned agreed to adopt it as the permanent political boundary for the future, conceding, on both sides, that it was not the true original boundary. Mr. Justice Story, delivering the opinion of the court, said: "Although, in the compact, Walker's line is agreed to be in future the boundary between the two States, it is not so established as having been for the past the true and rightful boundary; on the contrary, the compact admits the fact to be the other way. While the compact cedes to Tennessee the jurisdiction up to Walker's line, it cedes to Kentucky all the unappropriated lands north of the latitude of 36° 30′ north." Then, after further remarks of the same purport, follows the passage quoted by Chief Justice Taney, to the effect that the grants of North Carolina and Tennessee were not rightfully made, because they were originally beyond their territorial boundary.

The case of *Poole* v. *Fleeger* covers the case now under consideration. It was a case of disputed boundary, and Tennessee exercised sovereign jurisdiction *de facto* up to a certain line (Walker's) which she claimed to be the true boundary line, and made grants of land to that line, just as Georgia did in the present case to Watson's line. Walker's line, like Watson's, was found not to be the true line, and the grants made by Tennessee were found to be for lands in territory belonging to Kentucky; just as the grants of Georgia, next to Watson's line, were found to be for lands in the territory belonging to the United States and Florida. This court decided that the Tennessee grants were void, notwithstanding the exercise of sovereign jurisdiction *de facto* by that State over the territory in dispute, when the grants were made. If that decision was correct, the grant made by Georgia of the land in controversy must be held to be invalid for the same reason. The only difference between the cases is, that Kentucky and Tennessee adopted the erroneous line as their permanent boundary, though recognizing the fact that it was not the true original line; whilst in the present case Georgia and Florida adopted the nearest practicable approach to the

true line as their permanent boundary. This difference does not affect the question, except to make the present case the stronger of the two.

The only authority cited by the Supreme Court of Florida for the proposition that a government *de facto* can make a valid grant, is a *dictum* of Mr. Justice Baldwin, in delivering the opinion of the court in the case of *Rhode Island* v. *Massachusetts*, 12 Pet. 657, at page 748. The question there was, whether the people whose lands would be affected by the change of state line involved in that case ought to be made parties to the suit. Justice Baldwin says: "It is said that the people inhabiting the disputed territory ought to be made parties, as their rights are affected. It might with the same reason be objected that a treaty or compact, settling boundary, required the assent of the people to make it valid, and that a decree under the ninth article of confederation was void, as the authority to make it was derived from the legislative power only. The same objection was overruled in *Penn* v. *Baltimore;* and in *Poole* v. *Fleeger*, this court declared that an agreement between States, consented to by Congress, bound the citizens of each State." Thus far, the reasoning of the court was unanswerable. Settlements of boundary belong to the sovereign power, and cannot be questioned by individuals. But the learned Justice proceeds to lay down what he supposes to be two principles of the law of nations, which were entirely unnecessary to the decision of the question of parties which he was considering. He says: "There are two principles of the law of nations, which would protect them [private citizens] in their property: 1st, That grants by a government *de facto*, of parts of a disputed territory in its possession, are valid against the State which had the right; 12 Wheat. 600, 601; 2d, That when a territory is acquired by treaty, cession, or even conquest, the rights of the inhabitants to property are respected and sacred. 8 Wheat. 589, &c." This is the passage quoted and relied on by the Supreme Court of Florida.

The second of these propositions is in accordance with what we have already stated to be the received rule of international law; but the first is opposed to the cases which we have

already cited in relation to Spanish grants in Mississippi and West Florida, and to the case of *Poole* v. *Fleeger*. As to the authority referred to, 12 Wheat. 599, 600, 601, it is a mere *dictum* of Mr. Justice Trimble in *De la Croix* v. *Chamberlain*, clearly inconsistent with the decision made at the same term in *Henderson* v. *Poindexter's Lessee*, and with all the subsequent decisions above referred to, and as Mr. Justice Catron, in a manuscript note upon this part of Justice Baldwin's opinion, justly remarks, "no such question was raised in that case, and *Poole* v. *Fleeger* is certainly to the contrary."

We think that the decision of the Supreme Court of Florida is erroneous in deciding against the title of the plaintiff in error. That title is claimed under a grant from the United States, of land acquired by treaty with Spain, identified as such by the former treaty of limits and the proceedings of the commissioners appointed to carry out that treaty. The decision of the Supreme Court of Florida, in effect, is, either that the land was not embraced in the treaty of cession, or, if it was, that the possession of Georgia gave a superior right. We think it clear that the land was embraced in the treaty, and that the possession of Georgia did not give a superior right. The judgment is therefore reversed, and the cause remanded, with instructions to proceed according to law, in conformity with this opinion.

A point was made in the brief of counsel for defendants in error which was not raised in the courts below, and cannot, as now presented, be properly passed upon by us; namely, that the Register had no power under the state law to make the bargain with McCall and Stripling for the sale of the land, at the time he issued his certificate to them. This is a question of state law, and involves an issue of fact, and, if deemed important, may be raised on a new trial of the cause, which will necessarily be awarded as a consequence of the reversal of the judgment.

Judgment reversed.

UNITED STATES *v.* LOUISIANA.

APPEAL FROM THE COURT OF CLAIMS.

Submitted October 11, 1887. — Decided October 24, 1887.

The Court of Claims has jurisdiction of an action by a State against the United States for a demand arising upon an act of Congress.

The action of a State in the Court of Claims to recover moneys received by the United States from sales of swamp lands granted to the State by the act of September 28, 1850, is not barred by the statute of limitations until six years after the amount is ascertained from proofs of the sales before the Commissioner of the General Land Office.

The direct tax laid by the act of August 5, 1861, did not create any liability on the part of the States, in which the lands taxed were situated, to pay the tax.

THE case is stated in the opinion of the court.

Mr. Attorney General and *Mr. Heber J. May* for appellant, cited: *United States* v. *Ravara*, 2 Dall. 298; Spear Fed. Judiciary, 252; *Ames* v. *Kansas*, 111 U. S. 449; *Ex parte Russell*, 13 Wall. 664; *United States* v. *McDougall's Administrator*, 121 U. S. 89; *State of Texas Case*, 7 C. Cl. 301; *State of Illinois Case*, 20 C. Cl. 342; *State of New Hampshire Case*, 20 C. Cl. 394; *Rice* v. *United States*, 122 U. S. 611; *Wright* v. *Roseberry*, 121 U. S. 488; *Five Per Cent Cases*, 110 U. S. 471; *Marshall's Case*, 21 C. Cl. 308; *Ramsay's Case*, 14 C. Cl. 367; *Woolner's Case*, 13 C. Cl. 355; *Portland Company's Case*, 5 C. Cl. 441; *Nichols* v. *United States*, 7 Wall. 122; *Davidson's Case*, 21 C. Cl. 298, and cases therein cited.

Mr. William E. Earle for appellee, cited: *Turner* v. *Smith*, 14 Wall. 553; *Beauregard* v. *Case*, 91 U. S. 134; *Baldwin* v. *Stark*, 107 U. S. 463; *Marquez* v. *Frisbie*, 101 U. S. 473; *Shepley* v. *Cowan*, 91 U. S. 330; *Speidel* v. *Henrici*, 120 U. S. 377; *Emigrant Co.* v. *County of Wright*, 97 U. S. 339; *Emigrant Co.* v. *County of Adams*, 100 U. S. 67; *Mills County* v. *Railroad Companies*, 107 U. S. 557; *Ames* v. *Kansas*, 111

U. S. 449; *Börs* v. *Preston*, 111 U. S. 252; *Five Per Cent Cases*, 110 U. S. 471; *Tennessee* v. *Davis*, 100 U. S. 257; *State of Texas Case*, 7 C. Cl. 301; *State of Illinois Case*, 20 C. Cl. 342; *State of New Hampshire Case*, 20 C. Cl. 394.

Mr. Justice Field delivered the opinion of the court.

This action was brought in the Court of Claims by the State of Louisiana against the United States, to recover two demands, amounting in the aggregate to the sum of $71,385.83. The first of these demands arises upon the act of Congress of February 20, 1811, 2 Stat. 641, c. 21, "to enable the people of Orleans to form a constitution and state government," the fifth section of which declared that five per cent of the net proceeds of the sales of lands of the United States, within her limits, after the first day of January next ensuing, should be applied to laying out and constructing public roads and levees in the State, as its legislature might direct. Pursuant to the authority thus conferred, the people of the Territory of Orleans, represented in a convention called for that purpose, formed themselves into a State, by the name of Louisiana, and adopted a constitution under which the State was admitted into the Union. The five per cent of the net proceeds of sales of lands of the United States, made between July 1, 1882, and June 30, 1886, and due to the State by the United States, as found by the Commissioner of the General Land Office, amounted to $47,530.79.

The second of these demands arises upon the act of Congress of September 28, 1850, 9 Stat. 519, c. 84, "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and the act of March 2, 1855, 10 Stat. 634, c. 147, "for the relief of purchasers and locators of swamp and overflowed lands." The act of September 28, 1850, granted to the States then in the Union all the swamp and overflowed lands, made unfit thereby for cultivation, within their limits, which at the time remained unsold. The second section made it the duty of the Secretary of the Interior, as soon as practicable after the passage of the act, to prepare a list of the lands

described and transmit the same to the Governor of the State, and at his request to cause a patent to be issued therefor. It would seem that this duty was not discharged; and, notwithstanding the grant was one *in præsenti*, many of the lands falling within the designation of swamp and overflowed lands were sold to other parties by the United States. The act of March 2, 1855, was designed to correct, among other things, the wrong thus done to the State; it provided that, upon due proof of such sales, by the authorized agent of the State, before the Commissioner of the General Land Office, the purchase money of the lands should be paid over to the State. Such proof was not made, but equivalent proof was submitted to the Commissioner as to the character of the lands from the field notes of the Surveyor General of the State. This mode of proof was accepted by the Commissioner in other cases as early as 1850. The amount found in this way by the Commissioner on the 30th of June, 1885, to be due to the State from the United States, on account of sales of swamp lands to individuals, made prior to March 3, 1857, was $23,855.04.

It does not appear that there was any serious contest in the Court of Claims, either as to the validity or the amount of these demands; but it was objected that the demand arising upon the acts of September 28, 1850, and of March 2, 1855, was barred by the statute of limitations, and that both demands were set off by the unpaid balance of the direct tax levied under the act of August 5, 1861, 12 Stat. 292, which was apportioned to the State of Louisiana. The First Comptroller of the Treasury had, at different times previous to the commencement of this action, admitted and certified that the sums claimed were due to the State on account of the five per cent net proceeds of sales of the public lands, and on account of sales of swamp lands within the State purchased by individuals; but had directed the amounts to be credited to the State on account upon the claim of the United States against her for the unpaid portion of the direct tax mentioned.

It was, also, objected in the Court of Claims, and the objection is renewed here, that that court had no jurisdiction, under the Constitution and laws of the United States, to hear

and determine a cause in which the State is a party in a suit against the United States. This objection, therefore, must first be examined ; for, if well taken, it will be unnecessary to consider the other questions presented.

The Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may from time to time ordain and establish," and "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects." This clause was modified by the Eleventh Amendment, declaring that "the judicial power shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

As thus modified, the clause prescribes the limits of the judicial power of the courts of the United States. The action before us, being one in which the United States have consented to be sued, falls within those designated, to which the judicial power extends; for, as already stated, both of the demands in controversy arise under laws of the United States. Congress has brought it within the jurisdiction of the Court of Claims by the express terms of the statute defining the powers of that tribunal, unless the fact that a State is the petitioner draws it within the original jurisdiction of the Supreme Court. The same article of the Constitution which defines the extent of the judicial power of the courts of the United States, declares, that "in all cases affecting ambassadors, other public ministers, and consuls, and *those in which a State shall be party*, the Supreme Court shall have original jurisdiction. In all other

cases," "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." Although the original jurisdiction of the Supreme Court, where a State is a party, as thus appears, is not in terms made exclusive, there were some differences of opinion among the earlier judges of this court whether this exclusive character did not follow from a proper construction of the article. In a recent case, *Ames* v. *Kansas*, 111 U. S. 449, this question was very fully examined, and the conclusion reached that the original jurisdiction of the Supreme Court, in cases where a State is a party, is not made exclusive by the Constitution, and that it is competent for Congress to authorize suits by a State to be brought in the inferior courts of the United States. In that case, it is true, the action was commenced by the State in one of her own courts, and, on motion of the defendant, was removed to the Circuit Court of the United States, and the question was as to the validity of this removal. The case having arisen under the laws of the United States, it was one of the class which could be thus removed, if the Circuit Court could take jurisdiction of an action in which the State was a party. It was held that the Circuit Court could take jurisdiction of an action of that character, and the removal was sustained. The judiciary act of 1789, it is true, declares that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original but not exclusive jurisdiction." This clause, however, cannot have any application to suits against the United States, for such suits were not then authorized by any law of Congress. There could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party. The act of March 2, 1875, in extending the jurisdiction of the Circuit Court to all cases arising under the Constitution or laws of the United States, does not exclude any parties from being plaintiffs. Whether the State could thereafter prosecute the United States upon any demand in the Circuit Court, or the Court

of Claims, depended only upon the consent of the United States, they not being amenable to suit except by such consent. Having consented to be sued in the Court of Claims, upon any claim founded upon a law of Congress, there is no more reason why the jurisdiction of the court should not be exercised when a State is a party, than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none.

The statute of limitations does not seem to us to have any application to the demand arising upon the swamp-land acts. The act of 1850 contemplates that the Secretary of the Interior will identify the lands described, and although the State could not be deprived of her rights by the inaction of that officer, *Wright* v. *Roseberry*, 121 U. S. 488, 501, she was not obliged to proceed in their assertion in the absence of such identification. By the act of 1855, which provided for the payment to the State of moneys received by the United States on the sales of swamp lands within her limits, the payment was made to depend upon proof of the sales by the authorized agent of the State before the Commissioner of the General Land Office. No such proof was ever made or offered, and, therefore, until in some other equally convincing mode the swampy character of the lands sold was established to the satisfaction of the Commissioner, no definite ascertainment of the amount due to the State was had, so as to constitute a ground of action for its recovery in the Court of Claims. The method of proving the character of such lands by having recourse to the field-notes of the public surveys of the Surveyor-General of the State was adopted by the Commissioner as early as 1850, and was followed by him in this case in 1885. On the 30th of June of that year, he found in this mode and certified that there was due to the State from such sales the amount stated above. From that date only the six years within which the action could be brought in the Court of Claims began to run; and this action was commenced in September of the following year.

Nor do we regard the unpaid portion of the direct tax laid by the act of Congress of August 5, 1861, which was appor-

tioned to Louisiana, as constituting any debt to the United States by the State in her political and corporate character, which can be set off against her demands. 12 Stat. 292, c. 45. That act imposed an annual direct tax of twenty millions "upon the United States," and apportioned it to the several States of the Union. It directed that the tax should "be assessed and laid on the value of all lands and lots of ground, with their improvements and dwelling houses." (Sec. 13.) It was assessed and laid upon the real property of private individuals in the States. Public property of the States and of the United States was exempted from the tax. Its apportionment was merely a designation of the amount which was to be levied upon and collected from this property of individuals in the several States, respectively. The provisions of the act are inconsistent with any theory of the obligation of the States to pay the sums levied. It provides for the appointment of officers to assess the property to the different holders, and to collect the tax, and directs with minute detail the proceedings to be taken to enforce the collection, either by a distraint and sale of the personal property of the owners, or, that failing, by a sale of the real property taxed. It allows, it is true, the different States to assume the amounts apportioned to them respectively, and to collect the same in their own way by their own officers. Many of the States did thus assume the amounts, and in such cases it may well be considered that for the sums assumed they became debtors to the United States, and, so far as any portion of those sums has not been paid, that they still remain debtors. But, unless such assumption was had, no liability attached to any State in her political and corporate character. The liability was upon the individual land owners within her limits. The act declares that the amount of the taxes assessed "shall be and remain a lien upon all lands and other real estate of the individuals who may be assessed for the same during two years after the time it shall annually become due and payable." (Sec. 33.) Louisiana never assumed the payment of the taxes apportioned to her, or of any portion of them. She allowed the government to proceed by its officers to collect the tax from the property

holders. The amount apportioned to her was $385,886.67; the amount collected from the owners of land was $314,500.84; leaving only a balance of $71,385.83. It is not for us to suggest in what way this balance may be collected. After the war, the Secretary of the Treasury was authorized to suspend the collection of the tax in any of the States previously declared in insurrection, until January, 1868, and subsequently this authority was extended to January, 1869. 14 Stat. 331, c. 298, § 14; 15 Stat. 260, c. 69. The Secretary acted upon this authority, and suspended the collection. It is stated that, since 1869, no attempts have been made by the executive department to enforce its collection in those States. Be that as it may, it is enough for the disposition of the present case, that the unpaid balance of the tax apportioned to Louisiana constitutes no debt on the part of the State in her political and corporate character to the United States.

We perceive no error in the judgment of the court below, and it is, therefore,

Affirmed.

UNITED STATES *v.* ALABAMA. UNITED STATES *v.* MISSISSIPPI. Appeals from the Court of Claims. MR. JUSTICE FIELD. The questions presented in these cases are covered by the decision in the case of *The United States* v. *The State of Louisiana;* and, in conformity with it, the judgments in them must be affirmed. So ordered.

Mr. Attorney General and *Mr. Heber J. May* for appellant in each case.

Mr. Van H. Manning for appellee in each case.

THE EXCELSIOR.

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

Submitted October 11, 1887. — Decided October 24, 1887.

In this case the services rendered by a corporation whose business was that of a wrecker and salvor, to a vessel in distress were held to be salvage services of a meritorious character.

No agreement having been made for a fixed sum to be paid, nor any binding engagement to pay at all events, although there was an agreement to submit to arbitration the amount to be received for the service, in case the two principals could not agree upon a sum, it was held that there was no bar to the claim for salvage.

Comments upon the effect of a conversation at the time between the masters of the two vessels.

The effect of the agreement to submit to arbitration considered.

A salvage of $5600 having been awarded by the Circuit Court on the basis of 3½ *per cent* on $160,000 of value saved, this court, not being able to say, as a question of law, that the allowance was excessive, affirmed the decree.

This was a libel *in rem*, in admiralty, in a cause of salvage, filed by the Baker Salvage Company, a corporation of Virginia, against the steamer Excelsior and her cargo, in the District Court of the United States for the Eastern District of Virginia. That court awarded to the libellant, by a decree made on the 21st of February, 1884, the sum of $5600, as salvage, being 3½ *per cent*, on $160,000, the value of the Excelsior having been found at $150,000, and the value of her cargo at $10,000. 19 Fed. Rep. 436. The claimant appealed to the Circuit Court, which, on the 19th of May, 1884, affirmed the decree of the District Court, with interest on the $5600 from the date of the decree of the District Court, until paid, at the rate of six *per cent per annum*, and the costs of suit.

The Circuit Court found the following facts and conclusions of law:

"On the afternoon of the fourth of December, 1882, at five o'clock, the steamer Excelsior, Captain T. E. Baldwin, of the

Statement of the Case.

Potomac Steamboat Company, plying between Norfolk, Va., and Washington, D. C., touching at Old Point, Fortress Monroe, left her dock at Norfolk, steamed down the Elizabeth River and into Hampton Roads, heading the usual course to make a landing at Old Point wharf. She had on board a competent crew and an average number of passengers, the agreed value of the steamer being one hundred and fifty thousand dollars and of her cargo ten thousand dollars.

"As the Excelsior was heading the aforesaid course in Hampton Roads, at or near six P.M., the United States steam tug Fortune came into collision with her, by an accident. The Fortune struck the Excelsior, which is of wood, on the starboard bow, making a hole in her hull at least 8 by 10 feet; and, it being apparent that the Excelsior must otherwise sink in deep water, from the quantity she was making in her hull through the hole in her bow, she was promptly headed for the shore, going ashore on the south side of Hampton bar, at about its middle point, about two miles from Old Point wharf, three or four miles from Sewell's Point, between half a mile and a mile from the Soldiers' Home shore, the nearest shore, and within a hundred yards of the channel, where she sank, full of water, with a hole extending from her hurricane deck far down under water, lying almost head on to the shore, in water ranging in depth from six to seven feet at her bow to from ten to twelve feet at her stern.

"After ascertaining the above soundings and landing his passengers at Old Point Comfort, Captain Baldwin, of the Excelsior, proceeded to the same point and sent the following telegram to The Baker Salvage Company, at Norfolk, Va.:

"'December 4th, 1882.

"'Send assistance, with steam pumps, to Excelsior, on Hampton bar. Get here by low water.'

"Subsequently, Captain Baldwin sent another telegram, as follows:

"'Dec. 4th, 1882.

"'Del'y guaranteed. Bring steamer Resolute, a diver, with appliances.'

"The first of these telegrams was received at the telegraph office, in Norfolk, at 8.2 P.M., and the other at 9.15 P.M., on the evening of the collision.

"The Baker Salvage Company, through the agency of its superintendent and general manager, Captain E. M. Stoddard, at once, and vigorously, set to work in response to the telegrams, to render the aid asked for; and, at or about ten P.M., a fully equipped expedition, under the command of Captain Stoddard, left Berkeley, opposite Norfolk, at the intersection of the southern and eastern branches of the Elizabeth River, where the wharves of The Baker Salvage Company are located, for the purpose of relieving the Excelsior. The expedition consisted of the powerful wrecking steamer Resolute, Hobbs, master, with her stationary steam pump, capable of pumping four hundred tons per hour, with the schooner Scud in tow, having on board a portable steam pump capable of pumping one hundred tons per hour, and a full complement of wrecking material and appliances, the whole manned by a crew of ten seamen experienced in wrecking operations, and accompanied by a skilled diver, with diving apparatus. Captain Stoddard, making all reasonable haste, and in the exercise of his judgment, did not attempt to go alongside of the Excelsior that night, not knowing her exact position on Hampton bar, and being unable to identify her lights, but went directly to Old Point wharf, where he arrived about one o'clock on the morning of December 5th, when it was flood tide there. Between that hour and daylight he secured the services of a number of laborers at Old Point, whose services he anticipated would be needed to remove the cargo, thus materially advancing the work for which he had come. At daylight on the morning of the 5th of December, Captain Stoddard, with the expedition above described, went to the Excelsior, and found her lying, as above described, submerged to her main deck, with a hole in her bow, and full of water, water standing on her main deck aft at high tide, and about two feet below her guards at low tide.

"The Excelsior's cargo had not been reached by the water, being stored about amidships, which was higher than the stern.

Captain Stoddard at once had an interview with Captain Baldwin, in the presence of the purser of the Excelsior. Captain Baldwin asked what it was going to cost to get the ship off and deliver her at the railroad. Stoddard replied: 'I do not know;' to which Baldwin replied: 'This is not a salvage service;' to which Stoddard replied: 'Call it what you please, so I get my pay;' to which Captain Baldwin replied: 'It is no salvage service;' and they both agreed to submit to arbitration the amount to be received for the service by The Baker Salvage Company, in case the two companies could not agree upon a sum.

"At this point, viz., about seven o'clock on the morning of the 5th, Captain Stoddard began the direct operations upon the Excelsior and her cargo, for their relief. He brought the Scud alongside the Excelsior, for the purpose of removing the steamer's cargo to Old Point wharf, and, placing the diving apparatus aboard the Excelsior, set the diver to work to ascertain minutely the exact extent of the wound that had been sustained by the steamer in the collision; and, while this was going on, he returned to Old Point wharf in the Resolute, and brought off the laborers above mentioned, who had been employed to assist in the removal of cargo, and lumber to be used by the diver in battening up the hole.

"The work of removing the cargo to Old Point wharf was continued throughout the day, until, after three trips of the Scud, in tow of the Resolute, it was successful between four and five o'clock of the afternoon of the 5th of December, without loss, the work being done under the management and at the risk of The Baker Salvage Company, the second officer of the Excelsior supervising the same, hurrying up the laborers, keeping their time, and seeing that nothing was stolen.

"The diver, who began his operations about seven A.M. of the 5th of December, as aforesaid, worked steadily until the night of that day, battening up the hole with plank and covering the same with canvas. Resuming his work at an early hour the next morning, he completed it by one P.M. of the same day, the 6th.

"On the afternoon of the 5th, after the removal of the

cargo to Old Point wharf had been completed, and the Scud anchored for safety inside Hampton bar, with but one man left aboard of her as a guard, the Resolute came alongside the Excelsior on her starboard or weather side, put out fenders, made fast so as to be in position to use her stationary pump, and began to assist in the work of setting up the portable pump on board of the Excelsior. The work of setting up this portable pump was continued until nine P.M., the pump and all attachments being furnished by The Baker Salvage Company, only the steam for running it being supplied by the donkey engine of the Excelsior, while the Resolute was lying on the Excelsior's starboard side or windward side, as aforesaid. Between seven and eight o'clock on December 5th it began to blow a fresh or strong breeze from the east or southeast, so as to induce the master of the Excelsior to request that the Resolute lie alongside of the steamer, for the protection of the lives of those aboard of her, in case her joiner work should be carried away and she should begin to break up. The Resolute thus continued to lie on the starboard or weather side of the steamer, it being impracticable to shift her position to the lee side in such a breeze and with such a sea on; and, while lying thus, she afforded considerable protection to the Excelsior, acting as a breakwater to her, and incurred considerable risk herself. This wind, which produced quite a rough sea, lasted from between seven and eight o'clock in the evening of December 5th until about one o'clock on the following morning, during which time a portion of the crew of the Resolute had to be constantly at work putting in new fenders between the steamers as others would be crushed by the chafing, and keeping them in position; to do which it was necessary to go between the two steamers upon their guards, with no little danger to life or limb. Steam was also kept up on the Resolute all night, for immediate use, in case of emergency.

"Soon after daylight on the morning of the 6th work was resumed; the diver and gang battening up the hole, the crew of the Resolute, under the superintendence of Captain Stoddard, getting ready the stationary pump on board the Resolute, and completing the work of setting up the port-

able pump on board the Excelsior that had been begun the previous evening. The latter was completed about nine A.M., of this day, the 6th, as aforesaid, and was set to work to lower the water in the hold of the steamer, and thus assist the diver in his work of covering the planking with canvas, by drawing the canvas in. The stationary pump was ready by 12 M.; and, the diver completing his work of battening soon after that, both pumps were set to work at their full capacity, so that, at or near 2.3 P.M., the hull of the Excelsior had been so far freed from water, that the tug Olive Baker, that had been previously engaged to assist in the work, and had a line attached, hauled the steamer afloat. Captain Stoddard at once started to Norfolk with the Excelsior, having her in tow of the steam tugs Olive Baker and Olive Branch, and the wrecking steamer Victoria J. Peed, while the Resolute kept alongside, pumping every twenty minutes, to keep the hull free from water. Great care was exercised in towing the the steamer across Hampton Roads and up the river to Norfolk, as the hole in her bow was only covered with pine boards, one inch thick, and one thickness of No. 1 canvas, which might be knocked off by any hard substance floating in the water, that might come in contact with it. The work was successfully accomplished, however, and by five P.M., of December 5th, 1882, the Excelsior had been safely docked in Norfolk.

"The salvage service was thus successfully completed within less than 45 hours after the aid of the salvors had been invoked, and that without a single error of omission or commission on their part. The work was done with an energy, skill, fidelity, and courage that admit of no question. The officers and crew of the Excelsior rendered all the aid in their power to the salvors."

"The point at which the Excelsior was lying is on the south side of Hampton bar, about midway between its northeastern and southeastern extremities, and on the northern border of Hampton Roads; the locality, an exposed one, vessels ashore there being exposed to all winds from the east round to the southwest, and winds from the east come right in from the Atlantic Ocean, through the Capes on to the bar, with no

breakwater, except that furnished by the rip-raps and the small shoals about it. The weather, as it actually existed during the greater portion of the time of the salvage service was moderate, with light winds and no very heavy sea; but, on the evening of the 5th of December, a strong breeze set in from the east or southeast, between seven and eight o'clock, which lasted until one o'clock on the morning of the 6th, causing the water to be rough, and creating considerable apprehensions for the safety of the Excelsior. This constantly threatened danger was increased by the fact that the Excelsior is an expensively furnished bay and river steamer, standing very high out of the water, and composed almost entirely, above her main deck, of light joiner work, liable to be carried away by winds and waves, with guards from two to three feet wide at her stern to ten or twelve feet wide at her wheel-houses, under which, in her then present position, the waves struck with great force, since she could not rise with them, liable to tear up her guards, and to cause her slender joiner work to give way and the steamer to break up. These things rendered despatch necessary.

"The Baker Salvage Company, the libellant, is a body politic and corporate, with its principal office located at Norfolk, in the State of Virginia. Its business is that of wrecker and salvor, in which it is extensively engaged, its operations being conducted in the Atlantic Ocean and Gulf of Mexico, and along the coasts of those waters and the waters tributary thereto, wherever its services may be needed. The capital embarked in the said business is about one hundred thousand dollars, and it keeps constantly on hand, and in readiness for immediate use in its business, a number of powerful steamers and sailing vessels, proper for wrecking services, with a full equipment of the best and most improved wrecking apparatus and gear, such as steam pumps and connections, diving apparatus and gear, hoisting engines, anchors, chains, and cables of unusual size, falls, with a competent force of seamen, navigators, and divers, who have attained skill from their experience in wrecking operations. This immense equipment is kept up at an average expense of five thousand dollars per

month during the busy months — say, eight months in the year — and at an average of two thousand five hundred dollars during the balance of the year, and that, exclusive of interest on the large amount of capital invested, being the mere running expenses.

"In addition to the wrecking steamers Resolute and Victoria J. Peed, and the schooner Scud, with all the wrecking appliances and apparatus, its own property, which The Baker Salvage Company had employed in this service, it had also chartered, and used to assist in the work, the steam tugs Olive Branch, Olive Baker, and Nettie. The Baker Salvage Company had exposed to dangers incident to this salvage service at least fifty thousand dollars' worth of its valuable property, which, in the case of destruction, must have been a total loss, since insurance companies will only insure property so engaged at exorbitant rates, if at all. And the court finds that the libellant is entitled, for its salvage service in this cause, to the sum of five thousand six hundred dollars, with interest thereon from the 21st day of February, 1884, until paid;" "and the court finds the law to be, that this is a case of salvage;" "that the alleged contract which the claimant attempts to set up is no bar to a meritorious claim for salvage, in admiralty; that the libellant, the salvor, is entitled to be rewarded for the salvage service in proportion to the personal risk run by its employes while engaged in this salvage service, to the danger to which its valuable wrecking equipment was exposed while engaged in this service, to the danger from which the large and valuable property of the claimant has been relieved, to the labor expended by the salvors in rendering the salvage services, and the promptness, skill, and energy with which those services were rendered."

The claimant of the Excelsior and her cargo appealed to this court, and assigned for error, (1) that the Circuit Court, in its finding of facts, had ascertained and stated as proved, an agreement between the libellant and the claimant for a *quantum meruit* for the work and labor done by the libellant, and ought not to have decreed salvage therefor; (2) that the award was excessive in amount.

Argument for Appellant.

Mr. Theodore S. Garnett for appellant.

I. While it is not contended that the libellant should not receive a proper compensation for the work done by him, yet it is submitted that the question of salvage was here fairly raised and settled between the parties before any work was done on the vessel.

It was distinctly expressed by Captain Baldwin that this service was not to be charged for *as salvage*, and that view was assented to by the libellant's agent when he said, "Call it what you please, so I get my pay," and accepted the service.

There was a distinct announcement that *at all events* he must be paid, and there was immediate assent to that proposal by Captain Baldwin, for the work was at once allowed to proceed.

Here there was a stipulation for payment at all events, not conditioned upon success, but to be paid at all events, and such a bargain is inconsistent with the claim of *meritorious salvage*.

Upon this point, counsel would adopt the language of the court in the case of *The Independence*, 2 Curtis, 350, 355.

"In my judgment, a contract to be paid at all events, either a sum certain or a reasonable sum for work, labor and the hire of a steamer or other vessel, in attempting to relieve a vessel in distress, without regard to the success or failure of the efforts thus procured is *inconsistent* with a claim for salvage; and when such contract has been fairly made, it must be held binding by a Court of Admiralty and any claim for salvage disallowed."

"When the owner or his representative, or both, become personally liable by the contract to pay either an agreed sum or a *quantum meruit* for the labor and service rendered, without regard to its results, the parties do not contemplate nor engage in a salvage service, but quite a different service. . . . I do not perceive how a Court of Admiralty can, after the property has been saved, set aside such a contract and declare that a salvage service was performed."

II. The award is plainly and grossly excessive.

Opinion of the Court.

If it be found that the parties were contracting for services which were to be paid for without regard to success or failure, then it is plain that the court erred in decreeing compensation as *salvage*. The reward should have been in proportion to the character and amount of the service rendered.

Mr. W. H. C. Ellis for appellee.

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

(1) It is contended, on the facts found, that the question of salvage was fairly raised and settled between the parties before any work was done on the vessel; that what passed amounted to an announcement by Captain Stoddard, the master of the libellant's wrecking steamer, that he must be paid for his services at all events; that this proposal was assented to by the master of the Excelsior; that the work proceeded under that arrangement; and that, therefore, there could be no claim for salvage.

It is very clear that the services rendered by the libellant to the Excelsior constituted a salvage service of a meritorious character. The telegrams sent to the libellant, by virtue of which it entered upon the service, summoned it as a salvor; and the services detailed in the finding of facts constituted salvage services. No agreement was made for a fixed sum to be paid, nor any binding engagement to pay at all events, although there was an agreement to submit to arbitration the amount to be received by the libellant for the service, in case the two companies could not agree upon a sum. It was, however, held by this court, in the case of *The Camanche*, 8 Wall. 448, 477, that "nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage."

Nor was there in this case any agreement for a *quantum meruit* for the work and labor to be done by the libellant. In the case of *The Independence*, 2 Curtis, 350, 357, the proper

rule on the subject was laid down by Mr. Justice Curtis, in these words: "To bar a claim for salvage, where property in distress on the sea has been saved, it is necessary to plead and prove a binding contract to be paid at all events for the work, labor, and service, in attempting to save the property, whether the same should be lost or saved." A binding contract of that character is not proved by such a conversation as took place between the respective parties in the present case. In *The Salacia*, 2 Hagg. Adm. 262, 265, it was shown that the master of the salvor vessel declared at first "that he should not demand any salvage, but that his crew would not work unless paid for their labor, and that they declined taking a dollar a day, but would take two." As to this, Sir Christopher Robinson said: "It is probable that some such conversation may have passed at the beginning of this service, but it might not be known what would be the extent of it; and the court is not in the habit of considering such loose conversations as conclusive of the merits of any case, when brought regularly before it." In the present case, there was no assent by Captain Stoddard to the statement of Captain Baldwin that the service was not a salvage service, and the assertion by Captain Stoddard that the name of the service was immaterial, so long as he should get his pay, was fairly a statement that he should insist on his pay for the services according to their actual character.

The answer sets up an agreement between the masters of the respective vessels, after the Resolute had arrived at the place where the Excelsior was, that no salvage would be claimed by the libellant. Not only is it not found by the Circuit Court that any such agreement was made, but, on the facts found, the question was left open as to whether the services were to be paid for as salvage services, in case of success. Moreover, at the time of the conversation between the masters, the salvage service had been partly rendered, because the expedition had been fitted out, and the Resolute and her accompanying schooner, and the steam pumps and other appliances, and the diver, had been taken to where the Excelsior was, in compliance with the summons of her master.

Opinion of the Court.

Nor can the agreement for arbitration affect the question of a salvage service. In the case of *The Raisby*, 10 P. D. 114, there was an agreement to tow a ship in distress, "the matter of compensation to be left to arbitrators at home, to be appointed by the respective owners." As to this, Sir James Hannen said: "This, however, was valueless as an agreement. It could not have been pleaded as any answer to an action for salvage brought in the ordinary way in the Admiralty Division, and if effect could have been given to it at all, it would only have been by bringing an action upon it for not submitting to arbitration."

(2) As to the amount awarded, the case is not one where, as a question of law, this court can say that the allowance was excessive. On the contrary, it seems to have been reasonable and fair, at least as respects the claimant of the Excelsior and her cargo.

In the recent case in this court of *The Connemara*, 108 U. S. 352, the question involved was so fully considered that it is only necessary to refer to that case, as establishing the principle, that, "since the Act of 1875, in cases of salvage, as in other admiralty cases, this court may revise the decree appealed from for matter of law, but for matter of law only; and should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case." See, also, *The Tornado*, 109 U. S. 110, and *The Hesper*, 122 U. S. 256.

The decree of the Circuit Court is

Affirmed.

BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY *v.* SIMMONS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

Submitted October 11, 1887. — Decided October 24, 1887.

A decree in a suit in equity to foreclose a mortgage, which determines the validity of the mortgage, and, without ordering a sale, directs the cause to stand continued for further order and decree upon the coming in of a master's report, is not final for the purposes of an appeal.

Parsons v. *Robinson*, 122 U. S. 112, and *First National Bank of Cleveland* v. *Shedd*, 121 U. S. 74, distinguished.

THIS was a motion to dismiss an appeal because the decree appealed from is not final, but interlocutory only. The case was in substance this:

A bill was filed by a junior mortgagee against the mortgagor and a prior mortgagee to foreclose his mortgage and to establish his right to redeem the prior mortgage. The defence was that under certain proceedings had for the foreclosure of the prior mortgage his right to redeem had been cut off, and the mortgaged property sold free of his lien. The decree appealed from found: 1. That the junior mortgage was still a valid and subsisting lien, and that the right of its trustee and beneficiaries to redeem had not been cut off by the proceedings for the foreclosure of the earlier mortgage. 2. That those claiming title under the sale upon the foreclosure of that mortgage, and certain other parties, were entitled to redeem the junior mortgage "by paying off the amount due" thereon, "at such time as shall hereafter be fixed and determined by a further order or decree to be entered in this cause." 3. In case none of the parties claiming under the prior mortgage redeem the junior mortgage, and the junior mortgagee redeems the prior one, then that the junior mortgage shall be foreclosed, and a sale of the property "shall be had under a decree to be entered by this court," and the proceeds shall be applied, first, "to paying off the amount

Argument against the Motion.

paid to redeem from the first" mortgage; second, the amount found due on the second mortgage; and the balance, if any, paid to the mortgagor. 4. "In the event that none of these parties shall redeem from the others, . . . then a sale" of the mortgaged property "shall be had pursuant to such decree as may hereafter be entered herein, and from the proceeds shall be paid off, first, the amount which it may be hereafter determined is due on the first" mortgage; "second, . . . the amount which it may hereafter be determined is due on the second" mortgage; and, third, the balance, if any, to the mortgagor.

It was then ordered that, "for the purpose of determining the amount necessary to be paid by any of the parties in making redemption, as herein provided," the cause be referred to a master "to find and report" the amount due on both the first and the second mortgages, in accordance with certain principles of accounting which were specifically stated. The whole then concluded as follows: "This decree being interlocutory, it is ordered that said cause stand continued for further order and decree." From this decree the appeal was taken.

The case is reported as *Simmons* v. *Taylor*, 23 Fed. Rep. 849.

Mr. W. H. L. Lee for the motion. *Mr. Herbert B. Turner* and *Mr. B. F. Lee* were with him on the brief.

Mr. Thomas F. Withrow, opposing.

The appeal was taken in this case for the reason that a difference of opinion has been expressed in the court below as to the character of the decree. There is apparent warrant for this difference in the decisions of the courts. For example: This court held, in *The National Bank* v. *Shedd*, 121 U. S. 74, that the decree appealed from in that case, which ordered a sale of mortgaged property "before the rights of the parties under the several mortgages had been fully ascertained and determined," was a final decree, from which an appeal could be taken. In the later case of *Parsons* v. *Robinson*, 122 U. S.

112, the decree was held to be interlocutory "as it now stands," because "it does not terminate the litigation between the parties on the merits of the case," and that a decree is final only "*when it leaves nothing to be done but to make the sale and pay out the proceeds.*" The decree appealed from in this case leaves for determination the defences which affect the income and equipment bonds, all equities of the first mortgage bondholders, the amounts due on the income and equipment bonds, and on the first mortgage main line bond, after applying the rents and profits arising from the operation of the railway through a period of several years. That these cases are not in entire accord, in the judgment of the learned counsel who make this motion, is indicated by the fact that they cite the one last mentioned and omit the first.

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

The rulings at the last term in *Parsons* v. *Robinson*, 122 U. S. 112, are decisive of this motion. The right of the junior mortgagee to redeem the prior mortgage has been established by the decree appealed from, but the amount he must pay has not been determined. The validity of his lien as security for the amount due on his mortgage has been declared, but what that amount is has not been fixed. His right to a sale of the mortgaged property in case the debt is not paid has been settled, but such a sale cannot be made until a further order to that effect is entered. The litigation has not been ended; the terms of the redemption have not been fixed, and the foreclosure sale awaits the further judicial action of the court. In short, nothing can be done towards carrying the decree into effect until the "further order or decree" for which the cause was continued. This is shown more than once on the face of the decree, and consequently the decree is in fact, what the court took care to say it was, "interlocutory" only, and not final for the purposes of an appeal.

It is suggested in the brief of counsel for the appellant that the cases of *First National Bank of Cleveland* v. *Shedd*, 121

U. S. 74, and *Parsons* v. *Robinson*, *supra*, are in conflict, but this is a mistake. In Shedd's case there was a decree of sale absolutely and without reserve, which could be carried into execution at once, and when a purchaser acquired title under it, he would have held as against all the parties to the suit, no matter what might be the rulings on the other questions in the case which were reserved for further adjudication. The language of the decree, as shown at page 84, was to the effect "that the whole property be sold as an entirety, . . . and that upon a confirmation of the sale the purchaser be entitled to a conveyance freed and discharged of the lien of the mortgages, receiver's certificates, costs, expenses, &c." Such a decree was surely final for the purposes of an appeal within the rule as stated in *Forgay* v. *Conrad*, 6 How. 201, where it is said, at page 204: "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such a decree carried immediately into execution, the decree must be considered as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed." To the same effect are *Ray* v. *Law*, 3 Cranch, 179; *Bronson* v. *Railroad Co.*, 2 Black, 524, 531; and *Thomson* v. *Dean*, 7 Wall. 342, in which last case it is said, page 345: "In this case the decree directs the performance of a specific act, and requires that it be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. It looks to no future modification or change of the decree." If a sale had been made under the decree as it is stood in Shedd's case, "the title of the purchaser would not have been overthrown or invalidated, even by a reversal of the decree; and consequently the title of the defendants to the lands would have been extinguished,

and their redress, upon the reversal, would have been of a different sort from that of a restitution of the land sold." Such was the language of this court, speaking through Mr. Justice Story, in *Whiting* v. *Bank of the United States*, 13 Pet. 6, 15, in reference to the effect of a sale under a decree of foreclosure and sale, and there cannot be a doubt of its correctness. It was for this reason the decree in Shedd's case was held to be final in the sense of a court of equity for the purpose of an appeal.

But in *Parsons* v. *Robinson* we held there was no decree of sale which could be "carried immediately into execution;" that no order of sale could issue until the court had "given its authority in that behalf;" and that "further judicial action must be had by the court before its ministerial officers" "could proceed to carry the decree into execution." In this consists the difference between the two cases: in Shedd's case there was actually a decree of sale; in Parsons' case there was not. So, here, there has been no actual decree of sale, and

The motion to dismiss is granted.

MOREY *v.* LOCKHART.

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

Submitted October 18, 1887. — Decided October 24, 1887.

Since the Act of 1887, c. 373, took effect, this court has no power to review on appeal or in error an order of a Circuit Court remanding a cause to a state court.

THIS was a motion to dismiss an appeal from an order of the Circuit Court, remanding a cause to the state court from which it had been removed. The case is stated in the opinion of the court.

Mr. Assistant Attorney General Maury on behalf of *Mr. Eugene D. Saunders* and *Mr. E. D. White*, for the motion.

Mr. J. D. Rouse and *Mr. William Grant* opposing.

Opinion of the Court.

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

This is an appeal from an order of the Circuit Court remanding a suit which was begun and had been removed from a state court after the act of March 3, 1887, c. 373, 24 Stat. 552, went into effect. At the hearing of the motion the judges holding the Circuit Court differed in opinion, and the order to remand was made under § 650 of the Revised Statutes in accordance with the opinion of the presiding judge. The question as to which the difference of opinion arose was duly certified and recorded, and this appeal was taken from the order which was entered. A motion is now made to dismiss because an appeal does not lie in such a case.

Before the act of March 3, 1875, there could be no appeal from an order of the Circuit Court remanding a suit which had been removed, because such an order was not a final judgment or decree in the sense which authorizes an appeal or writ of error. *Railroad Company* v. *Wiswall*, 23 Wall. 507. That act, however, provided in express terms that "the order of said Circuit Court dismissing or remanding said cause to the state court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be," 18 Stat. 470, c. 137, last paragraph of § 5; and under this authority numerous cases have been brought to this court by appeal or writ of error for the review of such orders. But, by § 6 of the act of 1887, c. 373, the last paragraph of § 5 of that of 1875, c. 137, was expressly repealed; and in the last paragraph of § 2 of the act of 1887 it was enacted that "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 case shall be allowed." It is difficult to see what more could be done to make the action of the Circuit Court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there

shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed.

It is contended, however, that the prohibition against appeals and writs of error in the act of 1887 applies only to removals on account of prejudice or local influence; but that cannot be so. The section of the statute in which the provision occurs has relation to removals generally, those for prejudice or local influence as well as those for other causes, and the prohibition has no words of limitation. It is in effect that no appeal or writ of error shall be allowed from an order to remand in "any cause" removed "from any state court into any Circuit Court of the United States." The fact that it is found at the end of the section, and immediately after the provision for removals on account of prejudice or local influence, has, to our minds, no special significance. Its language is broad enough to cover all cases, and such was evidently the purpose of Congress.

It is also contended that the appeal lies under § 693 of the Revised Statutes, on account of the certificate in the record of the judges holding the court, that their opinions were opposed upon the question of remanding. That section is as follows: "Any final judgment or decree in any civil suit or proceeding before a Circuit Court . . . wherein the said judges certify, as provided by law, that their opinions were opposed, . . . may be reviewed and affirmed, reversed or modified by the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas." But here there has been no judgment in the suit, and therefore this section does not apply. That was the ground on which an appeal was denied in *Railroad Company* v. *Wiswall*, *supra*, where it was said: "The order of the Circuit Court remanding the cause to the state court is not a 'final judgment' in the action, but a refusal to hear and decide." No case can be brought up under § 693, until there has been a final judgment or decree in the suit.

It follows that we have no jurisdiction of this appeal, and

The motion to dismiss is consequently granted.

GILSON *v.* DAYTON.

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

Submitted October 11, 1887. — Decided October 24, 1887.

As it appears on the face of the bonds sued on in this action that they were issued under the special act of February 18, 1857, which was held void in *Post* v. *Supervisors*, 105 U. S. 667, and not under the general law of March 6, 1867, the judgment dismissing the action is affirmed.

THIS was an action to recover on twelve bonds, each for $1000 issued by the town of Dayton. In each bond it was stated that it was "issued in pursuance of an election or special town meeting held in said town on the 17th day of April, 1869, under and by virtue of a certain act of the Legislature of the State of Illinois approved February 18th, 1857," "authorizing municipal subscriptions to the stock of certain railroads," "the said act having special reference to the Ottawa, Oswego and Fox River Valley Railroad," that a majority of the voters had voted in favor of their issue, "previous application in writing of fifty legal voters of said town for such an election" "having been made to the clerk of said town, and the said town clerk having called said election" "in accordance therewith," "and having given due notice of the time and place of holding the same, as required by law and by the act aforesaid."

In his declaration the plaintiff averred the making and issue of the bonds, set out one of the bonds at length, and further averred "that he purchased the above-mentioned bonds and coupons in the usual course of commercial business for an investment, paying therefor a good and valuable consideration long before the same were due and payable, and without any notice of any claimed defect or irregularity in their issue or want of power to issue them, relying upon the faithful action of the town and State officials in their issue and registration, and upon all laws and judicial decisions in existence at the

time they were voted and issued for their validity, and especially upon the act of March 6, 1867, found in volume 1, page 866, Private Laws of Illinois of 1867."

The defendant demurred. Demurrer sustained and the action dismissed. Plaintiff sued out this writ of error.

The act of 1857 referred to in the bond was held by the courts of Illinois, and by this court in *Post* v. *Supervisors*, 105 U. S. 667, to be "of no force or effect by reason of its not appearing by the legislative journals to have been passed as required by the constitution of 1848." The act of 1867 referred to in the declaration was a general enabling act for the county in which Dayton was situated, but it required the application for the meeting to be made by "twenty legal voters and tax payers of the district."

Mr. George A. Sanders, for plaintiff in error, contended that although the bonds on their face purported to have been issued under the act of 1857, yet as the act of 1867 was in force and gave plenary power for their issue, and the averment in the declaration respecting them had been admitted by the demurrer, they should be held to have been issued under the later act; and he cited: *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539; *Gelpcke* v. *Dubuque*, 1 Wall. 175, 203; *Supervisors* v. *Schenck*, 5 Wall. 772, 784; *Lexington* v. *Butler*, 14 Wall. 282; *County of Warren* v. *Marcy*, 97 U. S. 96, 104; *Commissioners* v. *Bolles*, 94 U. S. 104; *Empire* v. *Darlington*, 101 U. S. 87; *Marcy* v. *Oswego*, 92 U. S. 637; *Coloma* v. *Eaves*, 92 U. S. 484; *Ackley School District* v. *Hall*, 113 U. S. 135, 139; *Moran* v. *Miami County*, 2 Black, 722; *Mercer County* v. *Hackett*, 1 Wall. 83; *White* v. *Railroad*, 21 How. 575; *Thomson* v. *Lee County*, 3 Wall. 327, 331; *Marion County* v. *Clark*, 94 U. S. 278; *Cromwell* v. *County of Sac*, 96 U. S. 51; *Anderson County* v. *Beal*, 113 U. S. 227; *Johnson County* v. *January*, 94 U. S. 202; *Burr* v. *Chariton County*, 2 McCrary, 603; *East Lincoln* v. *Davenport*, 94 U. S. 801; *Rock Creek* v. *Strong*, 96 U. S. 271.

Mr. G. S. Eldredge for defendant in error.

Syllabus.

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

The judgment in this case is affirmed on the authority of *Crow* v. *Oxford*, 119 U. S. 215. See also *Post* v. *Supervisors*, 105 U. S. 667, 691. It appears on the face of the bonds sued for that the subscription was made under and by virtue of the act of February 18, 1857, and that the vote of the town was taken at a special town meeting called upon the "application in writing of fifty legal voters of said town," which is in accordance with the provisions of that act. The act of March 6, 1867, which the plaintiff now claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by "twenty voters and *tax-payers*." The record does not show that any of those who signed the application for the meeting at which the vote was taken were tax-payers. It thus appears from the bonds themselves not only that they were issued under the act of 1857, but that they were not issued under that of 1867.

Affirmed.

HENDERSON *v.* LOUISVILLE AND NASHVILLE RAILROAD.

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

Argued October 21, 1887. — Decided October 31, 1887.

A railroad company is not responsible for the loss of a bag containing money and jewelry, carried in the hand of a passenger and by him accidentally dropped through an open window in the car, although, upon notice of the loss, it refuses to stop the train, short of a usual station, to enable him to recover it.

Under the practice in Louisiana, the Circuit Court of the United States, after ordering a petition to be dismissed as showing no cause of action, but with leave to file an amended petition, may, at the hearing on the amended petition, amend the order allowing it to be filed, by providing that it shall be treated as a mere amendment to the original petition, and thus preclude the plaintiff from contesting a material fact, within his own knowledge, averred in that petition.

Opinion of the Court.

THIS was an action against a railroad company. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. O. B. Sansum for plaintiff in error, cited: *First National Bank* v. *Marietta Railroad*, 20 Ohio St. 259, 279; *Butcher* v. *London Railway*, 16 C. B. 13, 15; *Richards* v. *London Railway*, 7 C. B. 839; *Robinson* v. *Dunmore*, 2 Bos. & Pul. 416.

Mr. Thomas L. Bayne (*Mr. George Denegre* was with him on the brief) for defendant in error, cited: *Clark* v. *Burns*, 118 Mass. 275; *Crystal Palace* v. *Vanderpool*, 16 B. Mon. 302; *Tower* v. *Utica & Schenectady Railroad*, 7 Hill, 47 [*S. C.* 42 Am. Dec. 36]; *Abbot* v. *Bradstreet*, 55 Maine, 530; *Weeks* v. *New York, New Haven, & Hartford Railroad*, 72 N. Y. 50; *Del Valle* v. *Richmond*, 27 La. Ann. 90; *Stilley* v. *Stilley*, 20 La. Ann. 53; *Case* v. *Watson*, 22 La. Ann. 350; *Hart* v. *Bowie*, 34 La. Ann. 323.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action against a railroad corporation by a passenger to recover for the loss of a handbag and its contents.

The plaintiff, a married woman suing by authority of her husband, alleged in the original petition that on October 25, 1883, the defendant, being a common carrier of goods and persons for hire, received her into one of its cars as a passenger from her summer residence at Pass Christian in the State of Mississippi to her winter residence in New Orleans, having in her hand, and in her immediate custody, possession and control, a leathern bag of a kind usually carried by women of her condition and station in society, containing $5800 in bank bills, and jewelry worth $4075; that while the plaintiff, holding the bag in her hand, was attempting to close an open window next her seat, through which a cold wind was blowing upon her, the bag and its contents, by some cause unknown to her, accidentally fell from her hand through the open window upon the railroad; that she immediately told the conductor of the train that the bag contained property of hers of great value,

and requested him to stop the train, and to allow her to leave the car and retake the bag and its contents; but he refused to do so, although nothing hindered or prevented him, and, against her protestations, caused the train to proceed at great speed for three miles to Bay St. Louis, where he stopped the train, and she despatched a trusty person to the place where the bag had fallen; but before he arrived there the bag with its contents was stolen and carried away by some person or persons to the plaintiff unknown, "and was wholly lost to the plaintiff by the gross negligence of the defendant as aforesaid."

The further averments of the petition, undertaking to define specifically the nature and effect of the obligation assumed by the defendant to the plaintiff, are mere conclusions of law, not admitted by the exception, in the nature of a demurrer, which was filed by the defendant, in accordance with the practice in Louisiana, upon the ground that the petition set forth no cause of action. The Circuit Court sustained the exception, and ordered the petition to be dismissed. 20 Fed. Rep. 430.

On the day the judgment was rendered, and before it was signed, it was amended, on the plaintiff's motion, by adding the words "unless the plaintiff amend her petition so as to state a cause of action within five days."

Within that time the plaintiff filed an amended petition, alleging that the defendant received the plaintiff as a passenger, and the bag and its contents as part of her luggage, to be safely kept and carried by the defendant as a common carrier to New Orleans, and there delivered to the plaintiff; that the defendant did not so carry and deliver; and that the things were lost by the negligence and improper conduct of the defendant, and not by any want of care on the part of the plaintiff.

The defendant excepted to the amended petition, because the plaintiff had no right to file one after the original petition had been dismissed as aforesaid, and because the amended petition was inconsistent with the original petition, especially in that the original petition alleged that the bag and its contents were held and kept by the plaintiff in her immediate possession, control and custody, whereas the amended petition alleged that the defendant received them as her luggage.

After argument on this exception, the order allowing the plaintiff to file an amended petition was modified by the court so as to provide that the amended petition should be deemed and should have effect only as an addition to the original petition; and the exception to the amended petition was sustained and the action dismissed. The plaintiff sued out this writ of error.

The mere statement of the case is sufficient to demonstrate the correctness of the judgment below.

The facts alleged in the original petition constitute no breach or neglect of duty on the part of the defendant towards the plaintiff. She did not entrust her bag to the exclusive custody and care of the defendant's servants, but kept it in her own immediate possession, without informing the defendant of the value of its contents, until after it had dropped from her hand through the open window. Even if no negligence is to be imputed to her in attempting to shut the window with the bag in her hand, yet her dropping the bag was not the act of the defendant or its servants, nor anything that they were bound to foresee or to guard against; and after it had happened, she had no legal right, for the purpose of relieving her from the consequences of an accident for which they were not responsible, to require them to stop the train, short of a usual station, to the delay and inconvenience of other passengers, and the possible risk of collision with other trains.

This action being on the common law side of the Circuit Court, the pleadings and practice were governed by the law of the State. Rev. Stat. § 914. By article 419 of the Code of Practice of Louisiana, "after issue joined, the plaintiff may, with the leave of the court, amend his original petition; provided the amendment does not alter the substance of his demand by making it different from the one originally brought." An amendment wholly inconsistent with the allegations of the original petition cannot be allowed. *Barrow* v. *Bank of Louisiana*, 2 La. Ann. 453. It is by no means clear that a petition, which has been dismissed as showing no cause of action, can be afterwards amended in matter of substance. *Hart* v. *Bowie*, 34 La. Ann. 323. But if the order

allowing an amended petition to be filed could be lawfully made in this case, so long as final judgment had not been entered, it was equally within the power of the court to modify that order so as to treat the amendment as a mere addition to the original petition, and thus to preclude the plaintiff from contesting a material fact, within her own knowledge, which she had once solemnly averred.

Judgment affirmed.

SUN INSURANCE CO. *v.* KOUNTZ LINE.

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

Petition for rehearing. Presented October 11, 1887. Decided October 24, 1887.

The mandate in *Sun Insurance Co.* v. *Kountz Line*, 122 U. S. 583, is modified in manner as shown in the order herein announced.

THIS cause was decided at the last term of court, and is reported at 122 U. S. 583 *et seq.* After the opinion of the court was handed down, and on the same day, the counsel of the plaintiff in error moved for a stay of the mandate, and for leave to file a petition for a rehearing. Both motions were granted. During vacation the petition was lodged in the office of the Clerk of the Court, and, on the opening of the court at the present term, it was presented to the Chief Justice and the Associate Justices. The petition was as follows:

"Come the appellees, by counsel, and move the court (leave therefor being obtained) to grant a rehearing in this cause on behalf of the appellees, for the following reasons:

"*First.* That there is no such legal evidence in the record as would sustain the conclusion that the several transportation companies are jointly liable with the H. C. Yeager Transportation Company for the loss of the produce and merchandise shipped on the steamboat Henry C. Yeager at St. Louis on the 21st May, 1880, or that it was ever the intention of the respective owners of said boats to be partners, or to hold

themselves out as partners, or that they actually held themselves out as partners.

"*Second.* That the statutes of the United States having fixed the jurisdiction of the Supreme Court at $5000, and the claim of one of the appellants (the Hibernian Insurance Company) being only $4829.73, and no claim for interest or damages being made in the libel, nor allowed by any judgment of court, nor allowed by the laws of Louisiana, under such circumstances, where the libel was filed, the appeal as to it should have been disallowed.

"*Third.* That the decree of the Circuit Court is simply 'reversed,' with directions to that court to set aside all orders inconsistent with, and to enter such orders and decree as may be in conformity to, the principles of this opinion, and that it is impossible to determine whether this is as to all the parties libellants, or which of them, as this court did not limit or define its order of 'reversal.'"

Mr. Attorney General, *Mr. Charles B. Singleton*, and *Mr. R. H. Browne* for the petitioner cited: *Rich* v. *Lambert*, 12 How. 347, 352, 353; *Seaver* v. *Bigelows*, 5 Wall. 208; *Oliver* v. *Alexander*, 6 Pet. 143; *Stratton* v. *Jarvis*, 8 Pet. 4; *Stewart* v. *Dunham*, 115 U. S. 61; *Gibson* v. *Shufeldt*, 122 U. S. 27; *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *Olney* v. *Steamship Falcon*, 17 How. 19; *Hemmenway* v. *Fisher*, 20 How. 255; *Brown* v. *Bessou*, 30 La. Ann. 734; *Citizens' Bank* v. *McCondran*, 22 La. Ann. 53; *Saunders* v. *Taylor*, 7 Martin, N. S. 15; *Baudin* v. *Conway*, 2 La. 513; *Thompson* v. *First National Bank of Toledo*, 111 U. S. 537; *The S. B. Wheeler*, 20 Wall. 385; *Merchants' Ins. Co.* v. *Allen*, 121 U. S. 67; *Dickinson* v. *Valpy*, 10 B. & C. 128; *Pott* v. *Eyton*, 3 C. B. 32; *Edmundson* v. *Thompson*, 7 H. & N. 1027; *Irvin* v. *Conklin*, 36 Barb. 64; *Ward* v. *Pennell*, 51 Maine, 52; *Markham* v. *Jones*, 7 B. Mon. 457; *Wright* v. *Powell*, 8 Ala. 671; *Hefner* v. *Palmer*, 67 Ill. 161; *Campbell* v. *Hastings*, 29 Ark. 512; *Insurance Co.* v. *Railroad Co.*, 104 U. S. 146, 149; *Briggs* v. *Vanderbilt*, 19 Barb. 222; *Bonstel* v. *Vanderbilt*, 21 Barb. 26; *Brandt* v. *Virginia Coal & Iron Co.*, 93 U. S. 326.

Syllabus.

MR. JUSTICE HARLAN:

The rehearing asked is denied and the mandate is modified so as to read as follows:

"The decree, in so far as it dismisses the original libel of the appellants, the Sun Mutual Insurance Company of New Orleans and the Hibernia Insurance Company of New Orleans, and adjudges that the M. Moore Transportation Company and the K. P. Kountz Transportation Company, respectively, recover from said appellants the cost and expenses of the seizure, detention and sale of the steamboats J. B. M. Kehlor and Katie P. Kountz, respectively, is reversed, and the cause is remanded with directions to the court below to set aside all orders inconsistent with the rights of said appellants as declared in the opinion of this court, and to enter such orders and decrees as may be in conformity therewith."

ORIENT INSURANCE COMPANY *v.* ADAMS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued April 13, 1887. — Decided October 24, 1887.

In the absence of fraud or design, misconduct on the part of the master of a vessel covered by a policy of insurance will not defeat a recovery on the policy, when the proximate cause of the loss is a peril covered by it.

A provision in a policy of insurance of a steam vessel that the insurer shall not be liable for losses occasioned by "the derangement or breaking of the engine or machinery or any consequences resulting therefrom" relates to losses of which the derangement or breaking is the proximate cause, and not to such as are a remote consequence of either.

The abandonment of a vessel for total loss, made in good faith at a time when it was in reasonable probability impracticable to recover and repair it, and when the damage from the perils insured against amounted in like probability to more than fifty per cent of the value, is a valid abandonment within the terms of a policy which provides that there shall be "no abandonment as for a total loss," unless the injury sustained be equivalent to fifty per cent of the agreed value; although by a

change of circumstances it afterwards became practicable to float off the vessel, and thereby the loss was reduced below fifty per cent of that value.

THIS was an action to recover on a policy of marine insurance. Judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. James Lowndes for plaintiff in error cited *Hollingsworth* v. *Brodrick*, 7 A. & E. 40; *Thompson* v. *Hopper*, 6 El. & Bl. 937; *Siordett* v. *Hall*, 4 Bing. 607; *Pipon* v. *Cope*, 1 Camp. 434; *Law* v. *Hollingsworth*, 7 T. R. 160; *Bell* v. *Carstairs*, 14 East, 374, 429; *American Ins. Co.* v. *Ogden*, 20 Wend. 287; *Chandler* v. *Worcester Ins. Co.*, 3 Cush. 328; *Williams* v. *New England Ins. Co.*, 3 Cliff. 244; *The Titania*, 19 Fed. Rep. 101; *Hazard* v. *N. E. Insurance Co.*, 1 Sumner, 218; *Hall* v. *Franklin Ins. Co.*, 9 Pick. 466; *Commonwealth Insurance Co.* v. *Chase*, 20 Pick. 142; *Reynolds* v. *Ocean Insurance Co.*, 22 Pick. 191 [*S. C.* 23 Am. Dec. 727]; *Sewall* v. *United States Insurance Co.*, 11 Pick. 90; *Peele* v. *Suffolk Insurance Co.*, 7 Pick. 254 [*S.C.* 19 Am. Dec. 286]; *Cort* v. *Delaware Insurance Co.*, 2 Wash. C. C. 375.

Mr. D. T. Watson for defendant in error. *Mr. Isaac Vanvoorhis* was with him on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings up for review a judgment against the Orient Mutual Insurance Company of New York upon a policy whereby that company insured the defendants in error in the sum of five thousand dollars, on the steamer Alice, of the agreed valuation of $27,000, against perils "of the seas, lakes, rivers, canals, fires, and jettisons that should come to the damage of said vessel or any part thereof."

The policy provided, among other things, that the company should be free from all claim for loss or damage "arising from or caused by . . . barratry, . . . or occasioned by the bursting of boilers, the collapsing of flues, explosion of gunpowder, the derangement or breaking the engine or machinery,

or any consequence resulting therefrom, unless the same be caused by unavoidable external violence;" that there should be "no abandonment as for a total loss on account of said vessel grounding or being otherwise detained, or in consequence of any loss or damage, unless the injury sustained be equivalent to fifty per centum of the agreed value in this policy; that the aforesaid vessel is, and shall be at all times during the continuance of this policy, tight and sound, sufficiently found in tackle and appurtenance thereto, competently provided with masters, officers, and crew, and in all things and means for the safe employment thereof;" and that "in no case whatever shall the assured have the right to abandon until it shall be ascertained that the recovery and repairs of said vessel are impracticable, nor sell the wreck, or any portion thereof, without the consent of the company."

The insured sued as for a total loss arising from one of the perils specified in the policy.

The company pleaded *non assumpsit* and payment, with leave to give in evidence the matters set forth in its affidavit of defence, which was adopted as a special plea. Those matters will sufficiently appear from the facts which will now be stated.

According to the bill of exceptions, there was evidence in behalf of the plaintiffs tending to show that, without wilfulness or design on the part of her captain, the vessel was carried, April 28, 1880 — before the expiration of the policy — over the falls of the Ohio River, at Louisville, Kentucky, and sunk, receiving damage in a sum equal to fifty per centum of her agreed value; and that on the 18th of May, 1880, it being apparently impracticable to float her off and repair her, the vessel was abandoned to the insurers as a total loss, and the sum due under the policy demanded.

The evidence introduced by the company tended to establish these facts: The master of the Alice was C. F. Adams, one of the assured, and a son of the other plaintiff. Before the sailing of the vessel he had the reputation of being a "drinking" man, and of that fact his father was informed. On her arrival at Louisville, on the morning of April 28, 1880,

the master gave the usual signal (which was transmitted to the engineer) that he had no present need of the engines. The joint of the mud valve was out of order, threatening damage to the freight, and making repairs necessary. The steam was thereupon blown off in order to make repairs. The captain, coming on board, saw that repairs were going on, and knew that the mud valve connected with the boiler needed repairs. The work of repairing made it necessary to blow off steam. The captain subsequently went on deck, and, without making inquiry of the engineer as to the condition of the steam or receiving any notice from him that steam was ready, tapped his bell at about 8.30 A.M. as a signal to let go the boat. At that time there was not sufficient steam to propel the vessel. It is the custom of the river for the master, before giving the order to let go, to inquire of the engineer as to the condition of the steam, and await his reply that the steam is ready before giving the order to let go. At the time of the accident the vessel was in a position to be carried over the falls, if she was let go without steam on. Upon being let go she was carried by the current down the river and over the falls, and, striking a pier, was badly damaged; in consequence of which she sunk soon thereafter below the bridge in about eighteen feet of water.

There was, also, evidence in behalf of the company, tending to show that the vessel was but slightly injured, and, in the spring of 1881, was floated and removed from the place at which she sunk, and put in the condition in which she was before sinking, for a sum little less than $6000; that when she was raised, the plaintiffs refused to pay the expense thereof; that after May 18, 1880, the plaintiffs sold her furniture and apparel without the company's consent, and that on or about the 28th of April, 1880, they put her into the possession of the Cincinnati Underwriters' Wrecking Company, which thereafter had the right of possession until the vessel was seized by the United States marshal under process, in December, 1880, upon maritime liens.

To further maintain the issues on its behalf the defendant — the bill of exceptions states — produced in evidence an ex-

emplification of the record of a certain cause, entitled "Cincinnati Underwriters' Company against The Steamer Alice," &c., in the United States District Court for the District of Kentucky, as tending to show that after the 18th May, 1880, the claimants, by the answers and petitions in that suit, claimed to be the owners of the vessel, her furniture, and apparel; that the Alice was subject to maritime liens, in a considerable sum, existing on the 18th of May, 1880; that she was sold under a decree to satisfy the same, the plaintiffs receiving a part of the proceeds of sale; that the plaintiffs admitted that she was slightly damaged, and they had refused, after she was raised, to pay the expense of raising her.

Thereupon the plaintiffs offered evidence tending to show that "it was the custom of the river that the engineer should give notice to the captain before exhausting steam, and that it was not the custom for the captain to have notice from the engineer that steam was ready before giving the order to let go."

The plaintiffs, in further reply, offered to prove by the plaintiff, C. F. Adams, "that the steamer, at the time of loss, was insured in seven companies for a total insurance of eighteen thousand dollars, and, after the notice of abandonment, six of them, representing an insurance of $13,000.00, settled with the insured, and, as part of the settlement, released to the latter all interest in the steamer as she lay; that, after the marshal's sale of the boat, the plaintiffs claimed to own the $\frac{13}{18}$ of the proceeds of sale, and that when the claim for the entire proceeds was made it was as to form, under the advice of counsel; but the plaintiffs did not intend thereby to waive the abandonment theretofore made, or to keep, as against the Orient Insurance Company, the $\frac{5}{18}$ of the proceeds of sale." This was offered as bearing upon the question of waiver of abandonment of the Alice; to which offer the defendant objected; but the objection was overruled and the testimony of the witness admitted. The defendant excepted to the overruling of the objection and to the admission of the testimony.

The first assignment of error relates to the instructions upon the general question whether the insured, by anything done or

omitted to be done, had defeated their right to recover on the policy. The court, at the request of the plaintiffs, and against the objections of the company, instructed the jury that "where a loss under a policy of insurance, such as the one in suit, happens from the perils of the river, it is not a defence to the insurance company that the remote cause of loss was the negligence of the insured or his agents;" and that "the mere fault or negligence of the captain of the vessel by which the Alice was drifted into the current and drawn over the falls, will not constitute a defence for the company, unless the jury should be satisfied that the captain acted fraudulently or wilfully, with design in so doing." The theory of the defence was disclosed by the request to instruct the jury that if they "are satisfied from the evidence that the accident and loss was caused by the misconduct of Captain Charles F. Adams, that then the plaintiff cannot recover." This request was denied, but the court said to the jury: "This is true if the jury is satisfied that the conduct of the captain is properly characterized. If he designedly or recklessly exposed the vessel to the dangers of navigation at the falls, knowing that she was not in a condition to encounter them, he was guilty of misconduct such as would relieve the defendant from liability; but if the proximate cause of the loss was the stranding of the vessel, this was covered by the policy, and the defendant is not relieved from liability by showing that the loss was remotely ascribable to the negligence of the captain or the other officers or employes."

We do not perceive anything in these instructions of which the insurance company can rightfully complain. The court proceeded upon the ground that, if the efficient and, therefore, proximate cause of the loss was a peril of the river, the company could not escape liability by showing that the loss was remotely caused by mere negligence in not ascertaining, before giving the signal to let the vessel go, that she had steam enough for her proper management. The court committed no error in so ruling. In *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. 507, 518, which was a case of insurance against fire on land, the court said that "a loss by fire, occasioned by the mere fault

or negligence of the assured, or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss, and also upon the ground that the express exceptions in policies against fire leave this within the scope of the general terms of such policies." In the subsequent case of *Waters* v. *Merchants' Louisville Ins. Co.*, 11 Pet. 213, 224, it was said in reference to the case of *Columbia Ins. Co.* v. *Lawrence*, that "the court then thought that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against, is within the protection of the policy; notwithstanding it might have been occasioned remotely by the negligence of the master and mariners." To the same effect are *Patapsco Ins. Co.* v. *Coulter*, 3 Pet. 222, 237; *General Mut. Ins. Co.* v. *Sherwood*, 14 How. 352; and *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 325.

But it is insisted that the court should have granted the request of the company to the effect that it was not liable if the accident and loss were caused by the "misconduct" of the master. Had that request been granted, in the form asked, the jury might have supposed that the company was relieved from liability if the master was chargeable with what is sometimes described as gross negligence as distinguished from simple negligence. Hence the court properly said, in effect, that the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy. The principle upon which the court below acted was that expressed by Chief Justice Gibson in *American Ins. Co.* v. *Insly*, 7 Penn. St. 223, 230, when he said that "public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means; for though the maxim *respondeat superior* is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither for his servants nor for himself." *Williams* v. *Suffolk Ins. Co.*, 3 Sumner, 270, 276.

The next assignment of error is that the court erred in ruling that the loss was not within the express exceptions of the

policy. The specification, under this assignment, is that the loss was the consequence of the derangement of the mud valve, and, therefore, within the exception that the company should be free of all claim for loss or damage occasioned by "the derangement or breaking of the engine or machinery, or any consequence resulting therefrom." The "consequence" here referred to is an immediate or proximate, not a remote consequence. Even if the mud valve is a part of the machinery of the vessel, within the meaning of the policy, its derangement cannot be said to have been the proximate cause of the loss. So far as the bills of exception show, the repairs of the mud valve had been completed before the order was given to let the vessel go.

It is also contended that the court erred in its instructions as to the abandonment of the vessel by the plaintiffs. The court told the jury, in substance, that the assured were entitled to abandon the vessel, if, on May 18, 1880, it was impracticable to recover and repair it, and if the damage from the perils of the river amounted to fifty per cent of the agreed value; that the right to abandon was to be determined from the facts as they existed on that day; that if the right then existed, and the plaintiffs availed themselves of it, the subsequent floating off of the vessel in the winter or spring of 1881 would not change the result; and that, in determining whether the injuries to the vessel from the perils of the river were to the extent of fifty per cent of her agreed value, the jury should take into consideration the "place where the Alice lay, and the uncertainty as to when (if at all) a rise would come to float her off, and all other circumstances in the case."

The argument in behalf of the company is that these instructions disregarded the express terms of the contract between the parties; that while the rule laid down by the court made the probability of the stipulated loss, at the time of abandonment, the test of the right to abandon, the policy made the actual existence of the stipulated proportion of loss the ground of the exercise of that right. We do not think the court mistook the meaning of the contract or erroneously instructed the jury. The jury were distinctly told that the right to

abandon depended upon the fact that it was impracticable to recover and repair the vessel. But how were the jury to determine the existence of that fact? The contract provided as a condition precedent to the right to abandon that it be "ascertained that the recovery and repairs of said vessel are impracticable." But in what mode ascertained? How was the insured to determine whether the recovery and repair of the vessel were impracticable at the time of abandonment? Why, manifestly, as the jury were told, by taking into consideration where the vessel lay, the uncertainty as to when (if at all) a rise would come to float her off, and all the other attendant circumstances. While the damage must at the time have been equivalent to fifty per cent of the agreed value, and while the fact that the repairs subsequently made amounted to only $6000 tended to show that the actual damage was not so great as claimed, that fact is not decisive of the right to abandon. For, as said in *Bradlie* v. *Maryland Ins. Co.*, 12 Pet. 378, 397, "If the abandonment when made is good, the rights of the parties are definitively fixed; and do not become changed by any subsequent events. If, on the other hand, the abandonment when made is not good, subsequent circumstances will not affect it, so as, retroactively, to impart to it a validity which it had not at its origin." *Rhinelander* v. *Ins. Co.*, 4 Cranch, 29; *Marshall* v. *Delaware Ins. Co.*, 4 Cranch, 202.

Again: "In many cases of stranding, the state of the vessel at the time may be such, from the imminency of the peril, and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment; although, by some fortunate occurrence, she may be delivered from her peril, without an actual expenditure of one-half of her value after she is in safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from her peril, are, at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond half value; and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold any attempt to get the vessel off, because of

such apparently great expenditures, the abandonment would doubtless be good." 12 Pet. 398.

In the same case the court quote with approval the following language of Kent:

"The right of abandonment does not depend upon the certainty, but on the high probability of a total loss, either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities, and if the facts present a case of extreme hazard and of probable expense, exceeding half the value of the ship, the insured may abandon; though it should happen that she was afterwards recovered at a less expense." 3 Kent Com. 321.

In this connection it is assigned for error that the court erred in ruling that the fact of the actual repair of the vessel for less than fifty per centum of her agreed value was not evidence relevant to the issue as to the amount of damage done to the Alice. This statement as to the ruling of the court is scarcely accurate. The court refused, and properly, to tell the jury that the fact that the vessel was recovered and repaired was "the best evidence" that it was practicable to recover and repair it. That fact, however, went to the jury as evidence, and they were at liberty, under the instructions, to give it due weight in connection with all the other circumstances, in determining whether the recovery and repair of the vessel were, within the principles announced in other instructions, impracticable at the time of the abandonment.

Upon the whole case we are of opinion that no error of law was committed to the prejudice of the company, and the judgment is

Affirmed.

TUFTS *v.* TUFTS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Submitted October 21, 1887. — Decided October 31, 1887.

In this suit the facts found are not materially and substantially different from those alleged in the bill, and they will support a decree for the relief asked for.

Opinion of the Court.

In equity. Decree for complainant. Respondent appealed. The case is stated in the opinion of the court.

Mr. Benjamin Sheeks and *Mr. J. M. Rawlins* for appellant.

Mr. Arthur Brown for appellee.

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

This is a suit in equity begun on the first of August, 1882, by Elmira P. Tufts, then in life, against Elbridge Tufts, her son, to set aside a deed executed by her to him, bearing date June 26, 1882, on the ground that it was obtained by fraud. The material averment in the complaint is, that "defendant . . . promised the plaintiff in the month of June, 1882, if she would execute an agreement, which he then, on or about said June 26, 1882, had drawn up and read to plaintiff, . . . that the defendant would build the plaintiff, at his own expense, a nice brick house upon his, said defendant's, lot of land, situated immediately east of and adjoining on the eastern portion of the above-described lot of land, which was owned by the plaintiff, . . . and give her a life lease of the same to use to her own benefit, free from any and all expense to her during her natural life, said brick building to be commenced by defendant as soon as the plaintiff would sign said written agreement then drawn up by the defendant;" and that the deed was signed and executed under the belief, induced by the false and fraudulent statements of the defendant, that it was that agreement. At the hearing the court made, among others, the following finding of fact:

"That at the time of the execution of said deed plaintiff did not know that it was a deed of her property in question, but believed it to be a life lease of property belonging to the defendant, upon which she was agreeing to assist in building a house; that prior to the time of the execution of said deed there had been negotiations between the said plaintiff and the said defendant to the effect that the plaintiff should assist defendant with money to build a house upon lands of his own, and that the plaintiff should have a life lease of the same;

that after such negotiations had taken place she directed defendant to prepare the proper papers; that defendant, instead of preparing the papers directed by plaintiff, prepared a warrantee deed of the land in question, and procured the signature of the plaintiff thereto; that the same was not read to the plaintiff, and she did not know the contents thereof; that there was no consideration for the same passed between the parties, and that the plaintiff signed the same under the belief that it was a paper relative to a life lease to her of the said land of the defendant upon which said building was to be erected; that the signature of the plaintiff to the said deed was procured by the fraud of the defendant; that the defendant never has attempted to build any such house as was contemplated by the agreement for the life lease."

Upon this finding a decree was entered declaring the deed null and void, and directing the defendant to reconvey to the plaintiff. From that decree this appeal was taken.

The objection now urged to the decree is, not that it is wrong upon the facts found, but that the findings make a different case from that alleged in the complaint. To this we cannot agree. The suit was brought to set aside the deed because it was executed in the belief, caused by the false and fraudulent statements of the defendant, that it was an agreement under which the plaintiff was to have a life lease of property belonging to the defendant, and not a deed conveying her own property absolutely in fee to him. That is substantially the finding of the court, and, in a suit in equity for relief on the ground of fraud, it is enough if the facts found are not materially and substantially different from those alleged in the bill.

The decree is affirmed.

DAVIS *v.* KEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued October 18, 1887. — Decided October 31, 1887.

A decree dismissing a bill for a partnership accounting affirmed, on the ground that the plaintiff had regarded the partnership agreement as never having gone into effect or as having been cancelled; and that part of the matters in dispute had been settled by a subsequent agreement between the parties.

In equity. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Mr. Henry E. Davis, appellant, in person.

Mr. John Paul Jones for appellee. *Mr. Heber J. May* was with him on the brief.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity brought in the Supreme Court of the District of Columbia, in April, 1881, by Henry E. Davis, administrator *de bonis non* of Philip B. Fouke, deceased, against John J. Key. The object of the bill is to obtain an accounting from Key as to transactions between him and Fouke under an alleged partnership between them, entered into by a written agreement made September 24th, 1869.

On the 10th of August, 1869, Key and Fouke, with one Hays and one De Castro, entered into a written agreement of copartnership, as follows:

"Articles of copartnership entered into between John J. Key, of the city of Terre Haute, State of Indiana; Philip B. Fouke, now of the city of New Orleans, State of Louisiana; H. T. Hays and J. O. De Castro, both of the city of New Orleans, State of Louisiana.

"It is agreed between said parties, that a copartnership is this day formed between them, for the purpose of prosecuting claims in behalf of the citizens of the United States of America against the Government of Mexico and of citizens of the Government of Mexico against the Government of the United States of America.

"It is agreed between said parties, that the said Fouke, Hays and De Castro shall procure claims of citizens of the respective governments named against the other, and attend to taking the necessary proof, and that the said claims shall be sent to said Key, at Washington City, accompanied with a power of attorney from the claimant authorizing said Key to prosecute said claims, and authorizing him to receive from said governments any and all amounts that may be due and coming to them.

"That said Key shall retain all fees, as agreed on by said parties, and shall pay over to said parties, acting in the capacity of special attorneys for that purpose of the claimant, the amount due to them as such special attorneys, both for the amount awarded the claimant and for fees due Hays, Fouke, and De Castro in the case, either at Washington, New York, or New Orleans, as he may be directed from time to time by either Hays, Fouke, or De Castro, acting as the special agent of the claimant, whose power as such in all cases sent by them is, to all intents and purposes, recognized by the parties to this contract.

"That said Key shall retain, in all cases when no special direction is given, the portion due to said firm, paying over to the other parties at once, or accounting in such manner as they may from time to time direct, for the proportion of the fees so retained.

"It is agreed that all fees received under this copartnership shall be divided, one-half part to said Key and the other half-part to said Fouke, Hays, and De Castro.

"Said Key is to remain at Washington City, said Hays at New Orleans, said De Castro to be in the city of Mexico, and said Fouke is to render his services wherever they shall be needed.

"In witness whereof we have hereunto set our hands and seals this 10th day of August, 1869.

"John J. Key. [seal.]
"P. B. Fouke. [seal.]
"Harry T. Hays. [seal.]
"J. O. De Castro. [seal.]"

On the 24th of September, 1869, Fouke and Key executed the following agreement:

"Articles of copartnership entered into between Philip B. Fouke and John J. Key.

"It is agreed between said parties that a partnership be this day formed between them, for the purpose of practising law in the city of Washington, District of Columbia, and that partnership shall be equal.

"It is agreed each party shall give their undivided attention to the business, and that said business embraces all matters pertaining to the profession of the law, including prosecution of claims against the Government of the United States, either before Congress or the Court of Claims. Neither party shall have the right to use the name of the firm except in such matters as pertain to the business of attorneys.

"It is understood and agreed that all sums received by said Key or Fouke under an agreement of partnership heretofore formed by said Key, Fouke, H. T. Hays, and J. O. De Castro shall be equally divided by said Fouke and Key.

"It is agreed that an account of expenses shall be kept between said parties pertaining to their business, (except that part in prosecuting claims under the treaty of July 4th, 1868, between the United States and Mexico,) and all sums received by either partner from their business, and all sums retained by either party, shall be entered on a book kept for that purpose, and the same shall be subject to the control of both.

"It is agreed that this copartnership shall continue until the 24th day of September, 1871, unless dissolved by mutual consent.

"In witness whereof we have, this 24th day of September, 1869, set our hands and seals.

"P. B. Fouke. [seal.]
"John J. Key. [seal.]"

The bill alleges that certain business was conducted by Fouke and Key, pertaining to the profession of the law, and within the scope of the agreement of September 24th, 1869,

and that no accounting has been had in regard to it, although moneys were received by Key on account of it.

Two defences are set up in the answer of Key: (1) that, in April, 1870, Fouke accepted the appointment of Public Administrator for the Parish of Orleans, in the State of Louisiana, and thereafter resided in New Orleans, and did not practise law in the city of Washington, and that the copartnership formed by the agreement of September 24th, 1869, was dissolved by the mutual assent of the parties; (2) that, by a written instrument, dated November 5th, 1875, executed by Fouke and Key, and by Hays and De Castro, and by the clients interested in claims successfully prosecuted under the copartnership articles of August 10th, 1869, all matters between Fouke and Key, in respect to such claims, were settled and adjusted.

A replication was filed to the answer, and proofs were taken, and the cause was heard in the first instance by the General Term. It dismissed the bill, and the plaintiff has appealed to this court.

It appears that Fouke never complied with the terms of the agreement of September 24th, 1869. The copartnership was to continue until the 24th of September, 1871, unless dissolved by mutual consent. From April 2d, 1870, until after the latter date, Fouke remained in New Orleans, discharging the duties of the office of Public Administrator there, did not practise law in the city of Washington, and did not give his undivided attention to the business of the copartnership. He returned to Washington in 1872 or 1873, and died there October 3d, 1876, without having attempted to enforce the agreement of September 24th, 1869. The evidence satisfies us that he regarded that agreement as never having gone into effect, or as having been cancelled. We are also of opinion, that any claim under that agreement is inconsistent with the terms of the instrument of November 5th, 1875, executed by Fouke and Key with other parties, so far as the matters covered by that instrument are concerned.

The decree of the court below is affirmed.

Citations for Plaintiff in Error.

DAVENPORT BANK *v.* DAVENPORT BOARD OF EQUALIZATION.

ERROR TO THE SUPREME COURT OF IOWA.

Submitted October 11, 1887. — Decided October 31, 1887.

Section 5219, Rev. Stat., respecting the taxation of national banks, does not require perfect equality between state and national banks, but only that the system of taxation in a State shall not work a discrimination favorable to its own citizens and corporations and unfavorable to holders of shares in national banks.

If a state statute creating a system of taxation does not on its face discriminate against national banks, and there is neither evidence of a legislative intent to make such discrimination, nor proof that the statute works an actual and material discrimination, there is no case for holding it to be unconstitutional.

This was a proceeding in a state court of Iowa to relieve a national bank from an alleged excessive rate of taxation. The judgment below for the defendant was affirmed by the Supreme Court of the State on appeal. This writ of error was sued out to review that judgment of affirmance. The case is stated in the opinion of the court.

Mr. A. J. Hirschl and *Mr. W. T. Dittoe* for plaintiff in error cited: *Van Allen* v. *Assessors*, 3 Wall. 581; *German American Savings Bank* v. *Burlington*, 54 Iowa, 609; *Murray* v. *Charleston*, 96 U. S. 432; *Hartman* v. *Greenhow*, 102 U. S. 672; *Horne* v. *Green*, 52 Mississippi, 452; *Board of Commissioners* v. *Elston*, 32 Ind. 27; *Stuart* v. *Palmer*, 74 N. Y. 183; *Hubbard* v. *Supervisors*, 23 Iowa, 130; *Ohio Life & Trust Co.* v. *Debolt*, 16 How. 416; *Pollard* v. *Zuber*, 65 Ala. 628; *People* v. *Weaver*, 100 U. S. 539; *Adams* v. *Mayor*, 95 U. S. 22; *Chicago* v. *Lunt*, 52 Ill. 414; *People* v. *Commissioners*, 4 Wall. 244; *Worth* v. *Railroad Co.*, 89 Nor. Car. 291; *Miller* v. *Heilbron*, 58 Cal. 133; *Loftin* v. *Citizens' Bank*, 85 Ind. 341; *Pelton* v. *National Bank*, 101 U. S. 539; *San Mateo County* v. *Southern Pacific Railroad*, 13 Fed. Rep. 722; *Santa*

Clara County v. *Southern Pacific Railroad*, 18 Fed. Rep. 385.

Mr. L. M. Fisher, *Mr. C. A. Ficke*, and *Mr. E. E. Cook* for defendants in error cited: *Hubbard* v. *Supervisors*, 23 Iowa, 130; *Miller* v. *Heilbron*, 58 Cal. 133; *People* v. *Weaver*, 100 U. S. 539; *Evansville* v. *Britton*, 105 U. S. 322; *Stanley* v. *Albany*, 121 U. S. 535; *Supervisors* v. *Stanley*, 105 U. S. 305; *Henkle* v. *Keota*, 68 Iowa, 334; *Davenport* v. *Board of Equalization*, 64 Iowa, 140; *Morseman* v. *Younkin*, 27 Iowa, 350; *Cook* v. *Burlington*, 59 Iowa, 251; *Bank* v. *Tennessee*, 104 U. S. 493; *Farrington* v. *Tennessee*, 95 U. S. 687; *Railroad Co.* v. *Hoge*, 99 U. S. 348; *Davenport Bank* v. *Mittelbuscher*, 4 McCrary, 361; *United States* v. *Union Pacific Railroad*, 91 U. S. 72; *Lionberger* v. *Rouse*, 9 Wall. 468; *Mercantile Bank* v. *New York*, 121 U. S. 138; *Boyer* v. *Boyer*, 113 U. S. 701; *Board of Commissioners* v. *Elston*, 32 Ind. 27; *Champaign County Bank* v. *Smith*, 7 Ohio St. 42; *People* v. *Home Ins. Co.*, 29 Cal. 533; *People* v. *Commissioners*, 4 Wall. 244; *Newark Banking Co.* v. *Newark*, 121 U. S. 163; *Adams* v. *Mayor*, 95 U. S. 19.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Iowa.

The question presented grows out of the allegation on the part of the bank, which is a national bank located in Iowa, that the shares of its stock are taxed at a rate which is in excess of the taxes levied upon other moneyed capital of the State. The foundation of this allegation is, that the statute of the State on this subject taxes savings banks, one of which is in the same town with the plaintiff, on the amount of its paid-up capital, and does not tax the shares of those banks held by the individual shareholders. The case, passing through the proper stages in the state tribunals, was decided by the Supreme Court against the plaintiff.

The proposition of counsel seems to be, that the capital of

savings banks can be taxed by the State in no other way than by an assessment upon the shares of that capital held by individuals, because, under the act of Congress, the capital of the national banks can only be taxed in that way. It is strongly urged that in no other mode than by taxing the stockholders of each and all the banks can a perfect equality of taxation be obtained. The argument is not conclusive, if the proposition were sound; for the act of Congress does not require a perfect equality of taxation between state and national banks, but only that the shares of the national banks shall not be taxed at a higher rate than other moneyed capital in the hands of individuals. That this does not mean entire equality is evident from the fact that, if the capital of the national banks were taxed at a much lower rate than other moneyed capital in the State, the banks would have no right to complain, and the law in that respect would not violate the provisions of the act of Congress for the protection of national banks.

It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is, that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits, the manner of assessing and collecting all taxes by the States is uncontrolled by the act of Congress.

In the case before us the same rate per cent is assessed upon the capital of the savings banks as upon the shares of the national banks. It does not satisfactorily appear from anything found in this record that this tax upon the moneyed capital of the savings banks is not as great as that upon the shares of stock in the national banks. It is not a necessary nor

a probable inference from anything in this system of taxation that it should be so, and it is not shown by any actual facts in the record that it is so. If then neither the necessary, usual or probable effect of the system of assessment discriminates in favor of the savings banks against the national banks upon the face of the statute, nor any evidence is given of the intention of the legislature to make such a discrimination, nor any proof that it works an actual and material discrimination, it is not a case for this court to hold the statute unconstitutional.

The whole subject has been recently considered by this court in the case of *Mercantile Bank* v. *New York*, 121 U. S. 138. In that opinion it was held that, while the deposits in the savings banks of New York constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the act of Congress in such a sense as to require that because they were exempted from taxation the shares of stock in national banks must also be exempted. The reason given for this is that the institutions generally established under that name are intended for the deposits of the small savings and accumulations of the industrious and thrifty; that to promote their growth and progress is the obvious interest and manifest policy of the State; and, as was said in *Hepburn* v. *School Directors*, 23 Wall. 480, it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt.

It is unnecessary to inquire whether the savings banks of Iowa are based upon principles similar to those of New York which were the subject of the opinion in *Mercantile Bank* v. *New York*, for while in that case the savings banks were exempt from taxation, the Iowa statute imposes a tax upon them equal to that imposed upon the shares of the national banks. The whole subject is so fully reviewed and reconsidered in that opinion, delivered less than a year ago, that it would be but a useless repetition to go farther into the question.

The judgment of the Supreme Court of Iowa is

Affirmed.

Counsel for Parties.

PARKER AND WHIPPLE COMPANY *v.* YALE CLOCK COMPANY.

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

Argued October 20, 1887. — Decided October 31, 1887.

The first eight claims of reissued letters-patent No. 10,062, granted March 14, 1882, to Arthur E. Hotchkiss, for improvements in clock movements, on an application for a reissue filed July 19, 1881, (the original patent, No. 221,310, having been granted to Hotchkiss November 4, 1879, on an application filed July 29, 1879, and a prior reissue, No. 9656, having been granted April 12, 1881,) are invalid, because not for the same invention as that of the original patent.

The statutes, and the decisions of this court, on the question of the necessity that a reissued patent should be granted only for the same invention as the original patent, reviewed.

What was suggested or indicated in the original specification, drawings or patent office model is not to be considered as a part of the invention intended to have been covered by the original patent, unless it can be seen, from a comparison of the two patents, that the invention which the original patent was intended to cover embraced the things thus suggested or indicated in the original specification, drawings or patent office model, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent.

In this case, the original patent was amended so as to cover improvements not covered by it, and which came into use by others than the patentee free from the protection of the patent; and there is no evidence of any attempt to secure by the original patent the inventions covered by the first eight claims of the reissue; and those inventions must be regarded as having been abandoned or waived, so far as the reissue is concerned.

In equity. To restrain alleged infringement of letters-patent. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion of the court.

Mr. Charles E. Mitchell for appellants. *Mr. John K. Beach* was with him on the brief.

Mr. C. R. Ingersoll for appellee.

Opinion of the Court.

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 Connecticut, by the Parker & Whipple Company, a corporation of Connecticut, and Arthur E. Hotchkiss, against the Yale Clock Company, a corporation of Connecticut, and Henry C. Shelton, Frederick A. Lane, and Paschal Converse, directors of the latter company. The suit is founded on reissued letters-patent No. 10,062, granted March 14th, 1882, to Arthur E. Hotchkiss, for improvements in clock movements, on an application for a reissue filed July 19th, 1881, the original patent, No. 221,310, having been granted to Hotchkiss, November 4th, 1879, on an application filed July 29th, 1879, and a prior reissue, No. 9656, having been granted April 12th, 1881.

The Circuit Court dismissed the bill, upon the ground that the invention described in the first eight claims of the reissue, which are the claims alleged to have been infringed, was an invention of which no trace was to be found in the original specification, and was manifestly other and different from that which was the subject of the original patent, and that the statute in regard to reissues forbids such a radical transformation of a patent as was attempted in this case. 21 Blatchford, 485. The plaintiffs have appealed to this court.

The circumstances of this case are so well stated in the opinion delivered by Judge Shipman, holding the Circuit Court, that we adopt his language, as follows:

"At the date of the invention, expensive clocks of tiny size were being made, which met with favor from the public. They were convenient and attractive, and the main object of the patentee (the original specification says a leading object) was to make a good time-keeping clock of the like small size, which could be furnished to the public at the small price which characterizes the manufacture of Connecticut clocks. The clock was devised for this end, unquestionably with much study and painstaking, and I shall assume that the invention, as claimed in the reissue, was both novel and patentable. Much skill and ingenuity have been displayed in attacking

and defending these contested points, but, as I think that a vital point of the plaintiffs' case depends upon the validity of the reissue, I shall confine myself to that question.

"The patentee, in his original specification, stated the nature of his invention as follows: 'This invention relates to that class of time-keepers in which a fixed annular rack or internally toothed wheel is employed to aid a spring-barrel in rotating the train of wheels. The nature of said invention consists, partly, in the combination of a fixed internally toothed circular rack and a concentric-going barrel or plate with a mainspring, a transmitting wheel rotating with said barrel, and a fixed clock movement. It also consists in arranging the operating parts of the timepiece on a fixed plate, and attaching the same to the back of the clock case by means of tongues which extend out from said plate through perforations in the back of said case. It also consists in providing said tongues with broad shoulders, which cause said plate to stand out from the back of the clock case, so as to leave space for the mainspring between them. It also consists in the combination of a mainspring having a perforated end with a lateral finger extending from the broad part of one of said tongues, whereby said mainspring is firmly held at its fixed end, yet easily detached. It also consists in the combination with a fixed plate, which confines the mainspring and supports the movement, of a rotating plate arranged in front of said fixed plate, and provided with a hub which extends through said fixed plate and is connected to the winding end of the mainspring. It also consists in adapting to and combining with the hub thus constructed, a key having a screw-threaded winding part for engaging with said hub, and a recessed part for engaging with the prismatic end of the centre shaft. It also consists in constructing the annular rack or internally toothed wheel with an annular recess for receiving the pillar plate, and thereby economizing space. It also consists in constructing the pillar plate and pillars in one piece, and attaching said pillars to the front plate by twisting them. It also consists in substituting an automatic winding dog, operating like an escapement verge, for the click and spring ordinarily used.

It also consists in constructing the case with an opening at the bottom and adapting the key and the adjusting nut of the pendulum-ball to one another, so that the adjustment of the said ball may be effected conveniently from the outside of the case. It also consists in providing said ball with a spring which will force it down into place and with a guide which will prevent it from turning.' The twelve claims of the original patent were confined to these details thus enumerated in the specification.

"In March, 1880, the Parker & Whipple Company entered into a contract with the Yale Clock Company to manufacture the Hotchkiss clock, at a stipulated price per clock, the licensees furnishing the dies and tools for such manufacture. About 50,000 clocks were made by the defendants and delivered to the licensees between June 17th and December 27th, 1880. During this period the defendant Frederick A. Lane, superintendent of the Yale Clock Company, made the infringing clock. It did not contain a single patented feature of the Hotchkiss clock, but in respect to every other leading feature the parts of the two clocks are interchangeable. The Lane clock was immediately patented, was put upon the market, and is being manufactured by the Yale Clock Company.

"An examination of the Hotchkiss patent showed that the vital parts of the invention were not alluded to in the specification or in the claims. Perhaps the fact that the clock had three wheels and their position might have been understood by an expert, from drawing No. 6. That drawing was not made for the purpose of showing the wheels, and it is manifest, from the specification, that the patentee did not suppose they had anything to do with his invention, which he did suppose lay in entirely other parts of the clock. The model showed a completed clock, and contained whatever was and was not invented by Hotchkiss.

"In the specification of the second reissue, the patentee omitted the entire description which has been quoted, and inserted the following: 'My invention relates to an improvement in clock movements, the object being to make a clock movement which shall be simple and durable in its construc-

tion, of small initial cost in manufacture, and the several parts of which shall be relatively arranged in such manner that the movement may be inclosed in a small and compact case. To this end, the invention consists essentially in dividing the train into two parts; in arranging the divisions of the train in a frame having three plates; in providing an additional wheel and pinion between the escape wheel and centre wheel; in making the three wheels between the escape wheel and centre wheel with the same number of teeth and of the same size; in arranging the pivots of the three arbors, carrying the three like wheels and pinions, between the escape wheel and centre wheel, in the circumferences of circles which are concentric with the centre arbor; and in other minor improvements, as the invention is hereinafter more fully described and explained by reference to the drawings.' In accordance with this statement, the plaintiffs' experts claimed, upon the trial, that the invention consisted generally in the division of the train into two parts, by means of a frame having three plates, the point of division being between the centre wheel and the centre pinion; and, secondly, in the arrangement, between the centre wheel and the escape wheel, of three wheels, which are driven by the centre wheel, in the circumference of a circle which is concentric to the centre arbor, the three wheels being arranged on a semicircle concentric to the centre pinion. This general outline of the invention is stated with accuracy and completeness in eight claims of the reissue, four of which relate to the division of the train into two parts, in a frame having three plates, while the other four relate to the arrangement of the three wheels. The 10th and 11th claims relate to details which were specified in the original patent, but which are not used by the defendants. The defendants infringe the first eight claims.

"The position of the plaintiffs is, that the invention of the reissue was the invention of Hotchkiss, and was shown in the model accompanying the original application for a patent, and that, therefore, the description in the reissue is not to be regarded as new matter, but as a correction of a misstatement in the description contained in the original specification.

"The defendants, making no point in regard to laches in applying for a correction of the original patent, deny the plaintiffs' premise and conclusion. They deny the premise, because they say that the original description limited the invention to that class of time-keepers in which a fixed annular rack or internally toothed wheel is employed to aid a spring barrel in rotating the train of wheels, and that this construction only was shown in the model, and that the importance of the Lane invention consisted in the abandonment of the 'planet wheel' and the substitution therefor of the ordinary mainspring.

"If the premise was true, they deny the conclusion, because it is a fact, the truth of which is apparent, that, in the original specification and drawings, the patentee gave no hint that he regarded the construction described in any one of the first eight claims of the reissue as forming any material or immaterial part of his invention."

On these premises, the court said that "the eight claims which are in controversy are a total abandonment of the principles which are stated in the original patent to be those of the invention, and are an introduction into the reissue of a subject-matter which has no relation to the original patent, except that each patent relates to clocks."

The original patent contained twelve claims, in these words:

"1. In combination with a fixed circular rack and a stationary clock-movement, a plate rotated by the mainspring and carrying a device which connects the rack and movement, substantially as and for the purpose set forth.

"2. A perforated clock-case back, in combination with a base-plate for the movement, said base-plate being provided with flexible claws, which may pass through the perforations in said clock-case back, substantially as and for the purpose set forth.

"3. In combination with mainspring B, perforated at *b*, the lateral attaching-finger *c* on flange C′ of plate C, said parts being constructed and applied substantially as and for the purpose set forth.

"4. In combination with mainspring B, the fixed plate C

and its flanges, C′, forming a barrel for said spring, but allowing inspection of the latter between the flanges C′, substantially as set forth.

"5. In combination with mainspring B and fixed plate C, the rotating plate F and its hub G, said hub extending through plate C for the attachment of the spring, substantially as set forth.

"6. In combination with ratchet V, a verge-like automatic winding-dog U, held in proper position for catching by the forward motion of said ratchet.

"7. In combination with a pillar-plate, a fixed circular rack having an annular inner recess to receive said plate, whereby said rack serves also the purpose of attaching said plate, and the said parts are made to occupy the least possible space.

"8. In combination with a perforated front plate, a rear pillar-plate, having twisted tongues on the ends of its pillars, whereby said plates and pillars are clamped together, substantially as set forth.

"9. In combination with a pendulum-rod and adjustable pendulum-ball, a spring arranged to force said ball down against the adjusting-nut.

"10. In combination with a pendulum-rod and an adjustable pendulum-ball, a spring fitted into a recess of said ball and operating to force the latter down against the said nut.

"11. In combination with the adjusting-nut of a pendulum, a clock-case bottom, perforated at A^2, and a key having a prismatic recess fitting said nut, whereby the height of the pendulum-ball may be adjusted by the key from the outside of the clock-case, substantially as set forth.

"12. In combination with a hollow, internally threaded winding-hub, G, a key having a screw-threaded portion for engaging with said hub, and a prismatically recessed portion for passing through said hub and engaging with the centre shaft."

The reissue contains ten claims, as follows:

"1. In a clock movement having a frame consisting of three plates suitably connected together, a train which is divided into two parts, a front part and a back part, the front part

arranged between the front and middle plates of the frame, and the back part arranged between the middle and back plates of the frame, the point of division being between the centre wheel and centre pinion, the said centre wheel and centre pinion being arranged on the centre arbor carrying the minute-hand, as set forth.

"2. In a clock movement having a frame consisting of three plates suitably connected together, the middle plate of the frame, the said middle plate dividing the train into two parts between the centre wheel and centre pinion, the said centre wheel and centre pinion being arranged on the centre arbor carrying the minute-hand, as set forth.

"3. In a clock movement, a frame consisting of three plates suitably connected together, the middle plate of which divides the train into two parts between the centre wheel and centre pinion, the said centre wheel and centre pinion being arranged on the centre arbor carrying the minute-hand, and the frame having the parts of the divided train arranged between its three plates, as set forth.

"4. In a clock movement having a frame consisting of three plates suitably connected together, a centre arbor carrying the minute-hand and provided with a centre wheel and centre pinion, the wheel arranged between the front and middle plates of the frame, and the pinion arranged between the middle and back plates of the frame, as set forth.

"5. The improvement in a clock-train, consisting of three wheels suitably fastened on arbors carrying pinions, and arranged between the escape-wheel and its arbor carrying a pinion, and the centre arbor carrying the centre wheel and centre pinion, as set forth.

"6. The improvement in a clock-train, consisting of three wheels having the same number of teeth and the same diameters, suitably fastened on arbors, the pivots of which are arranged in the circumferences of circles concentric with the centre arbor, the several arbors carrying pinions having the same number of leaves and the same diameters, all the said parts arranged between the escape-wheel and its arbor carrying a pinion, and the centre arbor carrying the centre wheel and centre pinion, as set forth.

"7. The improvement in a clock-train, consisting in the arrangement of the pivots of the escape-wheel arbor and of the pivots of the three arbors carrying the three wheels and the three pinions between the escape-wheel arbor and the centre arbor carrying the centre wheel and centre pinion, in a semicircle, as set forth.

"8. In a clock movement, the combination, with a train divided into two parts, a front part and a back part, by the middle plate of a frame having three plates, the division being made between the centre wheel and centre pinion, the said centre wheel and centre pinion being arranged on the centre arbor carrying the minute-hand, the escape-wheel being arranged in the front part of the train and near the top of the frame, and the pivots of the front part of the train being arranged within a semicircle, of a pendulum attached to an arbor near the top of the frame and vibrating in a plane passing between the front and middle plates of the frame, as set forth.

"9. In a clock movement provided with a circular rack, the circular disk F, rotated by the mainspring and carrying the planet-wheel E only, which connects the rack with the centre pinion, as set forth.

"10. In combination with a pendulum-rod, provided with the plate S, fastened to the rod, a spring arranged on the rod, to hold the pendulum-ball against the adjusting-nut, as set forth."

The appellants contend that the first eight claims of the reissue do not specify any invention which is not contained in the clock described in the original patent and embodied in the model originally deposited in the Patent Office, and that the drawings of the original and of the reissued patent are substantially the same. On these premises, it is argued for the appellants, that it is lawful to include in the claims of a reissue whatever is suggested, or substantially indicated, in the specification, model or drawings of the original patent, if the applicant was the original and first inventor thereof, and that such a reissue will, therefore, be for the same invention as that of the original patent.

Expressions in some opinions of this court, wrested from

their context and interpreted in a different sense from that in which they were used, are cited to support these views; but the language of the court on the subject has steadily been to the contrary, and, as the question arises so distinctly in this case, and some misapprehension exists in regard to it, it seems proper to discuss it with some fulness.

The first statutory provision for the reissue of patents was made by the 3d section of the Act of July 3d, 1832, c. 162, 4 Stat. 559. It provided for the reissue in certain cases "for the same invention." This provision of the Act of 1832 was superseded by § 13 of the Act of July 4th, 1836, c. 357, 5 Stat. 122, which provided, "that whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative, or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim as new; if the error has, or shall have, arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the Commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor, for the same invention."

This provision of the Act of 1836 was in turn superseded by § 53 of the Act of July 8th, 1870, c. 230, 16 Stat. 205, which provided, "that whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee." This provision of the Act of 1870 was enacted in the same language in § 4916 of the Revised Statutes, and was the provision of law in force when the reissue in the present case was granted.

It is thus seen that in all the statutes on the subject of reissues, the only authority granted to the Commissioner is one to issue a new patent "for the same invention."

The provision of the statute of 1836 has been before this court in numerous cases. In *Burr* v. *Duryee*, 1 Wall. 531, 577, at December Term, 1863, this court, speaking by Mr. Justice Grier, said: "The surrender of valid patents, and the granting of reissued patents thereon, with expanded or equivocal claims, where the original was clearly neither 'inoperative nor invalid,' and whose specification is neither 'defective or insufficient,' is a great abuse of the privilege granted by the statute, and productive of great injury to the public. This privilege was not given to the patentee or his assignee in order that the patent may be rendered more elastic or expansive, and therefore more '*available*' for the suppression of all other inventions."

The case of *Seymour* v. *Osborne*, 11 Wall. 516, was before this court at December Term, 1870. The answer set up, as a defence, that the reissued patents sued on were void, because not granted for the same invention as that embodied in the original patents. The court overruled the defence on the ground stated by it, p. 544, that the original patents were not in evidence in the case. Notwithstanding this, the opinion, delivered by Mr. Justice Clifford, said: "Reissued letters-patent must, by the express words of the section authorizing the same, be *for the same invention*, and consequently where it appears on a comparison of the two instruments, as matter of law, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, as that state of facts shows that the commissioner, in granting the new patent, exceeded his jurisdiction. Power is unquestionably conferred upon the commissioner to allow the specification to be amended if the patent is inoperative or invalid, and in that event to issue the patent in proper form; and he may, doubtless, under that authority, allow the patentee to redescribe his invention and to include in the description and claims of the patent not only what was well described before, but whatever else was suggested or

substantially indicated in the specification or drawings which properly belonged to the invention as actually made and perfected. Interpolations of new features, ingredients, or devices, which were neither described, suggested, nor indicated in the original patent, or patent office model, are not allowed, as it is clear that the commissioner has no jurisdiction to grant a reissue unless it be for the same invention as that embodied in the original letters-patent, which necessarily excludes the right on such an application to open the case to new parol testimony and a new hearing as to the nature and extent of the improvement, except in certain special cases, as provided in a recent enactment not applicable to the case before the court. Corrections may be made in the description, specification, or claim where the patentee has claimed as new more than he had a right to claim, or where the description, specification, or claim is defective or insufficient, but he cannot under such an application make material additions to the invention which were not described, suggested, nor substantially indicated in the original specifications, drawings, or patent office model. . . . Letters-patent reissued for an invention substantially different from that embodied in the original patent are void and of no effect, as no jurisdiction to grant such a patent is conferred by any act of Congress upon the commissioner, and he possesses no power in that behalf except what the acts of Congress confer. Whether a reissued patent is for the same invention as that embodied in the original patent or for a different one, is a question for the court in an equity suit, to be determined as a matter of construction, on a comparison of the two instruments, aided or not by the testimony of expert witnesses, as it may or may not appear that one or both may contain technical terms or terms of art requiring such assistance in ascertaining the true meaning of the language employed."

In these extracts from the opinion it is seen that the court adheres strictly to the view, that, under the statute, the Commissioner has no jurisdiction to grant a reissued patent for an invention substantially different from that embodied in the original patent, and that a reissue granted not in accordance

with that rule is void. In what is there said about redescribing the invention, and about including in the new description and new claims what was suggested or indicated in the original specification, drawings or patent office model, it is clearly to be understood, from the entire language, that the things so to be included are only the things which properly belonged to the invention as embodied in the original patent; that what that invention was is to be ascertained by consulting the original patent; and that, while the new description may properly contain things which are indicated in the original specification, drawings or patent office model, (though not sufficiently described in the original specification,) it does not follow that what was indicated in the original specification, drawings or patent office model is to be considered as a part of the invention, unless the court can see, from a comparison of the two patents, that the original patent embodied, as the invention intended to be secured by it, what the claims of the reissue are intended to cover.

In what was thus said in *Seymour* v. *Osborne* there is no warrant for the view, that, *ex vi termini*, what was suggested or indicated in the original specification, drawing or patent office model is to be considered as a part of the invention intended to have been covered by the original patent, unless the court can see, from a comparison of the two patents, that the invention which the original patent was intended to cover fairly embraced the things thus suggested or indicated in the original specification, drawings or patent office model, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent.

The "recent enactment" referred to in *Seymour* v. *Osborne* is found in § 53 of the act of July 8th, 1870, in these words: "but no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention,

and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid." This provision is now found in the same words, in § 4916 of the Revised Statutes. The last clause of it has no application to the present case, and, therefore, its proper construction need not be considered.

The case of *Gill* v. *Wells*, 22 Wall. 1, at October Term, 1874, arose under the act of 1836. In that case, this court, speaking by Mr. Justice Clifford, said, p. 19: "Invalid and inoperative patents may be surrendered and reissued for the same invention, but Congress never intended that a patent which was valid and operative should be reissued merely to afford the patentee an opportunity to expand the exclusive privileges which it secures, to enable him to suppress subsequent improvements which do not conflict with the invention described in the surrendered patent. Evidence of a decisive character to negative the theory that such a practice finds any support in the act of Congress, besides what existed before, is found in the new Patent Act," (the act of July 8th, 1870, § 53,) "which expressly provides that no new matter shall be introduced into the specification; and in case of a machine patent, that neither the model nor the drawings shall be amended except each by the other."

In the case of *Powder Company* v. *Powder Works*, 98 U. S. 126, at October Term, 1878, this court, speaking by Mr. Justice Bradley, said, p. 137, in reference to the reissued patents in that case: "These reissues being granted in 1872, were subject to the law as it then stood, being the act of July 8, 1870, the fifty-third section of which (reproduced in § 4916 of the Revised Statutes) relates to the matter in question. It seems to us impossible to read this section carefully without coming to the conclusion that a reissue can only be granted for the same invention which formed the subject of the original patent of which it is a reissue. The express words of the act are, 'a new patent for the same invention'; and these words are copied from the act of 1836, which in this respect was substantially the same as the act of 1870. The specification may be amended so as to make it more clear and distinct; the claim may be modified so as to make it more

comformable to the exact rights of the patentee; but the invention must be the same. So particular is the law on this subject, that it is declared that 'no new matter shall be introduced into the specification.' This prohibition is general, relating to all patents; and by 'new matter' we suppose to be meant new substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent. The danger to be provided against was the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others, after its issue. The legislature was willing to concede to the patentee the right to amend his specification so as fully to describe and claim the very invention attempted to be secured by his original patent, and which was not fully secured thereby, in consequence of inadvertence, accident, or mistake; but was not willing to give him the right to patch up his patent by the addition of other inventions, which, though they might be his, had not been applied for by him, or, if applied for, had been abandoned or waived. For such inventions he is required to make a new application, subject to such rights as the public and other inventors may have acquired in the meantime. This, we think, is what the present statute means, and what, indeed, was the law before its enactment, under the previous act of 1836. If decisions can be found which present it in any different aspect, we cannot admit them to be correct expositions of the law. The counsel for the complainant refers us to, and places special reliance on, the last clause of § 53 of the act of 1870, where it is said: 'But where there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake.' But this clause relates only to the evidence which may be employed by the commissioner in ascertaining the defects of the specification. It does not authorize him to grant a reissue for a different invention, or to determine that one invention is the same as another and different one, or that two inventions

essentially distinct constitute but one. In this case, it is not necessary for us to decide, and we express no opinion, as to the precise meaning and extent of the final clause of § 53, to which we have referred; as, whether it relates to all patents, or only to patents for machines. But as it relates to the matter of evidence alone, it cannot enlarge the power of the commissioner in reference to the invention for which a reissue may be granted. That power is restricted, by the general terms of the section, to the same invention which was originally patented."

If, by "new matter," in § 4916 of the Revised Statutes, is meant such new substantive matter as might be the subject of another application for a patent, there was new substantive matter introduced into the specification of the reissue in the present case; for the description set forth in that specification as the foundation for the first eight claims in it, and those eight claims themselves, might have been the subject of another application for a patent, at the time the original patent was applied for and taken out, leaving that patent valid and operative in respect to the claims it covered.

In the present case, the infringing clock was made by the defendant Lane more than six months before the reissue in suit was applied for. As stated by the Circuit Court in its opinion in this case, the Lane clock did not contain a single patented feature of the Hotchkiss clock, and it was immediately patented and put upon the market. This, therefore, is a case of the amendment of a patent so as to cover improvements not covered by the patent, and which came into use by others than the patentee and his licensee, free from the protection of the patent.

There is no evidence of any attempt to secure by the original patent the inventions covered by the first eight claims of the reissue, and those inventions must be regarded as having been abandoned or waived, so far as the reissue in question is concerned, subject, however, to the right to have made a new application for a patent to cover them; in other words, those eight claims are not for the same invention which was originally patented.

In *Mahn* v. *Harwood*, 112 U. S., 354, 359, at October Term, 1884, it was said by this court, speaking by Mr. Justice Bradley: "In this very matter of reissued patents, it has also been frequently decided that it is a good defence, in a suit on such a patent, to show that the commissioner exceeded his authority in granting it. Such a defence is established by showing that the reissued patent is for a different invention from that described in the original, inasmuch as the statute declares that it must be for the same invention."

The same view was taken in *Coon* v. *Wilson*, 113 U. S. 268, 277, at October Term, 1884, a case substantially like the present one, where it was said: "Although this reissue was applied for a little over three months after the original patent was granted, the case is one where it is sought merely to enlarge the claim of the original patent, by repeating that claim and adding others; where no mistake or inadvertence is shown, so far as the short or sectional bands are concerned; where the patentee waited until the defendants produced their continuous band collar, and then applied for such enlarged claims as to embrace the defendants' collar, which was not covered by the claim of the original patent; and where it is apparent, from a comparison of the two patents, that the reissue was made to enlarge the scope of the original. As the rule is expressed in the recent case of *Mahn* v. *Harwood*, 112 U. S. 354, a patent 'cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake, inadvertently committed, in the wording of the claim, and the application for a reissue is made within a reasonably short period after the original patent was granted.' But a clear mistake, inadvertently committed, in the wording of the claim, is necessary, without reference to the length of time. In the present case, there was no mistake in the wording of the claim of the original patent. The description warranted no other claim. It did not warrant any claim covering bands not short or sectional. The description had to be changed in the reissue, to warrant the new claims in the reissue. The description in the reissue is not a more clear and satisfactory statement of what is described in the original

patent, but is a description of a different thing, so ingeniously worded as to cover collars with continuous long bands and which have no short or sectional bands." See also *Ives* v. *Sargent*, 119 U. S. 652, 662, 663.

Reference was made on the argument to language used by Mr. Justice Bradley, in delivering the opinion of this court in the case of *The Cornplanter Patent*, 23 Wall. 181, 217, where he said: "It may be remarked in passing, that, in our view, the several reissues are for things contained within the machines and apparatus described in the original patents." The reissues referred to were sustained by this court. There is nothing in the remark thus made to show that the court did not find the reissues to be for the same inventions as the original patents, consistently with the views contained in the other cases above referred to, or that the court did not follow those views in deciding that case.

Comment is made by the appellants upon the fact that the original specification states that the "mainspring occupies the whole back of the space occupied by the works, so as to give the greatest running power with the least possible expense of room, one of the leading objects of my invention being to render it possible to make a cheap, neat, and satisfactory timepiece of unusually small size;" and upon the further fact that the specification of the reissue states that the invention has for its object "to make a clock movement which shall be simple and durable in its construction, of small initial cost in manufacture, and the several parts of which shall be relatively arranged in such manner that the movement may be enclosed in a small and compact case." It is urged that every one of the claims of the reissue responds to the object of making a cheap and small but satisfactory timepiece. But this statement, in the original specification, of the object of the invention, in such general terms, cannot have the effect of making the reissue one for the same invention as that of the original, when it otherwise would not be. Such a general statement contained no intimation that the invention consisted in the matters covered by the first eight claims of the reissue.

The decree of the Circuit Court is affirmed.

BULL *v.* BANK OF KASSON.

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

Submitted May 3, 1887. — Decided October 31, 1887.

A bank check for the payment of "five hundred dollars in current funds" is payable in whatever is current by law as money, and is a bill of exchange, within the meaning of the act of March 3, 1875, c. 137, defining the jurisdiction of the courts of the United States.

A bank check, presented by a bona fide indorsee for payment six months after its date, the funds against which it was drawn remaining in the hands of the drawee, and the drawer having been in no way injured or prejudiced by the delay in presentment, is not overdue so as to be subject to equities of the drawer against a previous holder.

This case came before this court on a certificate of division of opinion between the circuit and district judges holding the Circuit Court of the United States for the District of Minnesota. The action was upon two drafts, or bills of exchange, (as they are termed in the record,) each for $500, drawn by the First National Bank of Kasson in Minnesota upon the Ninth National Bank in New York City, and payable to the order of A. La Due, of which the following were copies:

"The First National Bank,

"$500. Kasson, Minn., Oct. 15, 1881.

"Pay to the order of Mr. A. La Due five hundred dollars in current funds.

"No. 18956. E. E. Fairchild, Cashier.

"To Ninth National Bank, New York City.

"Indorsed: Pay to the order of M. Edison, Esq. A. La Due. M. Edison."

"First National Bank,

"$500. Kasson, Minn., Oct. 15, 1881.

"Pay to the order of Mr. A. La Due five hundred dollars in current funds.

"No. 18754. E. E. Fairchild, Cashier.

"To Ninth National Bank, New York City.

"Indorsed: Pay to the order of M. Edison, Esq. A. La Due. M. Edison."

Statement of the Case.

The drafts or bills of exchange were immediately after their execution transferred by indorsement of the payee to one M. Edison, at Kasson, Minnesota. Edison was at the time largely indebted, and on the following day he absconded from Kasson, carrying the drafts with him. These drafts he retained in his possession until March 24, 1882, when, at Quincy, in Illinois, he sold and indorsed them for a valuable consideration to the plaintiffs, who had no notice of any set-off to them. The plaintiffs then forwarded them to New York City, where, on the 27th of March, they were presented for payment to the drawee, the Ninth National Bank of New York; and payment was refused by it. The drafts were then protested for non-payment, and notice thereof given to the drawer and indorsers.

In the meantime the First National Bank of Kasson, the drawer of the drafts, had become the owner of certain demands against Edison, which, under the statute of Minnesota, could be legally set-off against its liability on the drafts in the hands of Edison, and also in the hands of the plaintiffs, unless they were protected against such set-off as innocent purchasers of the paper before maturity, and without notice of the set-off. At the time the drafts were drawn, and at the time of their presentation for payment, the Ninth National Bank of New York had in its hands money of the drawer sufficient to pay them.

The action was tried by the court without the intervention of a jury by stipulation of parties, and the facts stated above are embodied in its findings. Upon these facts the following question of law arose, viz.: Whether the said drafts, or bills of exchange, were to be regarded as overdue and dishonored paper at the time they were presented by the plaintiffs to the drawee for payment and payment refused, so as to admit the set-off.

Upon this question the judges were divided in opinion, and, upon motion of plaintiffs, it was certified to this court for decision. The circuit judge who presided at the circuit, being of opinion that the question should be answered in the affirmative, ordered judgment for the defendant. To review this

Argument for Defendant in Error.

judgment, upon the certificate of division of opinion, the case was brought here on writ of error.

Mr. William McFadon for plaintiffs in error.

Mr. Charles C. Willson for defendant in error.

I. To give the Circuit Court jurisdiction, in a case like this, under the act of 1875, the instrument sued on must be either a promissory note or a bill of exchange. These two instruments would have been perfect inland bills of exchange if the words "in current funds" had been omitted. Those words must have been used with a purpose of limiting or changing the intent of the instrument. "Funds" is a more comprehensive word than "money." It includes securities and resources from which ready money may be realized. "Current funds" are those securities which are current and used as money in the place of payment. But they are not money, so as to give negotiability to the instrument which is payable in them. A bill of exchange payable in Bank of England notes was held to be not negotiable. *Ex parte Imeson*, 2 Rose Cas. Bankr. 225. So of a bill payable in "Office notes of the Lumberman's Bank at Warren." *Irvine* v. *Lowry*, 14 Pet. 293. So of a promissory note payable in current bank notes receivable at the counter of the Bank of Michigan. *Fry* v. *Rousseau*, 3 McLean, 106. So of a note "payable in New York funds or their equivalent." *Hasbrook* v. *Palmer*, 2 McLean, 10. So of a note promising to pay "six hundred and eighty dollars (Foreign Bills)." *Jones* v. *Fales*, 4 Mass. 245. See also *Texas Land & Cattle Co.* v. *Carroll*, 63 Texas, 48; *Haddock* v. *Woods*, 46 Iowa, 433; *Conwell* v. *Pumphrey*, 9 Ind. 135; *Lindsey* v. *McClelland*, 18 Wis. 481; *McCormick* v. *Trotter*, 10 S. & R. 94; *Little* v. *Phœnix Bank*, 2 Hill, 425; *Platt* v. *Sauk County Bank*, 17 Wis. 222, 226; Note in 1 Am. Leading Cases, 314.

II. Whatever may be the general rule of law elsewhere in regard to a set-off against overdue and negotiable paper, in Minnesota, where this case arose and where it was tried, it is provided by statute that in an action arising on contract the

defendant may set off any other cause of action arising also on contract, and existing at the commencement of the action. Minn. Genl. Stats., 1878, c. 66, § 97, second; c. 65, § 40. See *Linn* v. *Rugg*, 19 Minn. 181; *Martin* v. *Pillsbury*, 23 Minn. 175; *Bond* v. *Fitzpatrick*, 4 Gray, 89. The Federal Circuit Courts follow the rule in the State where the action was brought. *Partridge* v. *Insurance Co.*, 15 Wall. 573. The Circuit Court of the United States in Minnesota held that the bank had the right to make the set-off when sued upon these drafts. *Bull* v. *Bank of Kasson*, 14 Fed. Rep. 612. The Supreme Court of Minnesota also held, in a suit upon another of this series of drafts, that the set-off must be allowed. *La Due* v. *Kasson Bank*, 31 Minn. 33.

III. By the law which prevails in Minnesota these drafts were past due when Edison transferred them to plaintiff. A demand draft becomes due after the lapse of a reasonable time in which to present it for payment in the due course of business. A statute of Minnesota provides that a reasonable time shall not extend beyond sixty days from the date when it is put in circulation. Minn. Gen. Stats., 1878, c. 23, § 11. This statute was substantially copied from the Massachusetts statute mentioned in *Rice* v. *Wesson*, 11 Met. 400. For cases in which delay has been held fatal without a statutory rule, see *Walsh* v. *Dart*, 23 Wis. 334; *Phœnix Ins. Co.* v. *Gray*, 13 Mich. 191; *Sice* v. *Cunningham*, 1 Cowen, 397; *Hart* v. *Eastman*, 7 Minn. 74; *Newark Bank* v. *Bank of Erie*, 63 Penn. St. 404. For the construction put by the Supreme Court of Minnesota on this statute, see *La Due* v. *Kasson Bank*, 31 Minn. 33.

A bill of exchange is the instrument by which the payee transmits his funds to a distant creditor. Its sole purpose is such transmission, and the parties to it, when it is drawn, contemplate a speedy mailing of it to the indorsee, and that such indorsee will collect the bill of the drawee by due course of mail and business. The parties all contemplate that no one will hold the bill more than one day.

This being the expectation of the drawee when he sells the bill, he only undertakes to have an agent or correspondent at

the place of payment with funds for a reasonable length of time thereafter. He does not agree to maintain an agent and hold funds at the distant place of payment forever. There must come a time when the drawer's obligation to employ an agent and intrust him with funds at the place of payment, will end. It must end if the bill be not presented for payment within the time reasonably contemplated by the drawer and payee at the time it was made, having regard to the object of such bills and the usual course of business. It was not contemplated by the drawer and payee that these bills should be held as certificates of deposit with the drawee. They were past due when a reasonable time for presentation had elapsed. As they remained unaccepted, the drawer was the debtor, and had the right of set-off under the Minnesota Statutes.

IV. It is submitted that the certificate of division of opinion states a mixed question of law and fact, which, as a jury was waived, was proper for the decision of the Circuit Judge, but is not reviewable here on a certificate of division of opinion. *Williamsport* v. *Knapp*, 119 U. S. 357, 360.

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

In the record, the instruments upon which the action is brought are designated as "drafts or bills of exchange." In a general sense they may be thus designated; for they are orders of one party upon another for the payment of money, which is the essential characteristic of drafts or bills of exchange. They are also negotiable, and pass by delivery, and are within the description of instruments of that character in the act of March 3, 1875, prescribing the jurisdiction of Circuit Courts of the United States. But, in strictness, they are bank checks. They have all the particulars in which such instruments differ or may differ from regular bills of exchange. They are drawn upon a bank having funds of the drawer for their payment, and they are payable upon demand, although the time of payment is not designated in them. A bill of exchange may be so drawn, but it usually states the

time of payment, and days of grace are allowed upon it. There are no days of grace upon checks.

The instruments here are also drawn in the briefest form possible in orders for the payment of money, which is the usual characteristic of checks. A bill of exchange is generally drawn with more formality, and payment at sight, or at a specified number of days after date, is requested, and that the amount be charged to the drawer's account. When intended for transmission to another state or country, they are usually drawn in duplicate or triplicate, and designated as first, second or third of exchange. A regular bill of exchange, it is true, may be in a form similar to a bank check, so that it may sometimes be difficult, from their form, to distinguish between the two classes of instruments. But when the instrument is drawn upon a bank, or a person engaged in banking business, and simply directs the payment to a party named of a specified sum of money, which is at the time on deposit with the drawee, without designating a future day of payment, the instrument is to be treated as a check rather than as a bill of exchange, and the liability of parties thereto is to be determined accordingly. If the instrument designates a future day for its payment, it is, according to the weight of authorities, to be deemed a bill of exchange, when, without such designation, it would be treated as a check. *Bowen* v. *Newell*, 4 Selden, 190.

The instruments upon which the action is brought being bank checks, the liability of the parties is determinable by the rules governing such paper. A check implies a contract on the part of the drawer that he has funds in the hands of the drawee for its payment on presentation. If it is dishonored the drawer is entitled to notice, but, unlike the drawer of a bill of exchange, he is not discharged from liability for the want of such notice unless he has sustained damage, or is prejudiced in the assertion of his rights by the omission. In *Merchants' Bank* v. *State Bank*, 10 Wall. 604, this court said: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each

is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawee.[1] The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud." 10 Wall. 647.

Similar language is used by Mr. Justice Story with reference to the time when checks are to be regarded as due. In stating the differences in point of law between checks and bills of exchange, he refers to the rule that a bill of exchange, taken after the day of payment, subjects the holder to all the equities attaching to it in the hands of the party from whom he receives it. "But," he adds, "this rule does not apply to a check; for it is not treated as overdue, although it is taken by the holder some days after its date, and it is payable on demand. On the contrary, the holder in such a case takes it, subject to no equities of which he has not, at the time, notice; for a check is not treated as overdue merely because it has not been presented as early as it might be, or as a bill of exchange is required to be, to charge the drawer, or indorser, or transferrer. One reason for this seems to be, that, strictly speaking, a check is not due until it is demanded." Story Promissory Notes, § 491. See also *Matter of Brown*, 2 Story, 502, 513.

Accepting these citations as correctly stating the law, the question presented for our decision is readily answered. The drawer was in no way injured or prejudiced in his rights by

[1] This word is "drawer" in the original, and Mr. Wallace followed the original in reporting the case; but it is evidently a clerical or typographical error.

the delay of Edison to present the checks. The funds against which they were drawn remained undisturbed in the hands of the drawee, and, therefore, the drawer had no cause of complaint. The instruments in suit were not overdue and dishonored when presented for payment. Until then the plaintiffs, as purchasers for a valuable consideration without notice of any demand against Edison, in the hands of the drawer, were protected against its set-off.

The certificate of division of opinion presents to us only one question, and yet, to answer that correctly, we must consider whether the negotiability of the instruments in suit was affected by the fact that they were payable "in current funds." Undoubtedly it is the law that, to be negotiable, a bill, promissory note or check must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. *Irvine* v. *Lowry*, 14 Pet. 293; *Miller* v. *Austen*, 13 How. 218, 228. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term "current funds" has been used to designate any of these, all being current and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words.

It follows from these views that the question certified to us must be answered in the negative. The judgment will, therefore, be

Reversed, and the cause remanded, with directions to enter judgment for the plaintiffs upon the findings; and it is so ordered.

Counsel for Parties.

UNITED STATES *v.* PHILADELPHIA AND READING RAILROAD COMPANY.

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

Argued October 25, 1887. — Decided November 7, 1887.

At a trial by jury in a court of the United States, the judge may express to the jury his opinion upon questions of fact which he submits to their determination.

A claim of the United States against a railroad corporation for taxes on undivided profits during a certain period was, after full examination of the books of the corporation by officers of the government, and argument before the assessor of internal revenue for the district, settled and adjusted by agreement between the assessor and the corporation at a certain sum, which the corporation paid and took the collector's receipt for. Nearly twelve years afterwards, an internal revenue agent made another examination of the books of the corporation, resulting, as he testified, in charging it with a further sum for taxes during the same period. In a suit to recover this sum, the judge, in charging the jury, told them that the first assessment, the payment of money in pursuance of it, and the acquiescence of the government for so long a time since, raised a presumption that the assessment was correct, and that the money paid covered the defendant's entire liability; that the burden was thus cast upon the government of proving, by such evidence as to fully satisfy the mind, that the assessment was erroneous; that whether it had done so was for the jury to determine, and that the judge did not desire to control their finding, but was of opinion that under the circumstances they should not return a verdict for the government. *Held*, no error.

ASSUMPSIT for internal revenue taxes. Plea, "non-assumpsit, payment and set-off, with leave, &c." Verdict and judgment for the defendant. The United States excepted to the judge's charge to the jury, and sued out this writ of error. The case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Thomas Hart, Jr., for defendant in error. *Mr. William Ward* and *Mr. George R. Kaercher* were with him on the brief.

MR. JUSTICE GRAY delivered the opinion of the court.

Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination. *Vicksburg & Meridian Railroad* v. *Putnam*, 118 U. S. 545; *St. Louis &c. Railway* v. *Vickers*, 122 U. S. 360. The judge who presided at the trial of this action did not exceed his rightful power in this respect.

The action was brought by the United States against a railroad corporation to recover $40,844.19, for unpaid taxes on undivided profits from June 30, 1864, to November 30, 1867, under the internal revenue act of June 30, 1864, c. 173, § 122, as amended by the act of July 13, 1866, c. 184. 13 Stat. 284; 14 Stat. 138. The trial proceeded upon the rule established by previous decisions of this court, that an assessment is not required by the act, nor, if made, conclusive upon either party, and that in an action to recover the tax the controlling question is not what has been assessed, but what is by law due. *Savings Bank* v. *United States*, 19 Wall. 227; *Clinkenbeard* v. *United States*, 21 Wall. 65.

The president of the corporation testified that in 1868 the United States made a demand upon the company for some $350,000 alleged to be due for such taxes for the same period; that the company resisted the demand, and through him as its counsel contended that it had already paid more than was due, and was entitled to a considerable credit for items really belonging to construction, though charged to income in the form in which its accounts were made up; that the company opened all its books to the officers of the government, and after full investigation by them, and arguments in behalf of both parties before the assessor of internal revenue for the district, occupying several weeks, the officers of the company and the assessor agreed upon a settlement and adjustment of the demand for

the sum of $39,797.61, which the company thereupon paid, and for which it took the following receipt:

"United States Internal Revenue, Collector's Office,
"District of Pennsylvania, July 28, 1868.

"Received of Philadelphia & Reading R. R. Co. forty-one thousand eight hundred & seven $\frac{61}{100}$ dollars for excise tax on —

"Gross receipts	$2,010 00
"Profits over dividends	39,797 61
"Total	$41,807 61

"May, 1868, being amount assessed on June list for July 1st, '64, to Nov. 30, 1867.

"Joseph G. Kline, Deputy Collector."

The only witness called by the United States was an internal revenue agent, who testified that in November, 1879, he examined the defendant's books and accounts, the defendant giving him every facility that he desired; and that the result of his examination showed that the gross amount of the tax for the period in question was $85,532.60, and that, deducting an overpayment of $4890.80 in 1869 on the "renewal fund," (which the Commissioner of Internal Revenue had since held not to be taxable,) and deducting also the payment of $39,797.61 in 1868, there was $40,844.19 still due; that he made up the gross amount by charging the company with the total receipts from its road, and with rent received from another corporation, and crediting it with all the working expenses, the "renewal fund," interest paid on mortgages of real estate and on bonded debt, dividends paid to stockholders, and the United States tax and the State tax on such dividends; and that he did not know how the sum of $39,797.61 was made up.

In the course of a long examination and cross-examination, he testified that he made no allowance for interest paid by the company on its funded debt, and that by his mode of statement the company was taxed upon every dollar expended for interest, even if some of that interest was exempt from taxation; that where the company paid a dividend to stockholders, and assumed the payment of the government tax on

the dividend, he computed the dividend tax upon the whole dividend declared, and not merely upon the amount actually paid to the stockholders; that the fiscal year of the company ended with November 30, and that, in computing the tax for the five months from June 30 to November 30, 1864, he credited the company with five twelfths only of the "renewal fund" for the year ending November 30, 1864, and of the United States tax and the State tax on dividends, and of the annual dividend estimated as aforesaid, although, before June 30, 1864, there was no tax on surplus profits, and money spent in construction was not taxable.

Each of these points was contested by the defendant, it is not pretended that any of them have been determined by judicial decision, and it might well be inferred that they had all been taken into consideration in the settlement between the assessor and the company in 1868.

The bill of exceptions further states that the government offered in evidence "all the books of the Philadelphia and Reading Railroad Company, referred to, as well as the statements and reports, and closed." But it contains no description of those books, statements and reports, except as they are mentioned in the testimony of the internal revenue agent.

Such being the case on trial, the judge, in charging the jury, and referring them to the testimony given before them by the president of the company on the one side and by the witness for the government on the other, might justly and properly say to them, as he did: "From the assessment made by the government's officer in 1868, the payment of the money in pursuance of it, and the acquiescence of the government in what was thus done for so long a period — nearly twelve years — a presumption arises that the assessment then made was correct, and that the money paid covered the defendant's entire liability for taxes upon surplus earnings between the periods embraced. The burden is thus cast upon the plaintiff to repel the presumption by evidence that the assessment was erroneous, and, in view of the circumstances, the evidence should be such as to satisfy the mind fully in this respect." "Whether the government has proved mistake by the testi-

mony of the witness referred to (there is no other testimony tending to prove it) is for you to determine. In submitting this question, however, it is proper to say that, in the judgment of the court, it would be unsafe and therefore unjust to find error in the assessment and settlement under the evidence before you, and consequently to render a verdict against the defendant for the large sum of money claimed, as the plaintiff asks you to do. In other words, while the court does not desire to control your finding, but submits the question to you, it is of opinion that you should not, under the circumstances, find for the plaintiff."

Judgment affirmed.

COAN *v.* FLAGG.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

Submitted October 20, 1887. — Decided October 31, 1887.

The entry and survey of lands in the Virginia military district in Ohio, under which the plaintiff claims title, did not invest the owners of the warrant, or their assignee, with an equitable interest in the lands surveyed, as against the United States, for the reason that the excess of the land surveyed beyond that covered by the warrant was so great as to make the survey fraudulent and void; and, consequently, Congress could, by the act of February 18, 1871, 16 Stat. 416, grant the lands at its pleasure.

It was the purpose of the act of February 18, 1871, to grant to the State of Ohio all the lands in the Virginia military district in that State which had not at that time been legally surveyed and sold by the United States, in that sense of the word "sold" which conveys the idea of having parted with the beneficial title; and the lands in controversy, having been surveyed by a survey invalid against the United States, were within that description.

The fourth section of the act of May 27, 1880, 21 Stat. 142, recognized and ratified the title of the defendant in error to the lands in controversy as a purchaser from the Ohio Agricultural and Mechanical College for a valuable consideration.

Copies of official letters from the Commissioner of the General Land Office to a person claiming title under a warrant and survey, reciting the date of the filing of the survey in the office, being verified by the oath of the person who was a clerk in that division of the Land Office and at that time had charge of the matters relating to this subject, and in whose letters

to the parties interested were contained all the decisions of the Commissioner relating to it, are competent evidence to show the time of the filing.

In equity, in a state court in Ohio, to quiet title and to restrain waste. The answer set up title in respondent. Judgment for complainant, which was affirmed by the Supreme Court of the State on appeal. The defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Charles King, *Mr. William B. King*, *Mr. N. W. Evans*, and *Mr. A. C. Thompson*, for plaintiff in error, cited: *McArthur* v. *Dunn*, 7 How. 262; *Jackson* v. *Clark*, 1 Pet. 628; *Parker* v. *Wallace*, 3 Ohio, 490; *Stubblefield* v. *Boggs*, 2 Ohio St. 216; *Thomas* v. *White*, 2 Ohio St. 540; *Price* v. *Johnston*, 1 Ohio St. 390; *Taylor* v. *Brown*, 5 Cranch, 234; *Holmes* v. *Trout*, 7 Pet. 171; *Saum* v. *Latham*, Wright, O., 309; *Marquez* v. *Frisbie*, 101 U. S. 473; *Johnson* v. *Towsley*, 13 Wall. 72; *Bird* v. *Ward*, 1 Missouri, 398; *Shepley* v. *Cowan*, 91 U. S. 330; *Danforth* v. *Morrical*, 84 Ill. 456; *Brush* v. *Ware*, 15 Pet. 93; *Polk* v. *Wendell*, 5 Wheat. 293; *Griffin* v. *Reynolds*, 17 How. 609; *James* v. *Gordon*, 1 Wash. C. C. 333; *Winn* v. *Patterson*, 9 Pet. 663; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Dubuque &c. Railroad* v. *Litchfield*, 23 How. 66; *Mills* v. *St. Clair County*, 8 How. 569; *Wilcox* v. *Jackson*, 13 Pet. 498; *Nash* v. *Atherton*, 10 Ohio, 163; *Calhoun* v. *Price*, 17 Ohio St. 96.

Mr. W. A. Hutchins and *Mr. George O. Newman* for defendant in error cited: *Fussell* v. *Gregg*, 113 U. S. 550; *Jackson* v. *Clark*, 1 Pet. 628; *Taylor* v. *Myers*, 7 Wheat. 23; *Hoofnagle* v. *Anderson*, 7 Wheat. 212; *Stubblefield* v. *Boggs*, 2 Ohio St. 216; *Thomas* v. *White*, 2 Ohio St. 540; *Price* v. *Johnston*, 1 Ohio St. 390; *Saunders* v. *Niswauger*, 11 Ohio St. 298; *Miller* v. *Kerr*, 7 Wheat. 1.

Mr. Justice Matthews delivered the opinion of the court.

The judgment sought to be reviewed on the present writ of error was rendered by the Supreme Court of the State of Ohio

in a proceeding begun by Flagg, the defendant in error, to quiet his title and possession to a certain tract of land lying in Nile Township, Scioto County, Ohio, within the Virginia military district, embraced within survey No. 15,882. The judgment of the Supreme Court of Ohio in the case is reported as *Coan* v. *Flagg*, 38 Ohio St. 156.

On the 18th of February, 1871, Congress passed an act to cede to the State of Ohio the unsurveyed and unsold land in the Virginia military district in said State, 16 Stat. 416, which reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the lands remaining unsurveyed and unsold in the Virginia military district in the State of Ohio be, and the same are hereby, ceded to the State of Ohio, upon the conditions following, to wit: Any person who at the time of the passage of this act is a bona fide settler on any portion of said land may hold not exceeding one hundred and sixty acres, so by him occupied, by his preëmpting the same in such manner as the legislature of the State of Ohio may direct."

The lands thus ceded were granted by the State of Ohio to the Ohio Agricultural and Mechanical College. The college claiming the lands in controversy to be embraced within this cession, for a valuable consideration sold and conveyed the same to Flagg, who entered into possession prior to the commencement of this suit. Coan, the original defendant, claims title under:

1st. Exchange military warrant No. 494, issued by the State of Virginia on the 16th day of June, 1840, to the children and heirs of Francis Gordon, a child and heir of John Gordon, the only heir of Thomas Gordon, who was a lieutenant of cavalry in the Continental line of Virginia troops in the Revolutionary War, for 500 acres of land, to be laid off in one or more surveys;

2d. An entry No. 15,882, purporting to cover 500 acres of land under the foregoing warrant No. 494, made on December 18, 1849, by the said heirs of Francis Gordon and one David F. Heaton, an assignee of part of said warrant;

3d. A survey under said entry No. 15,882, purporting to contain 400 acres, 375 acres for the heirs of Francis Gordon, and 25 acres for said Heaton, made by said D. F. Heaton, a deputy surveyor of the district, on April 10, 1851, giving the metes and bounds of the lands surveyed, which was duly recorded on December 23, 1851, in the district land office at Chillicothe;

4th. And mesne conveyances from the heirs of said Francis Gordon and said Heaton to Coan.

It is an undisputed fact, appearing on the record, that this survey No. 15,882 embraces in fact 1682 acres.

The answer of Coan, the defendant below, contains the averment that "on the 26th of December, A.D. 1851, the said E. P. Kendrick, surveyor for said district, duly certified said survey, being numbered (the same as said entry) 15,882, to the General Land Office at Washington, D. C., for patent, and that said survey has ever since been on file in said office."

It is stated, however, in a letter addressed by the acting Commissioner of the General Land Office to L. C. Heaton, the executor of David F. Heaton, then claiming title, dated June 18, 1873, and admitted in evidence, that survey No. 15,882 was filed in that office for the purpose of obtaining a patent on the 26th of April, 1852. The same fact is recited in a letter from Willis Drummond, the Commissioner of the General Land Office, dated October 26, 1871, also admitted in evidence, addressed to David F. Heaton, then claiming title. No patent has ever been issued on this entry and survey, for the reason, among others, given in the correspondence between the officers of the Land Department and Heaton, "that the same contained a large excess of land over and above the amount stated therein and actually due in virtue of said warrant exchange No. 494;" the amount of that excess being stated at 1282 acres. This was communicated in a letter from the Commissioner of the General Land Office to L. C. Heaton, dated June 18, 1873, in which it was said that: "This office will not, of course, recognize the validity of any such survey as the foregoing, and must refuse, if there were no other objections, to carry the same into grant, and unless you deny the facts as above stated and wish to offer rebutting testimony, and be heard in reply,

you will understand that the claim for patent in the case of said survey, No. 15,882 is rejected. Should you, however, dispute the correctness of the said resurvey, &c., and will at once advise this office of the fact, every reasonable opportunity will be afforded you to be heard in the case with such evidence as you may desire to present."

On July 11, 1873, the Commissioner of the General Land Office, by a letter of that date, addressed to L. C. Heaton, informed him, in response to his application, made in a letter of June 30, that ninety days from July 11th would be allowed to establish his claim to a patent upon this survey.

On October 10, 1873, the Commissioner wrote to Heaton a letter containing the following: "You were advised on the 18th of June last of the rejection of your application for a patent in the case, but, at your request of the 30th of the same month, the matter was held open for the period above stated to afford you an opportunity to present rebutting testimony, &c. The allotted time having expired and nothing presented on your part to sustain the validity of the said survey, you are hereby advised that the rejection of the case, as stated in my said communication of the 18th of June last, is now made definite and final, so far as this office is concerned." No further action was taken in the Department on the subject.

It also appears that for the 100 acres not embraced in this survey, to make the 500 acres called for by warrant No. 494, another survey was made containing $517\frac{46}{100}$ acres, so that the whole amount of land embraced in the two surveys upon that warrant, nominally for 500 acres, actually embraced an excess of $1699\frac{46}{100}$ acres.

On the 27th of May, 1880, Congress passed an act to construe and define the act of February 18, 1871. The first and second sections of this act are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the act ceding to the State of Ohio the lands remaining "unsurveyed and unsold" in the Virginia military district in the State of Ohio had no reference to lands which were

included in any survey or entry within said district founded upon military warrant or warrants upon Continental establishment; and the true intent and meaning of said act was to cede to the State of Ohio only such lands as were unappropriated and not included in any survey or entry within said district, which survey or entry was founded upon military warrant or warrants upon Continental establishment.

"SEC. 2. That all legal surveys returned to the Land Office on or before March third, eighteen hundred and fifty-seven, on entries made on or before January first, eighteen hundred and fifty-two, and founded on unsatisfied Virginia military Continental warrants, are hereby declared valid."

The fourth section is as follows:

"SEC. 4. This act shall not in any way affect or interfere with the title to any lands sold for a valuable consideration by the Ohio Agricultural and Mechanical College, grantee, under the act of February eighteenth, eighteen hundred and seventy-one." 21 Stat. 142.

On the 7th of August, 1882, Congress passed an act in relation to land titles in the Virginia military district of Ohio, as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person in the actual, open possession of any tract of land in the Virginia military district of the State of Ohio, under claim and color of title, made in good faith, based upon or deducible from entry of any tract of land within said district founded upon military warrant upon Continental establishment, and a record of which entry was duly made in the office of the principal surveyor of the Virginia military district, either before or since its removal to Chillicothe, Ohio, prior to January first, eighteen hundred and fifty-two, such possession having continued for twenty years last past under a claim of title on the part of said party, either as entry-man or of his or her grantors, or of parties by or under whom such party claims by purchase or inheritance, and they by title based upon or deducible from such entry by tax sale

or otherwise, shall be deemed and held to be the legal owner of such land so included in said entry to the extent and according to the purport of said entry, or of his or her paper titles based thereon or deducible therefrom.

"SEC. 2. That so much of the act approved February eighteenth, eighteen hundred and seventy-one, entitled 'An Act to cede to the State of Ohio the unsold lands in the Virginia military district in said State,' and of an act approved May twenty-seventh, eighteen hundred and eighty, construing said act of February eighteenth, eighteen hundred and seventy-one, as conflicts with this act, be, and the same is hereby, repealed." 22 Stat. 348.

The Supreme Court of Ohio, in sustaining Flagg's title, decided —

1st. That the entry and survey under which Coan claimed title did not invest the owners of the warrant, or their assignee, with an equitable interest in the lands surveyed as against the United States, for the reason that the excess of land surveyed beyond that covered by the warrant was so great as to make the survey fraudulent and void, and that consequently it was competent for Congress, at the date of the act of February 18, 1871, to grant the lands at its pleasure.

2d. That, without deciding the question whether the lands were granted to the Ohio Agricultural and Mechanical College by the terms of the act of February 18, 1871, the fourth section of the act of May 27, 1880, recognizes and ratifies Flagg's title as a purchaser from the Ohio Agricultural and Mechanical College for a valuable consideration.

These conclusions are contested by the plaintiff in error. In support of his contention, in regard to the first proposition, it is argued that a survey cannot be deemed void and of no effect merely on the ground of an excess beyond the amount called for in the warrant, because a different effect is required to be given to it by the provisions of the act of Congress of July 7, 1838, 5 Stat. 262, the second section of which declares that: "No patent shall be issued by virtue of the preceding section for a greater quantity of land than the rank or term

of service of the officer or soldier, to whom or to whose heirs or assigns such warrant has been granted, would have entitled him to under the laws of Virginia and of the United States regulating the issuing of such warrants; and whenever it appears to the Secretary of War that the survey made by any of the aforesaid warrants is for a greater quantity of land than the officer or soldier is entitled to for his services, the Secretary of War shall certify on each survey the amount of such surplus quantity, and the officer or soldier, his heirs or assigns, shall have leave to withdraw his survey from the office of the Secretary of War and resurvey his location, excluding such surplus quantity in one body from any part of his resurvey, and a patent shall issue upon such resurvey as in other cases," &c.

We agree, however, with the Supreme Court of Ohio in holding that this provision of the law does not meet the difficulty. Whatever application the section may have, according to its terms, it is expressly limited to cases arising under the preceding section of the act, which expired by its own limitation on the 10th of August, 1840, and although extended and revived by the first section of the act of August 19, 1841, 5 Stat. 449, it contained the sole authority for making and returning entries and surveys under Virginia military land warrants, and ceased for that purpose to have any operation on the 3d of March, 1857, by force of the act of March 3, 1855, 10 Stat. 701. So that the right to relief against excessive surveys granted by the second section of the act of July 7, 1838, has not, at all events, existed since 1857. In addition, it is manifest that the second section of the act of July 7, 1838, relied on, does condemn and forbid the issuing of a patent upon a survey calling for a greater quantity of land than the party is entitled to by virtue of the warrant; and in such cases, it being the duty of the department to refuse the patent, the right of the applicant is merely to withdraw his survey, and resurvey his location, excluding such surplus quantity. In the present instance, the patent was refused, and for that reason; but the applicant did not ask leave to withdraw his survey and cause a resur-

vey of the location, and so elected not to avail himself, if he had such right, of the provisions of this section.

It was further contended, however, upon this point, that Congress has recognized the validity of surveys within the district, notwithstanding the quantity embraced in them was excessive, by the proviso in the act of March 2, 1807, 2 Stat. 424, 425, which reads as follows: "*Provided*, That no locations as aforesaid within the above-mentioned tract shall, after the passage of this act, be made on tracts of land for which patents had been previously issued, or which had been previously surveyed; and any patent which may nevertheless be obtained for land located contrary to the provisions of this section shall be considered as null and void."

But it was rightly considered, as we think, by the Supreme Court of Ohio, that the effect of this proviso, which, it was admitted, had been continued in force by subsequent enactments, was merely to withdraw, from subsequent entry and survey, lands actually surveyed, until the previous survey should be withdrawn or set aside, as between locators seeking to appropriate the same tract, and that it cannot have the effect of establishing excessive surveys, whether by mistake or design, as binding upon the government so as to vest an equitable estate in the holder of the warrant, and entitle him to a patent for the whole or a part of the survey.

Counsel for the plaintiff in error, however, claim in argument that the Supreme Court of Ohio erred upon this point in consequence of having overlooked the second section of the act of May 20, 1826, 4 Stat. 189. This section, however, as far as it goes, is identical with the second section of the act of July 7, 1838, above quoted, which is a reënactment of it, the act of May 20, 1826, having expired by its own limitation. The first section of this act extends the time for obtaining warrants until June 1, 1829, to complete locations thereon until June 1, 1832, and to return surveys and warrants to the Commissioner of the General Land Office, in order to obtain patents thereon, until June 1, 1833; and the second section is limited in its operation to cases provided for by the preceding section, and, therefore, ceased to operate after the dates therein mentioned.

Counsel for the plaintiff in error also refer to the decisions of this court in *Taylor* v. *Brown*, 5 Cranch, 234, 249, and *Holmes* v. *Trout*, 7 Pet. 171, as supporting the proposition that surplus land will not vitiate a survey; but those cases applied that principle only as between prior and subsequent locators, and do not sustain the proposition that upon such a survey the applicant is entitled, as of right, to obtain a patent from the United States.

The next question is, whether the act of February 18, 1871, taken in connection with the act of May 27, 1880, had the effect of vesting a complete legal and equitable title to these lands in Flagg. It is argued that the lands in question were not embraced within the terms of the cession to the State of Ohio used in the act of February 18, 1871. The lands ceded to the State by virtue of that act are described as those "remaining unsurveyed and unsold in the Virginia military district in the State of Ohio." The word "unsold," as used in the act, it is claimed, and may be admitted to be, entirely inappropriate. No land within that district had ever been sold, in the literal sense of that word, nor was it subject to sale. It was held in trust by the United States, first, for the purpose of satisfying donations made by the State of Virginia to her officers and soldiers in the Revolutionary War, to whom warrants might be issued as a reward for services. The remainder, after the satisfaction of those bounties, was held by the United States for their own use. All of this military tract, therefore, not appropriated according to law to the first of these uses, belonged to the United States, to be disposed of in its discretion. It was competent for Congress to grant to the State of Ohio any of these lands not subject to the trust, and at the date of the act of February 18, 1871, the time within which it was competent to appropriate any of the lands to the satisfaction of warrants issued by the State of Virginia had expired. The trust had been satisfied, and may be regarded as having been extinguished. Whatever of these lands, therefore, remained at that time, which had not been appropriated in accordance with the terms of existing law, so as to secure to the claimant a legal right to call for a patent, was

subject to the disposal of the United States for its own use and according to its own pleasure. It is in view of this condition of things that the cession contained in the act of February 18, 1871, must be considered and construed.

It is contended in argument by the plaintiff in error that the lands embraced and conveyed by the cession contained in the act of February 18, 1871, and therein described as "unsurveyed and unsold," must be understood to mean those which had not at that time been appropriated under existing laws so as to prevent subsequent locations by other entries and surveys upon Virginia military land warrants. And as such appropriation was then forbidden, as respects subsequent locators, by existing laws, wherever the land had been actually surveyed, although the survey might have contained a surplus which would deprive the locator of his right to call for a patent for the whole quantity from the United States, the Ohio Agricultural and Mechanical College, claiming as grantee under the State of Ohio, cannot be considered as having any better or other rights than those of a subsequent locator. And from this the conclusion is deduced that the lands in controversy could not have passed by the terms of the act of February 18, 1871. But this conclusion is not admissible. The State of Ohio, under the act of February 18, 1871, was not in the position of a subsequent locator under existing laws; it was a grantee under the terms of a new law directly from Congress itself, and was not in the attitude of an applicant to the officers of the Land Department, under previous laws, asking to make a location upon lands which had been already withdrawn from subsequent location by an entry and an actual survey. Congress had dominion and an absolute power of disposal of all the lands in the Virginia military land district which at that time had not become legally appropriated by entry and survey, so as to entitle the locator, by virtue of his equitable estate actually vested under existing law, to call upon the officers of the Land Department to complete his legal title by the issue of a patent.

The meaning of the act of February 18, 1871, therefore, seems to be to grant to the State of Ohio all the lands in the

Virginia military district which had not at that time been legally surveyed and sold by the United States, in that sense of the word which conveys the idea of having parted with a beneficial title. The lands in controversy were within that description. They had been surveyed, it is true, in point of fact, but the survey was not lawful and valid as against the United States, although it might operate to prevent a subsequent location under existing law. In point of fact, the officers of the Land Department refused to recognize the survey as binding, and rejected the application for the issue of a patent upon it. Upon this construction of the act of February 18, 1871, the officers of the Land Department undoubtedly acted, as is evident from the terms of the act of May 27, 1880. That act was passed expressly for the purpose of construing and defining the act of February 18, 1871, in order to change the interpretation which had in fact been put upon it. It declared that "the lands remaining 'unsurveyed and unsold' in the Virginia military district in the State of Ohio had no reference to lands which were included in any survey or entry within said district founded upon military warrant or warrants upon continental establishment," and that "the true intent and meaning of said act was to cede to the State of Ohio only such lands as were unappropriated and not included in any survey or entry within said district, which survey or entry was founded upon military warrant or warrants upon continental establishment."

Supposing this legislative interpretation to mean that the unappropriated lands referred to were such as had not been included in any survey or entry founded upon a military warrant, whether that survey was legal or illegal under previous laws, nevertheless, we are of the opinion, with the Supreme Court of Ohio, that the fourth section of the act must be held to have the legal operation and effect of confirming and ratifying previous titles made by the Ohio Agricultural and Mechanical College, under the act of February 18, 1871. The fourth section declares that "this act shall not in any way affect or interfere with the title to any land sold for a valuable consideration by the Ohio Agricultural and Mechanical Col-

lege, grantee, under the act of February 18, 1871." If the title of the Ohio Agricultural and Mechanical College, under the act of February 18, 1871, was valid, the act of May 27, 1880, giving for the future a new interpretation to that act, could not have the effect of divesting its title. If, on the other hand, the title to lands sold by the Ohio Agricultural and Mechanical College, under claim of title by virtue of the act of February 18, 1871, was unsupported by the terms of that act, then section 4 of the act of May 27, 1880, can have effect only as operating to confirm that title. This it was competent for Congress to do — no vested rights intervening — and this, in our opinion, is what they have done by the act of May 27, 1880.

By the act of August 7, 1882, 22 Stat. 348, which, however, does not affect the present case, Congress found it necessary to go still farther and quiet the title of all persons claiming lands in the Virginia military district who had been in actual and open possession thereof for twenty years, under claim and color of title made in good faith, based upon, or deducible from, any entry founded upon a military warrant upon continental establishment, recorded in the office of the principal surveyor within the district prior to January 1, 1852.

We are, therefore, of opinion that the Supreme Court of Ohio did not err in either of the propositions on which its judgment was based.

There is another view which confirms this conclusion. It was decided by this court in the case of *Fussell* v. *Gregg*, 113 U. S. 550, upon a careful and detailed review of all the legislation on the subject, that it was essential to the vesting of any interest under an entry and survey within the Virginia military land district, made prior to January 1, 1852, that the survey should be returned to the Commissioner of the General Land Office at Washington, on or before that date, and that the failure to do so discharged "the land from any claim founded on such location and survey," and extinguished "all right, title, and estate previously acquired thereby." Such lands might, therefore, very properly be considered, in contemplation of law, as "unsurveyed." This continued to be the

law until the passage of the act of May 27, 1880, by the second section of which it was declared, "that all legal surveys returned to the land office on or before March 3, 1857, on entries made on or before January 1, 1852, and founded upon unsatisfied Virginia military continental warrants, are hereby declared valid." The survey under which Coan claims title in the present case, was not filed, as appears from evidence in the record, in the General Land Office until April 26, 1852. It is contended by the plaintiff in error that it is otherwise admitted in the pleadings, on the ground that the answer of Coan averred, that, "on the 26th of December, A.D. 1851, the said E. P. Kendrick, surveyor for said district, duly certified said survey, being numbered (the same as said entry) 15,882, to the General Land Office at Washington, D. C., for patent, and that said survey has ever since been on file in said office." This is not a distinct and unequivocal averment of the fact that the survey had been filed in the General Land Office on or before January 1, 1852, but only that it had been duly certified by the district surveyor prior to that date. But, construing it as claimed, it, nevertheless, was not admitted in the pleadings, the reply of the plaintiff expressly denying the validity of the entry and survey.

Objection is also made and was taken in the court below to the admission of the evidence on which the fact rests, that the survey was not filed until April 26, 1852, in the General Land Office. This proof consists in copies of official letters written by the Commissioner of the General Land Office to Heaton, then claiming title under the warrant and survey, reciting the fact, which copies were sworn to by a witness, formerly a clerk in the General Land Office, and acquainted with the facts, he having, as such clerk, in fact written the originals himself for the Commissioner of the General Land Office, by whom they were signed. We are not referred by counsel in argument to any authority in support of the objection, and we do not see upon what principle it can be maintained. The witness testified that at the time the letters were written he was the clerk in charge of the division relating to the Virginia military district, and that all of the decisions of

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the Commissioner of the General Land Office were contained in letters written by him to the parties interested. We think the evidence was competent, and in fact it was uncontroverted.

We find no error in the judgment of the Supreme Court of Ohio. It is therefore

Affirmed.

SPIES *v.* ILLINOIS.

ORIGINAL.

Argued October 27, 28, 1887. — Decided November 2, 1887.

When application is made to this court, for the allowance of a writ of error to the highest court of a State under Rev. Stat., § 709, the writ will not be allowed if it appear from the face of the record that the decision of the Federal question which is complained of was so plainly right as not to require argument; especially if it accords with well considered judgments of this court.

It is well settled that the first ten articles of Amendment to the Constitution of the United States were not intended to limit the powers of the States, in respect of their own people, but to operate on the national government only.

Hopt v. *Utah*, 120 U. S. 430, affirmed to the point that 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 the defendant if, until the jury is completed, he has other peremptory challenges which he can use.

Hayes v. *Missouri*, 120 U. S. 68, affirmed to the point that the right to challenge is the right to reject, not the right to select a juror; and if from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained.

A statute of Illinois passed March 12, 1874, Hurd's Stats. Ill. 1885, 752, c. 78, § 14, enacted that "in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement." At a trial, had in that State, of a person accused of an offence punishable, on conviction, with death, the court ruled that, under this statute, "it is not a test question whether the juror will have the opinion, which he has

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formed from the newspapers, changed by the evidence, but whether his verdict will be based only upon the account which may here be given by witnesses under oath." *Held*, that, as thus interpreted, the statute did not deprive the persons accused of a right to trial by an impartial jury; that it was not repugnant to the Constitution of Illinois, nor to the Constitution of the United States; and that, if the sentence of the court, after conviction, should be carried into execution, they would not be deprived of their lives without due process of law.

When the ground relied on for the reversal by this court of a judgment of the highest court of a State is that the error complained of is so gross as to amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime, it must be made clearly to appear, in order to obtain a reversal, that such is the fact, and that the case is not one which leaves something to the conscience or discretion of the court.

When a person accused of crime voluntarily offers himself on his trial for examination as a witness in his own behalf, he must submit to a proper cross-examination under the law of the jurisdiction where he is being tried, and the question whether his cross-examination must be confined to matters pertinent to the testimony in chief, or whether it may be extended to the matters in issue, is not a Federal question.

In order to give this court jurisdiction under Rev. Stat., § 709, because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that it was duly set up; that the decision was adverse; and that that decision was made in the highest court of the State.

Questions concerning the rights of parties under treaties of the United States with other powers cannot be raised in this court for the first time, if the record does not show that they were raised in the court below.

This was a petition for a writ of error, addressed in the first instance to Mr. Justice Harlan.

The petitioners had been indicted, arraigned and tried in a state court of Illinois for an offence punishable with death under the laws of that State, and had been found guilty; and the proceedings in the trial court had been sustained by the Supreme Court of Illinois on appeal; and the petitioners had been sentenced to death, and the 11th day of November, 1887, had been named as the day for their execution.

Their petition, which was voluminous, set forth that the Supreme Court of Illinois had erred in its judgment, and had deprived them of their rights, privileges and immunities, and that in the proceedings at their trial there was drawn in ques-

tion the validity of certain statutes of the State of Illinois as being repugnant to the Constitution of the United States, which nevertheless had been adjudged by the court to be valid.

The petition then set forth the following act of March 12, 1874, Hurd's Stats. Ill. 1885, 752, c. 78, § 14:

"It shall be sufficient cause of challenge of a petit juror that he lacks any one of the qualifications mentioned in Section 2 of this Act; or if he is not one of the regular panel, that he has served as a juror on the trial of a cause in any court of record in the county within one year previous to the time of his being offered as a juror; or, that he is a party to a suit pending for trial in that court at that term. It shall be the duty of the court to discharge from the panel all jurors who do not possess the qualifications provided in this Act, as soon as the fact is discovered: Provided, if a person has served on a jury in a court of record within one year, he shall be exempt from again serving during such year, unless he waives such exemption: *Provided further*, that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence: and *Provided further*, that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."

It was charged that "in this case the criminal court of Cook County held that said statute controlled as to the qualifications of jurors, and that under this statute a man was a competent and qualified juror, and not subject to challenge for cause on account of prejudice or partiality, notwithstand-

ing any opinion formed and expressed by him touching the guilt or innocence of the accused, which opinion was based on what he had heard and read touching the matter inquired of, and notwithstanding the proposed juror stated that he still entertained an opinion that the defendants, or some of them, were guilty as charged, or upon the question of their guilt, and that he still believed to be true the accounts heard and read by him; and that his opinion was so fixed that it would require evidence, and even strong evidence, to change that opinion; provided only the juror would state that he did not know that he had expressed any opinion as to the truth of the reports read or heard by him prior to his being called as a juror, and that he believed he could render a fair and impartial verdict in the cause."

The petitioners objected that the statute as thus construed was repugnant to the provisions of Article 3, Section 2, Clause 3 of the Constitution of the United States, and of Articles 5, 6, and Section 1 of Article 14 of the Amendments to the Constitution; and also that it was repugnant to the provisions of the Constitution of the State of Illinois, especially those found in Sections 2 and 9 of Article 2. Those objections were overruled at the trial, and those rulings were sustained by the Supreme Court of Illinois, and it was averred that that court "thereby denied to the accused the claim, right, privilege and immunity of trial by an 'impartial jury,' and also by their decision deprived petitioners of life, liberty and property without 'due process of law,' and abridged the privileges and immunities of petitioners as citizens of the United States, contrary to and in violation of the Constitution of the United States."

It was next averred that the petitioners claimed in said cause the right, privilege and immunity, of the "equal protection of the law" guaranteed to them under Article 14 of the Amendments of the Federal Constitution; and such right, privilege and immunity were denied to them by the decision of said Supreme Court of said State, which decision was adverse to their claim:

Statement of the Case.

(*a*) Because in this case the protection, privilege, right and immunity of a previous uniform construction[1] of the constitutions of the State of Illinois relating to the impartiality of jurors, and an opinion touching the prisoner's guilt, to remove which evidence would be required, were denied to the defendants, whereby they were deprived of "the equal protection of the laws," it being held in this case as against the petitioners by said Supreme Court of the State of Illinois, but without overruling, modifying or calling in question any of such prior opinions and decisions of said court, that the prior opinion of the proposed juror concerning the guilt of the accused, though firm and deeply seated, based on reports fully believed to be true, and though said opinion was of such a nature as would require evidence, and even strong evidence, for its removal, did not render such person disqualified to sit as a juror for the trial of this case and these petitioners.

(*b*) Because although the Supreme Court of Illinois had uniformly accorded to other persons accused of crime the protection in the selection of a jury of excluding from the jury, as disqualified by reason of partiality, favor or bias, persons who confessed a prejudice against the class of persons to which the defendants confessedly belonged;[2] and had uniformly held that the accused had the right to interrogate proposed jurors fully, so as to ascertain whether such prejudice was so strong as to probably affect their verdict; and also to advise the accused with reference to determining whether to exercise a peremptory challenge;[2] and although the record showed that the petitioners claimed the same "protection of the law" in the selection of the jury, and asked that persons be excluded therefrom who confessed that they had a prejudice against persons belonging to the classes or societies called Socialists, Communists, and Anarchists, to some of which defendants

[1] Referring to *Smith* v. *Eames*, 3 Scammon, 76; *Gardner* v. *People*, 3 Scammon, 83; *Vennum* v. *Harwood*, 1 Gilman, 659; *Baxter* v. *People*, 3 Gilman, 368; *Neely* v. *People*, 13 Ill. 685; *Gray* v. *People*, 26 Ill. 344; *Collins* v. *People*, 48 Ill. 146; *Chicago & Alton Railroad* v. *Adler*, 56 Ill. 344.

[2] Referring to *Winnisheik Ins. Co.* v. *Schueller*, 60 Ill. 465; *Chicago & Alton Railroad* v. *Buttolf*, 66 Ill. 347; *Lavin* v. *People*, 69 Ill. 303.

belonged; and that they asked the right to interrogate persons proposed to them as jurors, as to whether their admitted prejudice against the classes named was of such a character as in their opinion would influence their verdict, if it should appear that defendants belonged to such classes: yet the right to so interrogate such proposed jurors, and the right to challenge them for cause, were alike denied to the petitioners by the said Supreme Court of Illinois, and the decision of said court was against the right, privilege and immunity so claimed.

(*c*) Because although the Supreme Court of the State of Illinois had theretofore uniformly held that it was improper and illegal for the representative of the people in argument to the jury to go outside of the record, to make unsustained charges against the defendants, and to indulge in vituperation and abuse of the accused, and had held that for such improprieties the cause should be reversed;[1] yet in the case at bar, as appeared from the record, the prosecuting attorney was allowed by the trial court, in the face of objection made, to travel entirely outside of the record, and to make as against the defendants on trial for life, charges and statements having no foundation in the evidence in the record, and was also permitted to indulge in violently denunciatory and abusive language towards the accused.

This, it was alleged, was assigned for error in the Supreme Court of the State of Illinois; but that court upheld the action of the trial court in the particulars above referred to, and held that the action of the State's attorney in these regards was not objectionable in this case, thereby deciding adversely to the right, privilege and immunity claimed by the petitioners, and denying to them that equal protection of the laws guaranteed to, and claimed by, them under the Federal Constitution.

(*d*) Because the counsel for the prosecution had been allowed by the trial court, against the petitioner's objection, to refer to the failure of some of the defendants to testify, and the

[1] Referring to *Fox* v. *People*, 95 Ill. 71; *Hennies* v. *Vogel*, 87 Ill. 242.

Supreme Court on appeal had sustained the rulings of the court below in this respect in disregard of uniformly previous rulings to the contrary.

It was further alleged that, under the provisions of Article 4, and Article 14, Section 1, Clause 2 of the Amendments to the Constitution, and under the provisions contained in Section 10 of Article 2 of the Constitution of the State of Illinois, the petitioners claimed the right, privilege and immunity to be exempt from compulsion to testify against themselves; and that their conviction in a case where they were compelled to give testimony against themselves would be a conviction "without due process of law," contrary to the guarantee of the Constitution of the United States; but that the record showed that the petitioners were compelled to give testimony against themselves.

(*a*) That the petitioners, Fielden, Parsons, and Spies, were put upon the stand as witnesses in their own behalf: that thereupon, under pretence of cross-examination, the representatives of the State were permitted, over the objection and protest of those petitioners, to ask of them various questions, which said petitioners were required by the court to answer, which questions were not by way of cross-examination, but were upon entirely original and new matter, not referred to nor alluded to upon the direct examination in any way whatever; whereby the said petitioners were compelled to give testimony against themselves under such pretence of cross-examination, when on trial for a capital offence, and which testimony said petitioners were also compelled to give, and the same was received, as against all of the petitioners, who were jointly on trial, and were sought to be charged with the crime of murder, as the result of an alleged conspiracy to which the petitioners were claimed to be parties; that the Supreme Court of the State of Illinois had theretofore uniformly held that an accused person who took the stand as a witness in his own behalf was entitled to be protected in cross-examination, and that the cross-examination must be confined to the subject-matter of the direct examination: and

that by the decision of the Supreme Court in this respect the petitioners had been denied the right, privilege and immunity of exemption from compulsion to give testimony against themselves, claimed at the trial; had been deprived of their lives and liberty without due process of law; and had been denied the equal protection of the laws, contrary to the provisions of the Constitution of the United States.

(*b*) That it appeared from the record that the houses and business places of the petitioners were forcibly and violently entered, and searched by the officers of the State interested in the prosecution, without any warrant whatever for such action, such entries and searches being made long after the alleged murder charged against the petitioners; that in connection with such forcible entries and searches, various articles of property belonging to different of the petitioners were seized without warrant or authority by the said representatives of the State, which articles of property were offered and received in evidence in the trial court over the objection and exception of the petitioners; whereby the petitioners through such unlawful conduct upon the part of the representatives of the State, were through their property and effects compelled to give evidence against themselves. The petition particularly referred in this connection to questions put to Spies with reference to a letter and postal addressed to him by Johann Most, which, it was alleged, had been unlawfully taken from Spies' desk by the representative of the State, and it was averred that the introduction of this letter was in contravention of the principles laid down by this court.[1] This was averred to have been done contrary to the provisions of the Fourth, the Fifth, and the Fourteenth Amendments to the Constitution of the United States, and of the 10th section of Article 2 of the Constitution of the State of Illinois.

It was further alleged that the privileges and immunities of the petitioners under Article 14, Clause 1, of the Amendments to the Constitution of the United States, and under Sections 4 and 17 of Article 2 of the Constitution of the State of Illinois had been abridged:

[1] Referring to *Boyd* v. *United States*, 116 U. S. 616.

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(*a*) That the act of the State of Illinois of March 27, 1874, Hurd's ed., 1885, 427, § 274, was as follows: 274. "An accessory is he who stands by, and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises or encourages, shall be considered as principal and punished accordingly:" that under this act, petitioners claimed on the trial that mere advice, not to do the particular crime charged, but advice to a general revolutionary movement, having in view a change in the existing order of society, by public speech, writing or printing, could not make the petitioners guilty of a particular murder of an individual or individuals never advised nor committed by them; but that in order to establish their guilt in such a case, such alleged general advice must be accompanied by some encouragement, aiding, abetting or assisting to the particular act; in other words, that there must be some physical act as distinguished from mere general advice, as theretofore held by the Supreme Court of the State of Illinois:[1] but the Supreme Court of Illinois sustained the trial court in overruling this claim of the petitioners and thus denied them their said privileges and immunities.

(*b*) That the petitioners had asked the trial court to give certain instructions in regard to the right of peaceable assemblage which are set forth in the petition; that that court refused to give them; and that their refusal had been sustained by the Supreme Court, whereby they had denied to the petitioners the right, privilege and immunity of peaceable assemblage claimed by them, contrary to the law of the land, and whereby was denied to them that due process of law guaranteed to them under the Federal Constitution.

There were also allegations that certain instructions of the court relating to a conspiracy between the petitioners; relating to the cross-examination of the defendants and their witnesses in respect to their being "Socialists," "Anarchists," &c.; and in regard to the opinions which they entertained, whether

[1] Referring to *Cox* v. *People*, 82 Ill. 191, at page 192.

socialistic, communistic or anarchical, were, in view of c. 38, § 46, of the Criminal Code of Illinois *ex post facto* law, in violation of Section 10, Article 1, of the Constitution of the United States and of Section 11 of Article 2 of the Constitution of the State of Illinois: also allegations that certain other instructions relating to the weight of evidence and the proof of a conspiracy were given in violation of the same provisions in the Constitution of the United States; but these points were not pressed in the briefs or arguments.

It was also alleged that the petitioners claimed in the trial court that the provision in c. 38, §§ 274, 275, of the Statutes of Illinois, Hurd's ed., 1885, relating to accessories, was inconsistent with, in conflict with, in violation of, and repugnant to, the provisions of the Constitution of the United States and void, as not informing the petitioners, and not within the scope and meaning of, and not in compliance with the provision of the Constitution of the United States, that they should be informed of the nature and cause of the accusation: but the Criminal Court and the Supreme Court of the State of Illinois, the highest court of the State in which a decision in the suit could be had, in a final judgment passed in said court, decided in favor of the validity of said statute.

It was also charged that the indictments did not inform the petitioners of the nature and cause of the accusations against them as required by the Sixth Amendment to the Constitution, and that consequently the prisoners had been deprived of their liberty and were about to be deprived of their lives, without due process of law.

It was also charged that on the exhaustion of the regular panel, a person was appointed to summon the required talesmen; that the petitioners' counsel asked for instructions to him to summon them from the body of the county; that these were refused and that he was directed to exercise his own judgment in getting the best class of men; that "while summoning talesmen from among bankers, capitalists, wholesale and retail merchants, brokers, board of trade dealers, clerks, salesmen, &c., he excluded in his selections substantially

the entire class of daily wage-workers from his special venire;" that the petitioners duly objected to this at the trial, and after verdict and judgment made it the ground of a motion for a new trial, but that the objection and the motion were overruled; that this action of the trial court was specially assigned for error in the said Supreme Court of the State of Illinois; but that the said Supreme Court of the State of Illinois, by their final judgment and order in said cause, overruled the claim asserted and advanced by petitioners in this behalf, and denied to the petitioners in the premises the right, privilege and immunity claimed by them respectively of trial by an impartial jury; and by their said final judgment deprived the petitioners respectively of life and property, and of liberty and property, without due process of law, and also denied to the petitioners respectively "the equal protection of the laws" claimed by them; the said judgment and decision of said Supreme Court of Illinois being adverse to and in denial of the rights, privileges and immunities claimed by the petitioners respectively under, and to them guaranteed by, the Constitution of the United States, as above particularly invoked and set forth.

It was also averred that all the defendants were confined in jail under order of court when the sentence was passed, and none of them were allowed to be present then and there, nor were their counsel notified to be present at said time, and were not present, and that no notice of the determination of the Supreme Court of Illinois of their application for a new trial was given to them or to their counsel, or to any one of them; and no opportunity was afforded them to move in arrest of judgment before sentence was passed.

The petition prayed "for the allowance of a writ of error herein, and for such other process as is provided by law, to the end that the errors aforesaid done the petitioners in and by the proceedings, judgment and order of said Supreme Court of the State of Illinois in said cause, and as well by said criminal court of Cook County, may be corrected by the Supreme Court of the United States."

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MR. JUSTICE HARLAN, to whom the petition was presented on the 21st October, 1887, said, in Chambers:

This is an application for a writ of error to bring up for review, by the Supreme Court of the United States, a judgment of the Supreme Court of the State of Illinois, involving the liberty of one of the petitioners, and the lives of the others. The time fixed for executing the sentence of death is, I am informed, the 11th day of November.

Under the circumstances, it is my duty to facilitate an early decision of any question in the case of which the Supreme Court of the United States may properly take cognizance. If I should allow a writ of error, it is quite certain that counsel would have to repeat, before that court, the argument they propose now to make before me. On the other hand, if I should refuse the writ, the defendants would be at liberty to renew their application before any other Justice of the Supreme Court; and, as human life and liberty are involved, that Justice might feel obliged, notwithstanding a previous refusal of the writ, to look into the case and determine for himself whether a writ of error should be allowed. If he, also, refused, the defendants could take the papers to some other member of the court; and so on, until each Justice had been applied to, or until some Justice granted the writ. In this way, it is manifest that delays might occur that would be very embarrassing, in view of the short time intervening between this day and the date fixed for carrying into effect the judgment of the state court.

As the case is one of a very serious character in whatever aspect it may be regarded, I deem it proper to make an order, which I now do, that counsel present this application to the court, in open session, to the end that early and final action may be had upon the question whether that court has jurisdiction to review the judgment in this case. There is no reason why it may not be presented to the court at its session to-day. Counsel may state that the application is made to the court pursuant to my directions.

Mr. Tucker's Argument for Petitioners.

Mr. Roger A. Pryor for petitioners, then presented the petition to the court on the same 21st day of October, and argued in support of it. The court took it under advisement, and, on the 24th of October, 1887,

Mr. Chief Justice Waite made the following announcement:

Following the precedent in *Twitchell* v. *The Commonwealth*, 7 Wall. 321, we have permitted this motion to be made in open court, at the suggestion of Mr. Justice Harlan, to whom the application was first presented, on account of the urgency of the case and its importance. But, as was said in that case, "writs of error to the state courts have never been allowed as of right," that is to say, as of course, and it is the duty of him to whom an application for such a writ is made to ascertain, from an examination of the record of the state court, "whether any question, cognizable here on appeal, was made and decided in the proper court of the State, and whether the case on the face of the record will justify the allowance of the writ."

Deeming that the proper practice, we will hear counsel on Thursday next, in support of this motion, not only upon the point whether any Federal questions were actually made and decided in the Supreme Court of the State, but also upon the character of those questions, so that we may determine whether they are such as to make it proper for us to bring the case here for review.

We have caused the Attorney General of Illinois to be informed that the motion will be heard at the time stated.

On Thursday, the 27th, and on Friday, the 28th, of October, 1887, argument was had.

Mr. J. Randolph Tucker for all the petitioners. *Mr. M. Salomon*, *Mr. W. P. Black* and *Mr. Roger A. Pryor* were with him on the opening brief.

I. Was a Federal question raised and decided in the state court? The act of 1867, 14 Stat. 385, c. 28, § 2, which took the place of the 25th section of the judiciary act of 1789, pro-

vides for a writ of error to the highest court of a State, where is drawn in question: (1) The validity of a statute of or authority exercised under any State, on the ground that the same is repugnant to the Constitution of the United States, and the decision is in favor of the validity; (2) Where a right, title, privilege, or immunity is claimed under the Constitution of the United States and the decision is against the right, title, privilege, or immunity specially set up or claimed. At the time of its passage the Fourteenth Amendment had already been proposed by Congress, and this act was no doubt passed in preparation for the peculiar questions which would arise under the amendment. The terms of the act and this coincidence indicate a liberal construction of it in regard to appeals.

In *Murdock* v. *Memphis*, 20 Wall. 590, the court say the law intended to give the litigant the right, if he *desired* it, to have his claim under the Constitution decided by this court. The writ does not issue *of course* but *of right*, where this court has jurisdiction. Its jurisdiction being settled, the writ of error is a writ of right. *Conflict* gives *jurisdiction*. *Repugnancy* requires *reversal*. *Armstrong* v. *Treasurer*, 16 Pet. 281; *Callan* v. *May*, 2 Black, 541, 543; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Pennywitt* v. *Eaton*, 15 Wall. 380; *Hall* v. *Jordan*, 15 Wall. 393; *Arrowsmith* v. *Harmony*, 118 U. S. 194; *Hayes* v. *Missouri*, 120 U. S. 68. The appeal is a matter of common right. *Buel* v. *Van Ness*, 8 Wheat. 313. Referring then to *Twitchell* v. *The Commonwealth*, 7 Wall. 324, and *Bohanan* v. *Nebraska*, 118 U. S. 231, *Mr. Tucker* continued:

The course of decisions in this court is, I insist, uniform in allowing a writ of error upon claim of repugnancy; and this is laid down in the civil case of *Murdock* v. *Memphis*, *supra*, and the same rule would *in favorem vitæ* be upheld in a criminal case, especially a capital one. Even under the statute of 1789, § 25, the rule as to the mode in which the question should be raised was very liberal. The special clause of the Constitution to which the alleged repugnancy existed need not be stated. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Furman* v. *Nichol*, 8 Wall. 56; *Walker* v. *Sauvinet*, 92 U. S. 90. If it appears in the lower court of the State or in the high-

est court: *Crowell* v. *Randell*, 10 Pet. 368; *Craig* v. *Missouri*, 4 Pet. 410; *Minnesota* v. *Bachelder*, 1 Wall. 109; *Moore* v. *Illinois*, 14 How. 13, (where point was first taken in highest court of State,) and without clear reference to the conflict, if necessarily inferred. Same cases; see specially *Satterlee* v. *Matthewson*, 2 Pet. 380; *Boughton* v. *Bank*, 104 U. S. 427. If an act of Congress was applicable to the case, it will suffice. Same cases; *Miller* v. *Nicholls*, 4 Wheat. 311; *Ins. Co.* v. *Treasurer*, 11 Wall. 204; *Murray* v. *Charleston*, 96 U. S. 432; *Dugger* v. *Bocock*, 104 U. S. 596, 603; *Murdock* v. *Memphis*, *supra*; *Tennessee* v. *Davis*, 100 U. S. 257; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *Brown* v. *Colorado*, 106 U. S. 95. Reference may be had to the opinion of the court. *Gross* v. *Mortgage Co.*, 108 U. S. 477; *Phila. Fire Association* v. *New York*, 119 U. S. 110.

This court has not only never been astute to deny its jurisdiction, but has been sometimes astute to find a ground on which to extend the protection of the Constitution to him who claims that his rights have been defeated by its violation. How much more so when life depends on the question: when the question is whether a man shall die because the supreme law has been overthrown by the judgment or law of a State? And if this has been the rule under the act of 1789, *a fortiori*, it must be under the act of 1867. The latter act does not use the words found in the former, which confines the jurisdiction to cases where the question appears on the face of the record. *Murdock* v. *Memphis*, *supra*.

Having thus established the right to the writ of error if the question of repugnancy be raised expressly or by fair and just implication, I ask attention to the language of the act of 1867: A writ of error lies: (1) If the repugnancy of a statute of a State, or of an authority exercised under any State, to the Constitution of the United States be claimed, or (2) A right, privilege, or immunity is claimed under the Constitution of the United States, and the decision of the state court is against the claim.

I maintain, therefore, (1) If the constitutionality of a state law was involved, or if the construction of that law by a court

exercising authority under the State, was repugnant to the Constitution, the jurisdiction of this court attaches. It is not only when a law is repugnant to the Constitution, but when the law, though constitutional, is so construed by state courts as to make its operation unconstitutional, that a writ of error lies. *Hall* v. *De Cuir*, 95 U. S. 485; *United States* v. *Harris*, 106 U. S. 629; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Strauder* v. *West Virginia*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370; *Civil Rights Cases*, 109 U. S. 3; *Yick Wo* v. *Hopkins*, 118 U. S. 356, and cases there cited. But where the conflict between the law or the state court, denying the right, privilege, or immunity arises, as in this case, under the Fourteenth Amendment, a very wide field of discussion opens before us, to which I invite the attention of the court.

It is settled by the cases above cited from 100 U. S. and by *Neal* v. *Delaware*, *supra*, that if the legislative, executive, or judicial departments, or any officers of a State, so exercise their authority as to violate the personal rights secured by the Fourteenth Amendment, it is the act of the State and is void.

The Fourteenth Amendment declares that no "State shall deprive any *person* of life, liberty, or property without due process of law." In *Hurtado* v. *California*, 110 U. S. 516, this court held that those words did not necessarily require an indictment by a grand jury in a state court in order to a legal conviction in a capital case, but that an accusation by a preliminary examination provided for under the state law was equivalent to an indictment; and based its conclusion upon the expositions of the common law prior to the Revolution, especially on the judgment of Lord Holt in *Rex* v. *Berchet*, 1 Shower, 106, and the argument of the reporter of that case; citing also *Rex* v. *Ingham*, 5 B. & S. 257; and also explaining the judgment of this court in *Murray* v. *Hoboken*, 18 How. 272. The opinion further compared the same words in the Fifth Amendment, where they are coupled with an express provision for a grand jury in capital and infamous crimes, with them as used in the Fourteenth Amendment, where no such provision was made.

But I find nowhere in that opinion, nor elsewhere in the decisions of this court, that a jury trial in criminal cases in state courts is not required by the words "due process of law," as the right of every man upon a trial for his life or liberty; and it would be a waste of words to argue that these words in the Fourteenth Amendment do secure to every person in every State a trial by jury before his life or liberty be taken away. The whole history of the common law as our ancestors brought it with them to this country; the memorable Declaration of Rights, on the 14th of October, 1774, in the first Continental Congress asserting it; the Bills of Rights of all the young Revolutionary Commonwealths; the arraignment of George III in the Declaration of Independence for its denial; the provision in the Ordinance of 1787, by which it was secured to every Northwestern State as its precious heritage; the uniform and concurrent political and judicial opinion of all jurists and statesmen in Great Britain and America for centuries, make it a mockery of words to hold that this language of Magna Charta in the Fourteenth Amendment left jury trial out of the term "due process of law" where life or liberty were in issue. See Blackstone Com. 349; 3 Story on Const. § 1783. "Due process" means consistency with common law right. There must be an impartial jury. Wharton on American Law, § 566. "Due process" means jury trial, made so by Magna Charta. 1 Kent, 612, 613, 614; *Regina* v. *Baldry*, 2 Denison, C. C. 430, 444; *Regina* v. *Jarvis*, L. R. 1, C. C. 96. So being twice put in jeopardy is against common law right. *Regina* v. *Bird*, 2 Denison, C. C. 94, 216.

In *Murray* v. *Hoboken*, 18 How., the question was not, is a jury within "due process of law," but, can there be "due process" without it, even as to property? The implicit meaning of the discussion in that case is that "due process of law" meant jury trial as essential in criminal cases. Now, if jury trial be secured to a person charged with crime as a part of "due process of law," what kind of jury is he entitled to? Is it a packed jury, or an impartial one? See Marshall, C. J., in *Burr's Case*, Robertson, Phila. 1808. Clearly the meaning

of trial by jury, as one of common law right, must comprehend that it shall be composed of impartial men — men without bias or prejudice, men fair and equal in their judgment between the State and the accused. And we claimed in the court of trial and in the highest court of the State, that these prisoners will be deprived of life and liberty without "due process of law," if a partial jury was packed upon them by the law of the State, or by the construction of that law by the courts of the State. For if the law, by judicial construction, provides an improper jury — a packed one — it is unconstitutional and void, and the judgment must be reversed; and on the other hand, if it be constitutional as construed, and the state court so enforces it as to make it a deprivation of life without due process of law, still the State has done the deed, and the judgment must be reversed.

And further: If the law, as applied to other citizens, by the highest court, differs essentially from the rulings in this case, so as to show that the protection afforded to others was denied to these prisoners, then they have been denied the equal protection of the laws by the State itself, contrary to the Fourteenth Amendment. And still further: If the constitution of the State, intended to protect all alike, is violated in this case and set at naught, the State has denied the equal protection of the law to these prisoners, and the judgment must be reversed.

One other provision of the Fourteenth Amendment will now be considered which is more comprehensive in its protection of personal rights than the one just considered. It is that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The meaning of this clause turns chiefly on what shall be deemed "privileges and immunities of citizens of the United States." A privilege is a special and peculiar right. An immunity is an exemption or relief from burden or charge. These words are used once in the original Constitution, Art. 4, § 2; and in respect to those privileges and immunities which are enjoyed by citizens of a State. What they are has been judicially defined partially in the judgment of Mr. Justice

Washington in the case of *Corfield* v. *Coryell*, 4 Wash. C. C. 371. He says: "We have no hesitation in confining these expressions to those privileges and immunities which are *fundamental*, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose the Union from the time of their becoming free, sovereign, and independent." This definition was accepted as correct by this court in the *Slaughter-House Cases*, 16 Wall. 36, by all the judges; both those who concurred in the judgment and those who dissented. An historic view of the question was judicially taken in that case, and I venture to follow the same course.

When the Constitution was proposed by the Federal Convention September 17, 1787, to the several States for ratification, many of them in their conventions expressed an apprehension that by enlarged construction of the powers delegated to the General Government, and by enforced implication, the rights of the States and of the people would be endangered. The preamble of the Congress proposing them to the States shows this. It is stated that "the conventions of a number of the States having at the time of their adopting the Constitution declared a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added," &c. Those amendments have been held, chiefly upon the basis of this historic fact, to be confined to their operation as limitations on the Federal power over States and citizens.

But when the late war closed and all slaves were made free by the Thirteenth Amendment, the non-slave-holding States apprehended (whether justly or not is not here in question) that the late slave-holding States would make, or enforce already existing laws abridging the rights of the African race; and, jealous of state power, as our fathers had been jealous of Federal power, they gave American citizenship to the former slaves, and prohibited the States from abridging the privileges and immunities of persons holding such citizenship. Congress made a ratification of this amendment a precondition to the admission of the Southern States to representation in the

Union. I may say that there was nothing in a restraint on the power of the States as to personal rights which was inconsistent even with the genius of the original Constitution. In the freedom of intercourse and commerce desired and provided for — in the intercommunication of citizenship between the States — in the provisions for the extradition of criminals and slaves — in the denial to the States of power to coin money, to pass *ex post facto* laws and bills of attainder, or laws impairing the obligation of contracts, our fathers meant to protect a citizen of New York while in Virginia, and *vice versa*, from the injurious effects of state laws on the rights of the citizens of every member of the Union; and hence when the Fourteenth Amendment secured the due process of law within the States for the citizens of all the States, it only extended the provisions already made in the original Constitution: because, as Taney, C. J., said: "For all the great purposes for which the Federal government was established we are one people, with one common country; we are citizens of the United States." *Passenger Cases*, 7 How. 283.

Looking, then, to the purpose in view in adopting this Fourteenth Amendment, and to the historic condition of things which suggested it, and to the general consistency of its purpose with that which led to the original Constitution, I cannot think that we can go wrong in holding, as a canon for its true construction, that it shall have a liberal interpretation in favor of personal rights and liberty. If the views of the minority of the court in the *Slaughter-House Cases*, 16 Wall. 36, be adopted, the argument I shall present would only be the stronger, but I shall rest upon that of the majority, as above cited.

I hold the privilege and immunity of a citizen of the United States to be such as have their recognition in or guaranty from the Constitution of the United States. Take then the declared object of the Preamble, "to secure the blessings of liberty to ourselves and our posterity," we ordain this Constitution — that is, we grant powers, declare rights, and create a Union of States. See the provisions as to personal liberty in the States guarded by provision as to *ex post facto* laws, &c.; as to con-

tract rights — against States' power to impair them, and as to legal tender; the security for *habeas corpus;* the limits imposed on Federal power in the Amendments and in the original Constitution as to trial by jury, &c.; the Declaration of Rights — the privilege of freedom of speech and press — of peaceable assemblages of the people — of keeping and bearing arms — of *immunity* from search and seizure — *immunity from self-accusation*, from second trial — and privilege of trial by due process of law. In these last we find the privileges and immunities secured to the citizen by the Constitution. It may have been that the States did not secure them to all men. It is true that they did not. Being secured by the Constitution of the United States to all, when they were not, and were not required to be, secured by every State, they are, as said in the *Slaughter-House Cases*, privileges and immunities of citizens of the United States.

The position I take is this: Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights — common law rights — of the man, they make them privileges and immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments, as limitations on power, only apply to the Federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power.

The history referred to shows that these ten Amendments had a double purpose: first, as a declaration of fundamental rights, and second, to prohibit their infringement by the Federal authority. I do not, in this proposition, controvert the doctrine of this court since *Barron* v. *Baltimore*, 7 Pet. 243; but I maintain that all the declared privileges and immunities in these ten Amendments of a fundamental nature and of common law right, not in terms applicable to Federal authority only, are privileges and immunities of citizens of the United

States, which the Fourteenth Amendment forbids every State to abridge. *Slaughter-House Cases*, at pages 79, 89, 93, 97, 98, and 118; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *United States* v. *Cruikshank*, 92 U. S. 542. These declarations of the court show that the rights declared in the first ten Amendments are to be regarded as privileges and immunities of citizens of the United States, which, as I insist, are protected as such by the Fourteenth Amendment.

It will be objected that *Hurtado* v. *California* is contrary to this view. It is not. That was decided on a clause of the Fifth Amendment, which in its terms applied only to Federal courts — that is, it referred to cases in the land and naval forces, which belong only to the United States' jurisdiction. *Noscitur a sociis.* So, in *Walker* v. *Sauvinet*, 92 U. S. 90, as to the Seventh Amendment. In terms it applies to Federal courts — and yet in that case Field and Clifford, JJ., dissented. *Presser* v. *Illinois*, 116 U. S. 252, did not decide that the right to keep and bear arms was not a privilege of a citizen of the United States which a State might therefore abridge, but that a State could under its police power forbid organizations of armed men, dangerous to the public peace.

This conclusion is confirmed by the consideration that the propounders of the Fourteenth Amendment were looking to the protection of the freedmen from the peril of legislation in the South against those fundamental rights of free speech; of freedom from unreasonable searches; of double jeopardy; of self-accusation; of not being confronted with witnesses and having benefit of counsel and the like: and if these are construed as the privileges and immunities of citizens of the United States, the Fourteenth Amendment secures them; otherwise not. The fundamental nature of these rights, as common law rights, which were recognized at the time of the Revolution as the inherited rights of all the States may be seen by reference to Tucker's Blackstone App., p. 305, Story, Constitution, § 1779, 1781–2–3. As to searches, self-accusation, &c., see Story, § 1895; May's Const. History of England, Vol. 3, Ch. 11; and especially *Boyd* v. *United States*, 116 U. S. 616.

In the Bill of Rights of Virginia, June 12, 1776, George

Mason took the resolution of the House of Commons for the 10th article. So in the other States.

The connection between the immunity from unreasonable search for papers and self-accusation is pointed out strongly in the opinion in *Boyd* v. *United States*, and in that case and in the authorities above quoted they were held to be fundamental common law rights, and as such privileges and immunities of the citizens of the United States. So that, whether the compulsion to testify as to the papers illegally seized upon, in the unreasonable search in this case, be regarded as a violation of a privilege or immunity of a citizen of the United States, or as contrary to "due process of law," it is equally vicious, unconstitutional, and void. I repeat — if, under due process, compulsory self-accusation is disallowed; or if it be a privilege or immunity of a citizen of the United States not to be self-accused by compulsion; in either case, the Fourteenth Amendment condemns this judgment.

One word more on this point. If the State cannot abridge the privilege of a citizen of the United States, the same limitation applies to an alien, for *no person* shall be denied the equal protection of the laws. So that all of these defendants are, whether citizens or aliens, alike protected from the abridgment of these privileges and immunities of citizens.

Enough has been said to justify the following conclusions: (1) A trial by an impartial jury is secured by the Fourteenth Amendment to these prisoners. (2) A trial without self-accusation, either by compulsion to give evidence or by the production of papers illegally seized, is also secured.

But suppose I am wrong in this. If the search and self-accusation were not repugnant to the Fourteenth Amendment, yet it was repugnant to the constitution of Illinois. Now, if the constitution of Illinois is denied to *these prisoners*, when accorded to others, we are denied the equal protection of the laws of Illinois. In other words, I insist (1) If anything is done not according to due process of law, or to abridge the privileges or immunities of citizens of the United States, contrary to the Fourteenth Amendment, the writ must be allowed and the judgment reversed. (2) If the action of the court was not in

violation of the clauses of the Fourteenth Amendment referred to, yet if the rights accorded and secured by the constitution and laws of Illinois be refused to these men, they are denied the equal protection of the laws, and the writ must be allowed and the judgment reversed.

Upon the law of selecting jurors and challenges I refer to *Queen* v. *Hepburn*, 7 Cranch, 290; *Reynolds* v. *United States*, 98 U. S. 145, 154, citing Lord Coke, "that a juror must be indifferent, as he stands unsworn," and also Marshall, C. J., in *Burr's trial*, 416; and to *Hayes* v. *Missouri*, 120 U. S. 68, 70, Field, J., on the value of peremptory challenges. See also radical differences between the New York law and this one.

On this last point one remark is proper. If a talesman be *rejected* for cause improperly, and a good and unobjectionable juror be obtained, no complaint can be made. But it is different if such talesman be adjudged good by the court, when he should be rejected, and the injury to the accused is real, though it cannot be estimated. This arises from the nature of the procedure. The accused has a right to secure an impartial jury by excluding all whom he can *prove* to be bad, or suspects without being able to adduce such proof. As to the former, he challenges for cause; as to the latter, of his own will. Where the latter are limited in number, wrong rulings against his challenge for cause circumscribes his peremptory privilege, by forcing him to choose between the party challenged for cause without effect and one against whom he has no proof, but only suspicion.

[Mr. Tucker then examined the facts in the record, and claimed that they showed that the prisoners were tried by a packed jury, and consequently were denied "due process of law." In regard to the seizure, he claimed that it was done without warrant and was illegal, citing *Boyd* v. *United States*, *supra*; and in regard to the cross-examination of Spies, he maintained that it was illegal, that it was not "due process of law," and was an abridgment of his immunity.]

II. The court ask us whether the record justifies a review of the case. We respectfully ask, Why not? If the questions were raised, and the jurisdiction established, why should these

prisoners be denied a hearing, which they *desire*, before this court? *Murdock* v. *Memphis*, *supra*. We cannot be expected to urge grounds for reversal, on a motion to be *heard*. We ask to be heard in order to obtain a reversal. Hearing must precede affirmance or reversal. To discuss the merits in order to show our right to a writ, is not only premature, but a denial of the right of appeal.

Here is a record of two millions of words. It is unprinted. Counsel have not read — cannot read it. The court has not done so — could not have done so. In the dark, we pray an appeal, because we say the Constitution condemns our condemnation. Can we in this condition be expected to prove that the judgment should be reversed, when we only ask to have a chance to print the record and show the injustice done to us, upon which injustice we claim the writ? If granted, we will on the hearing establish our right to reverse the judgment.

Mr. Roger A. Pryor for the petitioners, submitted a separate brief, in addition to the general brief signed by him with the other counsel. In this he contended: I. That the Illinois statute is not "due process of law," within the meaning of that provision in the Constitution, citing *Murray* v. *Hoboken*, 18 How. 272; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hoke* v. *Henderson*, 4 Devereaux, Law, 1 [*S. C.* 25 Am. Dec. 677]; *Wynhamer* v. *People*, 13 N. Y. 378; *Taylor* v. *Porter*, 4 Hill, 140 [*S. C.* 11 Am. Dec. 274]; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Pennoyer* v. *Neff*, 95 U. S. 714; *Hurtado* v. *California*, 110 U. S. 516; *Kennard* v. *Louisiana*, 92 U. S. 480; *Brown* v. *Commissioners*, 50 Mississippi, 468; *Rowan* v. *State*, 30 Wis. 129; *Hopt* v. *Utah*, 110 U. S. 574; *In re Ziebold*, 23 Fed. Rep. 791; *Ex parte Bain*, 121 U. S. 1. II. That "due process of law" implies and requires trial by an impartial jury. *Work* v. *State*, 2 Ohio St. 296 [*S. C.* 59 Am. Dec. 671]; *People* v. *Johnson*, 2 Parker Cr. Cas. 322; *People* v. *Fisher*, 2 Parker Cr. Cas. 402; *People* v. *Toynbee*, 2 Parker Cr. Cas. 490, 562; *Cancemi* v. *People*, 18 N. Y. 128; *Ex parte Milligan*, 4 Wall. 2; *United States* v. *Reid*, 12 How. 361; *Olive* v. *State*, 11 Neb. 1; *Hayes* v. *Missouri*,

120 U. S. 68; *Reynolds* v. *United States*, 98 U. S. 155; *Cancemi* v. *People*, 16 N. Y. 501. III. That the Illinois statute makes competent a juror with a preconceived and present opinion as to the guilt of the accused. *Henderson* v. *The Mayor*, 92 U. S. 259; *Hall* v. *De Cuir*, 95 U. S. 485; *Stevens* v. *The People*, 38 Mich. 742; *Hayes* v. *Missouri*, *supra*. IV. That it is an ancient and inviolable principle of the criminal jurisprudence of this country that the accused shall be presumed to be innocent until his guilt is shown, and, by consequence, that the burden of proving his guilt is on the prosecution. *Wynhamer* v. *People*, *supra*; *Cummings* v. *Missouri*, 4 Wall. 277. V. By the Fourteenth Amendment of the United States Constitution, which forbids any State "to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," the Illinois statute is condemned as repugnant to that provision of the fundamental law. *Ex parte Virginia*, 100 U. S. 339. VI. The record discloses to demonstration that some of the petitioners were, by the production in evidence of papers and property unlawfully seized and taken, compelled to be witnesses against themselves. See *Boyd* v. *United States*, 116 U. S. 616. That the action of the state judiciary in these respects is the action of the State is well settled. *Ex parte Virginia*, *supra*; *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313; *Neal* v. *Delaware*, 103 U. S. 370; *Civil Rights Cases*, 109 U. S. 3; *Yick Wo* v. *Hopkins*, 118 U. S. 356. VII. The effect of the provision in the Fourteenth Amendment that "no State shall deprive any person of life, liberty or property without due process of law," is to transfer the fundamental rights and liberties enumerated in the original amendments and incorporate them in the Fourteenth Amendment; so that all the fundamental rights, privileges and immunities of American citizenship recognized in the original Constitution, are now placed under the ægis of the national sovereignty; and not one of those rights, privileges and immunities can be invaded or violated by state action without affording the victim the right of recourse to this tribunal for redress of the wrong.

Mr. Butler's Argument for Petitioners Spies and Fielden.

Mr. George Hunt, and *Mr. Julius S. Grinnell*, opposing, cited: I. Under the general head that the record does not show that any Federal question is involved: *Murdock* v. *Memphis*, 20 Wall. 590; *Chouteau* v. *Gibson*, 111 U. S. 200; *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473; *United States* v. *Cruikshank*, 92 U. S. 542; *Walker* v. *Sauvinet*, 92 U. S. 90; *Presser* v. *Illinois*, 116 U. S. 252; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Missouri* v. *Lewis*, 101 U. S. 22; *Hayes* v. *Missouri*, 120 U. S. 68, and cases there cited; *Barbier* v. *Connolly*, 113 U. S. 27; *Slaughter-House Cases*, 16 Wall. 36; *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388. II. Under the general head that it does not appear from the record that a Federal question was raised and decided in the state court: *Starin* v. *New York*, 115 U. S. 248; *Germania Ins. Co.* v. *Wisconsin*, *supra*; *Ames* v. *Kansas*, 111 U. S. 449; *Detroit City Railway* v. *Guthard*, 114 U. S. 265; *Chouteau* v. *Gibson*, *supra*; *Santa Cruz County* v. *Santa Cruz Railway*, 111 U. S. 361; *Murdock* v. *Memphis*, *supra*; *Twitchell* v. *Commonwealth*, 7 Wall. 321; *Fox* v. *Ohio*, 5 How. 410; *Smith* v. *Maryland*, 18 How. 71; *Withers* v. *Buckley*, 20 How. 84. III. As to the validity of the jury act, other States have enacted similar laws, and their constitutionality has been sustained; notably in New York: *Stokes* v. *People*, 53 N. Y. 164; *Thomas* v. *People*, 67 N. Y. 218; *Phelps* v. *People*, 72 N. Y. 334; *Greenfield* v. *People*, 74 N. Y. 277; *Balbo* v. *People*, 80 N. Y. 484; *Cox* v. *People*, 80 N. Y. 500; *People* v. *Otto*, 101 N. Y. 690.

Mr. Benjamin F. Butler (for the petitioners Spies and Fielden only) contended that all the points raised by his associate counsel applied to Spies and Fielden; and that, in addition there were some considerations, not appertaining to the others, but which applied to them.

It cannot be doubted that at the time of their adoption, the first ten Amendments of the Constitution, in their inhibition, had no effect upon the acts of a state court so far as concerned proceedings in a trial in it. And if we relied only on those inhibitions, no Federal question would arise.

Citizens of the United States, however, then and still enjoyed privileges and immunities coming from an older and higher source than the Constitution. That instrument, Article 4, section 2, speaks of these privileges and immunities. They were inherent in each citizen of a State or the United States: — inherited from Great Britain under the common law and Magna Charta. Among them were (1) Trial by jury for high crimes; (2) Exemption from search and seizure without warrant of law; (3) Protection from self-accusation when a witness; and (4) Guaranty against being deprived of life, liberty, or property without due process of law. Thus all the rights, privileges and immunities which belonged to a British subject under Magna Charta, belonged to each citizen of the United States; and as new citizens of the United States were made by naturalization these rights came to them. Thus matters stood until the year 1866.

The condition of the negro after the war induced the adoption of the Fourteenth Amendment, the effect of which was, to clothe all the citizens of the United States with equal privileges and immunities which no State could abridge. If I am correct, that these immunities and privileges are the privileges of a citizen of a State, then, by the Fourteenth Amendment they become the privileges and immunities of citizens of every State; because every citizen of the United States becomes a citizen of some State; and by the 4th article of the Constitution, as lately interpreted by this court, is entitled to the privileges and immunities of a citizen in the several States, and thus by the Federal law, the citizens of all the States are clothed with the panoply of these privileges and immunities. The State is bound to so make and enforce its laws that all the rights, privileges and immunities of the citizen of the United States shall be secured to him; and if it fails to do so, then circumstances may arise under which proper process should go from the Federal court to the state court to correct that error, under such limitations as may be imposed by the statute authorizing the process.

Now in regard to the rights, privileges and immunities of these petitioners which were involved in the proceedings in

the state courts, nothing need be said as to protection from unlawful seizure; no doubt has ever arisen about that. The meaning and scope of the provision against self-accusation are also well understood. Not to be deprived of life, liberty or property, "without due process of law," is not so accurately defined. It is however but another form of the expression of the common law laid down by Lord Coke, *per legem terræ*, by the law of the land; that is of the *whole* land; not the law of a county, or of a province, or of any one state, but the law of the whole land. That is the law of the land, and was so understood by our forefathers as due process of law. Any other meaning given to the words "due process of law," as used in the Fourteenth Amendment, would make it simply ridiculous and frivolous; because any State may enact a due process of law, according to that State, by which a man's life may be taken, from which not a single right, privilege or immunity of citizenship can protect him. And any law a State may make, after the passage of the Amendment, for dealing with the rights of a citizen of the United States becomes wholly inoperative; because the "law of the land" must forever remain fixed as at that moment, not to be changed in regard to its citizens without a change of organic law; and for some purposes not to be even so changed.

If there could be any doubt as to the extent of the privileges and immunities of citizens of the United States, Spies and Fielden stand upon another ground which is impregnable. One is a citizen of Germany, the other of Great Britain; and there being no evidence that either was naturalized, he must be presumed to be an alien. *Hauenstein* v. *Lynham*, 100 U. S. 483. They are entitled to the privileges and immunities granted to them by treaties of the United States,[1] which, once conferred, cannot be taken away by municipal legislation. For,

[1] On the 5th November, 1887, Mr. Butler wrote to the Reporter: "I desire, if you see no incompatibility with your duty, that when you make your report you will refer to the treaty of 1794 between the United States and Great Britain, Fielden having been born in England, and to the Treaty of Amity and Commerce between Prussia and the United States, dated May 1, 1828, Article I, and also Article IX, the 'most-favored nation' clause."

a treaty once executed becomes a part of the organic law of the land, and cannot be varied by legislative enactment or judicial decision. It can never be altered or varied, except by the assent of the foreign power who was a party to it. It is binding both on the citizens of the United States and on the subjects of the foreign power residing here. Any provision of the constitution or of a statute of an individual State in conflict with the treaty is void, equally as if it were in conflict with the Constitution of the United States. Such a treaty has both a retroactive and a future effect. See *Hauenstein* v. *Lynham*, *supra*.

The office and desk of Spies, who was a German, were broken open by police officers of the State, headed by the prosecuting attorney, without warrant, and the letters and contents of the desk were carried away. One letter and a postal card, each from Johann Most, which were deemed to implicate Spies, were produced by the prosecuting attorney, he stating at the time that they were part of the letters so seized. They were placed before Spies when he was on the stand, and he was asked whether he had received them from Most. Objection was made to his being so asked, but the court compelled him to answer. He identified them: this was the only evidence of identification. Discussion was had whether it could be read in evidence. Objection was made that it was obtained by the State by an unlawful seizure, but the court ruled that that matter could not be investigated there. This being so, the only question here is, whether his rights, privileges and immunities as a foreigner, which are protected by treaty fully and equally with those of any citizen and are never to be changed from what they were when they accrued, by any power save war, can be wholly abrogated, set aside and trampled upon by a state court, and there can be no redress in the Supreme Court of the United States because no means have been provided to bring before it the matter by which the life of the party thus to be murdered can be saved?

If it be said that the injured party did not make sufficiently formal objection to what was done; that he waived the protec-

tion which the treaties throw about him, the answer is that, in a capital trial the prisoner cannot waive, willingly or unwillingly, anything which may affect the issues in that trial. *Commonwealth* v. *Webster*, 5 Cush. 386, 404 [*S. C.* 52 Am. Dec. 711]; *Commonwealth* v. *Mahar*, 16 Pick. 120; *Commonwealth* v. *Andrews*, 3 Mass. 126, 133.

But the defendants are not remitted solely to this claim of right to be heard. We deny that § 709 of the Revised Statutes is to be read as if it required that the defendant should say that he claimed his immunity under the Constitution. The claim must be an immunity or privilege arising under the Constitution; but it is not necessary that the party should *say*, in addition, that he claims the privilege under the Constitution of the United States. It cannot be that when a party is setting up in his own behalf a constitutional safeguard against the taking of his letters from him by an unlawful search and seizure, and offering them in evidence against him that the trial court, by interposing and saying "that subject cannot be investigated here," can prevent him from a full statement of the violation of his treaty rights, and prevent him from getting a hearing on the question here. Nor has it done so. For the record shows that in the Supreme Court of Illinois his contention in this respect was considered. The opinion of that court recites that the main contention there was that, after Spies' arrest certain effects of his, including this letter, were seized by the police without warrant or other legal process, and that such seizure was in violation of the constitutions, both of the United States and Illinois. That such a specification of claim to constitutional protection is sufficient is abundantly shown by the cases cited by my colleagues.

The indictment consists of sixty-nine counts, and sets forth the alleged crime, not in the manner secured to Englishmen in the time of the Revolution, but according to a statute of Illinois enacted fifty years after the Revolution. In the case of Spies and Fielden, after the treaties of peace and amity with countries which assured them protection against any change in due process of law by all future state laws, the question

now arises: Can these prisoners be tried for an alleged crime in a different manner, and with different forms of procedure, by a State, from that which existed when these rights accrued? See *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; especially the following passage on page 198: "If a treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them and give to the alien the full protection conferred by its provisions."

If this conduct of the state courts will not entitle these prisoners to a writ, then it would seem to be useless to undertake to present a stronger claim, arising out of this or any other record. I desire to bring to the attention of the court some of the hardships which the reference of this question by the learned associate justice to the whole court imposes upon these defendants. . . . The grievance which I most respectfully but earnestly set forth in behalf of my clients is that, by the course that the cause has been made to take, we go to hearing on an imperfect record, as certified by the clerk of the state court, but which has not been and cannot be made a part of the record of this court, until a writ of error shall issue to bring it up. And that thereupon, a proceeding for a certiorari taken, so as to have the record amended, certified, and sent up to this court for its action.

Nor is the matter wrongfully set up in the record slight or immaterial. The record shows that a new trial had been asked for in the Supreme Court of the State. It then proceeds to say that all the parties, to wit, the prisoners and the State, appeared in the Supreme Court, and that an order was made that the motion be overruled, and that thereupon the Supreme Court then proceeded to make sentence that seven of these prisoners be hanged until they were dead.

The record does not show that the prisoners were asked whether they had anything to say further before sentence should be passed upon them, and that part of the record is true, because the prisoners were not present, nor was either of

them, but they were confined in the jail on all of that day. Their counsel, or either of them, were not present when this sentence was pronounced; and the first knowledge, and the most like official knowledge which the prisoners had of their being sentenced to death in the near future, was reading it in the public prints.

In Archibold's Criminal Practice, Waterman's Notes, Vol. I, pp. 182–3, it is said (omitting the citations): It has from the earliest periods been a rule that, though a man be in the full possession of his senses when he commits a capital offence, if he becomes *non compos* after it he shall not be indicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution. The true reason for this lenity is, not that a man who has become insane is not a fit object of example, though this might be urged in his favor; but that he is *incapable of saying anything in bar of execution, or assigning any error in the judgment.* Error may well be assigned on the omission of the *allocutus* or demand of the defendant what he has to say why judgment should not proceed against him. . . . Error may be assigned if sentence of death be passed against a prisoner not present in court.

If it be due process of law in this country that men, not being outlaws, can be sentenced to death in their absence from the court, being shut up in prison, which has never been done in a court in a civilized country before, and there is no method of correcting that misconduct which can be afforded by the highest court in the land, it will become a question seriously to be considered, which is to be preferred, such process of law or anarchy?

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

When, as in this case, application is made to us on the suggestion of one of our number, to whom a similar application had been previously addressed, for the allowance of a writ of error to the highest court of a State under § 709 of the Revised Statutes, it is our duty to ascertain not only

whether any question reviewable here was made and decided in the proper court below, but whether it is of a character to justify us in bringing the judgment here for reëxamination. In our opinion the writ ought not to be allowed by the court, if it appears from the face of the record that the decision of the Federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our well considered judgments in similar cases. That is in effect what was done in *Twitchell* v. *The Commonwealth*, 7 Wall. 321, where the writ was refused, because the questions presented by the record were "no longer subjects of discussion here," although if they had been in the opinion of the court "open," it would have been allowed. When, under § 5 of our Rule 6, a motion to affirm is united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm when "the question on which our jurisdiction depends was so manifestly decided right, that the case ought not to be held for further argument." *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 195; *Church* v. *Kelsey*, 121 U. S. 282. The propriety of adopting a similar rule upon motions in open court for the allowance of a writ of error is apparent, for certainly we would not be justified as a court in sending out a writ to bring up for review a judgment of the highest court of a State, when it is apparent on the face of the record that our duty would be to grant a motion to affirm as soon as it was made in proper form.

In the present case we have had the benefit of argument in support of the application, and while counsel have not deemed it their duty to go fully into the merits of the Federal questions they suggest, they have shown us distinctly what the decisions were of which they complain, and how the questions arose. In this way we are able to determine as a court in session whether the errors alleged are such as to justify us in bringing the case here for review.

We proceed, then, to consider what the questions are on which, if it exists at all, our jurisdiction depends. They are thus stated in the opening brief of counsel for petitioners:

"First. Petitioners challenged the validity of the statute of Illinois, under and pursuant to which the trial jury was selected and empanelled, on the ground of repugnancy to the Constitution of the United States, and the state court sustained the validity of the statute.

"Second. Petitioners asserted and claimed, under the Constitution of the United States, the right, privilege, and immunity of trial by an impartial jury, and the decision of the state court was against the right, privilege, and immunity so asserted and claimed.

"Third. The State of Illinois made, and the state court enforced against petitioners, a law (the aforesaid statute) whereby the privileges and immunities of petitioners, as citizens of the United States, were abridged, contrary to the Fourteenth Amendment of the Federal Constitution.

"Fourth. Upon their trial for a capital offence, petitioners were compelled by the state court to be witnesses against themselves, contrary to the provisions of the Constitution of the United States which declare that 'no person shall be compelled in any criminal case to be a witness against himself,' and that 'no person shall be deprived of life or liberty without due process of law.'

"Fifth. That by the action of the state court in said trial petitioners were denied 'the equal protection of the laws,' contrary to the guaranty of the said Fourteenth Amendment of the Federal Constitution."

The particular provisions of the Constitution of the United States on which counsel rely are found in Articles IV, V, VI, and XIV of the Amendments, as follows:

"Art. IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

"Art. V. No person . . . shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law."

"Art. VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have

been committed, which district shall have been previously ascertained by law."

"Art. XIV, § 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law."

That the first ten Articles of Amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to since. *Barron* v. *Baltimore*, 7 Pet. 243, 247; *Livingston* v. *Moore*, 7 Pet. 469, 552; *Fox* v. *Ohio*, 5 How. 410, 434; *Smith* v. *Maryland*, 18 How. 71, 76; *Withers* v. *Buckley*, 20 How. 84, 91; *Pervear* v. *The Commonwealth*, 5 Wall. 475, 479; *Twitchell* v. *The Commonwealth*, 7 Wall. 321, 325; *The Justices* v. *Murray*, 9 Wall. 274, 278; *Edwards* v. *Elliott*, 21 Wall. 532, 557; *Walker* v. *Sauvinet*, 92 U. S. 90; *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Pearson* v. *Yewdall*, 95 U. S. 294, 296; *Davidson* v. *New Orleans*, 96 U. S. 97, 101; *Kelly* v. *Pittsburg*, 104 U. S. 78; *Presser* v. *Illinois*, 116 U. S. 252, 265.

It was contended, however, in argument, that, "though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights — common law rights — of the man, they make them privileges and immunities of the man as a citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments as limitations on power only apply to the Federal Government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power."

It is also contended that the provision of the Fourteenth Amendment, which declares that no State shall deprive "any person of life, liberty or property, without due process of law," implies that every person charged with crime in a State shall

be entitled to a trial by an impartial jury, and shall not be compelled to testify against himself.

The objections are in brief, 1, that a statute of the State as construed by the court deprived the petitioners of a trial by an impartial jury; and, 2, that Spies was compelled to give evidence against himself. Before considering whether the Constitution of the United States has the effect which is claimed, it is proper to inquire whether the Federal questions relied on in fact do arise on the face of this record.

The statute to which objection is made was approved March 12, 1874, and has been in force since July 1 of that year. Hurd's Rev. Stat. Ill. 1885, p. 752, c. 78, § 14. It is as follows:

"It shall be sufficient cause of challenge of a petit juror that he lacks any one of the qualifications mentioned in section two of this act; or if he is not one of the regular panel, that he has served as a juror on the trial of a cause in any court of record in the county within one year previous to the time of his being offered as a juror; or, that he is a party to a suit pending for trial in that court at that term. It shall be the duty of the court to discharge from the panel all jurors who do not possess the qualifications provided in this act, as soon as the fact is discovered: *Provided*, if a person has served on a jury in a court of record within one year, he shall be exempt from again serving during such year, unless he waives such exemption: *Provided further*, that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence: *And provided further*, that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."

The complaint is that the trial court, acting under this statute and in accordance with its requirements, compelled the petitioners against their will to submit to a trial by a jury that was not impartial, and thus deprived them of one of the fundamental rights which they had as citizens of the United States under the National Constitution, and if the sentence of the court is carried into execution they will be deprived of their lives without due process of law.

In *Hopt* v. *Utah*, 120 U. S. 430, it was decided by this court that 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 the defendant, if until the jury is completed he has other peremptory challenges which he can use." And so in *Hayes* v. *Missouri*, 120 U. S. 68, 71, it was said: "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." Of the correctness of these rulings we entertain no doubt.

We are, therefore, confined in this case to the rulings on the challenges to the jurors who actually sat at the trial. Of these there were but two — Theodore Denker, the third juror who was sworn, and H. T. Sanford, the last, who was called and sworn after all the peremptory challenges of the defendants had been exhausted.

At the trial the court construed the statute to mean, that, "although a person called as a juryman may have formed an opinion based upon rumor or upon newspaper statements, but has expressed no opinion as to the truth of the newspaper statement, he is still qualified as a juror if he states that he can fairly and impartially render a verdict thereon in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement. It is not a test question whether the juror will have the opinion which he has formed from newspapers changed by the evidence, but whether his verdict will be based only upon the account which may here be given by witnesses under oath."

Interpreted in this way, the statute is not materially different from that of the Territory of Utah, which we had under consideration in *Hopt* v. *Utah*, *ubi supra*, and to which we then gave effect. As that was a territorial statute, passed by a territorial legislature for the government of a territory over which the United States had exclusive jurisdiction, it came directly within the operation of Article VI of the Amendments, which guaranteed to Hopt a trial by an impartial jury. *Webster* v. *Reid*, 11 How. 437, 459. No one at that time suggested a doubt of the constitutionality of the statute, and it was regarded, both in the territorial courts and here, as furnishing the proper rule to be observed by a territorial court in empanelling an impartial jury in a criminal case.

A similar statute was enacted in New York, May 3, 1872, Session Laws of 1872, c. 475, 9 N. Y. Stat. at Large, Edmonds, 2d ed. 373; in Michigan, April 18, 1873, Acts of 1873, 162, Act 117, Howell's Stat., § 9564; in Nebraska, Comp. Stat. Neb. 1885, p. 838, Criminal Code, § 468; and in Ohio, Rev. Stat. Ohio, 1880, § 7278. The constitutionality of the statute of New York was sustained by the Court of Appeals of that State in *Stokes* v. *The People*, 53 N. Y. 164, 172, decided June 10, 1873, and that of Ohio, in *Cooper* v. *The State of Ohio*, 16 Ohio St. 328. So far as we have been able to discover, no doubt has ever been entertained in Michigan or Nebraska of the constitutionality of the statutes of those States respectively, but they have always been treated by their Supreme Courts as valid, both under the Constitution of the United States, and under that of the State. *Stephens* v. *The People*, 38 Mich. 739, 741; *Ulrich* v. *The People*, 39 Mich. 245; *Murphy* v. *The State*, 15 Neb. 383.

Indeed, the rule of the statute of Illinois, as it was construed by the trial court, is not materially different from that which has been adopted by the courts in many of the States without legislative action. *Commonwealth* v. *Webster*, 5 Cush. 295; *Holt* v. *The People*, 13 Mich. 224; *State* v. *Fox*, 1 Dutcher (25 N. J. L.), 566; *Oslander* v. *The Commonwealth*, 3 Leigh, 780; *State* v. *Ellington*, 7 Iredell, 61; *Smith* v. *Eames*, 3 Scammon, 76, 81. See also an elaborate note to this last case in

36 Am. Dec. 521, where a very large number of authorities on the subject is cited.

Without pursuing this subject further, it is sufficient to say that we agree entirely with the Supreme Court of Illinois in its opinion in this case that the statute on its face, as construed by the trial court, is not repugnant to § 9 of Art. 2 of the constitution of that State, which guarantees to the accused party in every criminal prosecution "a speedy trial by an impartial jury of the county or district in which the offence is alleged to have been committed." As this is substantially the provision of the Constitution of the United States on which the petitioners now rely, it follows that, even if their position as to the operation and effect of that Constitution is correct, the statute is not open to the objection which is made against it.

We proceed, then, to a consideration of the grounds of challenge to the jurors Denker and Sanford, to see if in the actual administration of the rule of the statute by the court, the rights of the defendants under the Constitution of the United States were in any way impaired or violated.

Denker was examined by the counsel for the defendants when he was called as a juror, and, after stating his name and place of residence, proceeded as follows:

"Q. You heard of this Haymarket meeting, I suppose? A. Yes.

"Q. Have you formed an opinion upon the question of the defendants' guilt or innocence upon the charge of murder, or any of them? A. I have.

"Q. Have you expressed that opinion? A. Yes.

"Q. You still entertain it? A. Yes.

"Q. You believe what you read and what you heard? A. I believe it; yes.

"Q. Is that opinion such as to prevent you from rendering an impartial verdict in the case sitting as a juror under the testimony and the law? A. I think it is."

At this stage of the examination he was "challenged for cause" for the defendants, but before any decision was made thereon the following occurred:

"Mr. GRINNELL (for the State): If you were taken and sworn as a juror in the case, can't you determine the innocence or the guilt of the defendants upon the proof that is presented to you here in court, regardless of your having any prejudice or opinion? A. I think I could.

"Q. You could determine their guilt or innocence upon the proof presented to you here in court, regardless of your prejudice and regardless of your opinion, and regardless of what you have read? A. Yes.

"The COURT: Do [Can] you fairly and impartially try the case and render an impartial verdict upon the evidence as it may be presented here and the instructions of the court? A. Yes; I think I could."

The court thereupon overruled the challenge, but before the juror was accepted and sworn he was further examined by counsel for the defendants, as follows:

"Mr. FOSTER: I was going to ask you something about the opinion that you have formed from reading the papers and from conversation. I believe you answered me before that you had formed an opinion from reading and hearing conversation. That is correct, is it? A. Yes; but I don't believe everything I read in the newspapers.

"Q. No; but you believe enough to form an opinion? A. Yes; I formed an opinion.

"Q. Was that opinion principally from what you read in the papers or was it from what you heard on the street? A. From what I read entirely.

"Q. Then you did believe enough of what you read to form an opinion upon the question of the guilt or innocence of these men, or some of them? A. Yes.

"Q. And I believe you said you also expressed your opinion which you have formed to others with whom you conversed? A. Yes; I have expressed that opinion.

"Q. During the expression of this opinion I will ask you whether you stated in substance to these persons or any of them that you believed enough of what you had read to form the opinion which you had?

"The COURT: Did you in any conversation that you had

say anything as to whether you believed or not the account which was in the newspapers which you read? A. No, sir; I never expressed an opinion in regard to whether the newspapers were correct or not.

"Q. You never discussed that matter at all? A. No, sir."

Then, after some inquiries as to his business, age, and residence, the examination by the counsel for the defendant proceeded:

"Q. Are you acquainted with any members of the police force of the city of Chicago that were present at the Haymarket meeting on the occasion referred to? A. No, sir.

"Q. Have you ever had any conversation with any one that undertook to detail the facts as they occurred at the Haymarket Square, or who claimed they had been there? A. No, sir.

"Q. Is your opinion entirely made up of what you have read distinguished from what you have heard? A. Entirely from what I have read in the newspapers.

"Q. Have you had much conversation with others in regard to it at or about your place of business or elsewhere? A. We have conversed about it a number of times there in the house.

"Q. There is where you have expressed, I presume, the opinion which you have formed? A. Yes, sir.

* * * * *

"Q. Do you know anything about socialism, anarchism, or communism? A. No, sir; I do not.

"Q. Have you any prejudice against this class of persons? A. I think I am a little prejudiced against socialism. I don't know that I am against anarchism. In fact, I don't really understand what they are. I do not know what their principles are at all.

"Q. I understand you to say that notwithstanding the opinion you formed at the time you read the newspaper that you now are conscious of the fact that you can try this case and settle it upon the testimony introduced here? A. Yes; I think I could.

"Q. And not be controlled or governed by any impression that you might have had heretofore? A. Yes, sir.

"Q. And the law, as given you by the court, governing it? A. Yes, sir.

"Q. In the conversations that you have had there at the store, you say you have expressed the opinion which you have formed before? A. Yes, sir.

"Q. Is that of frequent occurrence — that you have expressed the opinion you have formed? A. Well, I think I have expressed it pretty freely.

"Q. As to the number of times — as to whether it was frequent or not? A. O, no; we did not bring the matter up in conversation very often, but when we did we generally expressed our opinion in regard to the matter.

"Q. Your mind was made up from what you read, and you had no hesitancy in saying it — speaking it out. A. I don't think I hesitated.

"Q. Would you feel yourself any way governed or bound in listening to the testimony and determining it upon the prejudgment of the case you had expressed to others before? A. Well, that is a pretty hard question to answer.

"Q. I will ask you whether acting as a juror here you would feel in any way bound or governed by the judgment that you had expressed on the same question to others before you were taken as a juryman; do you understand that? A. I don't think I would.

"Q. That is, you have now made up your mind, or at least you have formed an opinion; you have expressed that freely to others. Now, the question is whether when you listen to the testimony you will have in your mind the expression which you have given to others and have to guard against that and be controlled by it in any way. A. No, sir; I don't think I would. I think I could try the case from the testimony regardless of this.

* * * * *

"Q. I understand you to say that you believe that you can entirely lay to one side the opinion which you have formed; it would require no circumstances or evidence to overcome it if you were accepted as a juryman? A. I think I could lay aside that opinion I have formed.

"Q. You believe that you could? A. Yes."

Here the examination of the juror by the counsel for the defendant, so far as it seems to be important to the present inquiry, was closed. Then on examination by the attorney for the State the following appears:

"Q. Do you know anything of the counsel upon the other side? A. No, sir.

"Q. You have men under you assisting you in shipping? A. No; there are no men under me.

"Q. Do you belong to any labor organization? A. No, sir.

"Q. You stated, I believe, that you didn't know much about anarchism or communism, and therefore you couldn't tell whether you had a prejudice or not. A. No, sir; I do not.

"Q. But you have read something about socialism? A. Yes, sir.

"Q. Do you believe in the maintenance of the laws of the State of Illinois and the Government of the United States? A. Yes, sir; I do.

"Q. Have you any sympathy with any individual or class of individuals who have for their purpose or object the overthrow of the law by force. A. No, sir.

"Q. Have you any conscientious scruples against the infliction of the death penalty in proper cases? A. No, sir.

"Q. If taken as a juror in this case do you believe you could determine the innocence or guilt of the defendants upon the proof presented to you here in court, under the instructions of the court, regardless of everything else? A. Yes; I think I could.

"Q. You know now of no prejudice or bias that would interfere with your duties as a juror? A. No, sir.

"Q. Are you a socialist, a communist, or an anarchist? A. No, sir.

"Q. You have no associations or affiliations with that class of people, so far as you know? A. No, sir."

At the close of this examination neither party challenged the juror peremptorily, and he was accepted and sworn. It is not denied that when this occurred the defendants were

still entitled to 142 peremptory challenges, or about that number.

When the juror Sanford was called he was first examined by counsel for defendants, and after some preliminary questions and answers, the examination, still by counsel for the defendants, proceeded as follows:

"Q. You know what case is on trial now, I presume? A. Yes.

"Q. Have you any opinion as to the guilt or the innocence of the defendants, or any of them, of the murder of Matthias J. Degan? A. I have.

"Q. You have an opinion; you say you have formed an opinion somewhat upon the question of the guilt or innocence of these defendants, do you mean, or that there was an offence committed at the Haymarket by the throwing of the bomb? A. Well, I would rather have you ask them one at a time.

"Q. All right. Have you an opinion as to whether or not there was an offence committed at the Haymarket meeting by the throwing of the bomb? A. Yes.

"Q. Now, from all that you have read and all that you have heard, have you an opinion as to the guilt or innocence of any of the eight defendants of the throwing of that bomb? A. Yes.

"Q. You have an opinion upon that question also? A. I have.

"Q. Did you ever sit on a jury? A. Never.

"Q. I suppose you know something about the duties of a juror? A. I presume so.

"Q. You understand, of course, that when a man is on trial, whether it be for his life or for any penal offence, that he can only be convicted upon testimony which is introduced in the presence and the hearing of the jury? You know that, don't you? A. Yes.

"Q. You know that any newspaper gossip or any street gossip has nothing to do with the matter whatever, and that the jury are to consider only the testimony which is admitted by the court actually, and then are to consider that testimony under the direction, as contained in the charge, of the court; you understand that? A. Yes.

"Q. Now, if you should be selected as a juror in this case to try and determine it, do you believe that you could exercise legally the duties of a juror — that you could listen to the testimony, and all of the testimony, and the charge of the court, and after deliberation return a verdict which would be right and fair as between the defendants and the people of the State of Illinois? A. Yes, sir.

"Q. You believe that you could do that? A. Yes, sir.

"Q. You could fairly and impartially listen to the testimony that is introduced here? A. Yes.

"Q. And the charge of the court, and render an impartial verdict, you believe? A. Yes.

"Q. Have you any knowledge of the principles contended for by socialists, communists, and anarchists? A. Nothing, except what I read in the papers.

"Q. Just general reading? A. Yes.

"Q. You are not a socialist, I presume, or a communist? A. No, sir.

"Q. Have you a prejudice against them from what you have read in the papers? A. Decided.

"Q. A decided prejudice against them? Do you believe that that would influence your verdict in this case, or would you try the real issue which is here, as to whether these defendants were guilty of the murder of Mr. Degan or not, or would you try the question of socialism or anarchism, which really has nothing to do with the case? A. Well, as I know so little about it in reality at present, it is a pretty hard question to answer.

"Q. You would undertake — you would attempt, of course, to try the case upon the evidence introduced here — upon the issue which is presented here? A. Yes, sir.

"Q. Now, the issue, and the only issue which will be presented to this jury, unless it is presented with some other motive than to arrive at the truth, I think is, did these men throw the bomb which killed officer Degan? If not, did they aid, abet, encourage, assist, or advise somebody else to do it? Now, that is all there is in this case; no question of socialism or anarchism to be determined, or as to whether it is right or wrong.

Now, do you believe that you can try it upon that theory and return a verdict upon that theory and upon that issue? A. Well, suppose I have an opinion in my own mind that they encouraged it?

"Q. Keep it — that they encouraged it? A. Yes.

"Q. Well then, so far as that is concerned I do not care very much what your opinion may be now, for your opinion now is made up of random conversations and from newspaper reading, as I understand? A. Yes.

"Q. That is nothing reliable. You do not regard that as being in the nature of sworn testimony at all, do you? A. No.

"Q. Now, when the testimony is introduced here and the witnesses are examined and cross-examined, you see them and look into their countenances, judge who are worthy of belief and who are not worthy of belief. Don't you think then you would be able to determine the question? A. Yes.

"Q. Regardless of any impression that you might have, or any opinion? A. Yes.

"Q. Have you any opposition to the organization by laboring men of associations, or societies, or unions so far as they have reference to their own advancement and protection, and are not in violation of law? A. No, sir.

"Q. Mr. Sanford, do you know any of the members of the police force of the city of Chicago? A. Not one by name.

"Q. You are not acquainted with any one that was either injured or killed, I suppose, at the Haymarket meeting? A. No.

* * * * *

"Q. Mr. Sanford, are you acquainted with any gentlemen representing the prosecution — these three gentlemen, Mr. Grinnell, Mr. Ingham, Mr. Walker, and Mr. Furthman, who [is] not here at the present time? A. No, sir.

"Q. You are, I presume, not acquainted with any of the detective officers of the city of Chicago? A. Not to my knowledge.

"Q. Now, Mr. Sanford, if you should be selected as a juror in this case do you believe that, regardless of all prejudice or opinion which you now have, you could listen to the legitimate

testimony introduced in court and upon that and that alone render and return a fair and impartial, unprejudiced and unbiased verdict? A. Yes."

At the close of this examination on the part of the defendants, the juror was challenged in their behalf for cause, and the attorney for the State, after it was ascertained that all the peremptory challenges of the defendants had been exhausted, took up the examination of the juror; and as to this the record shows the following:

"Mr. INGHAM: Mr. Sanford, upon what is your opinion founded — upon newspaper reports? A. Well, it is founded on the general theory and what I read in the newspapers.

"Q. And what you read in the papers? A. Yes, sir.

"Q. Have you ever talked with any one who was present at the Haymarket at the time the bomb was thrown? A. No, sir.

"Q. Have you ever talked with any one who professed, of his own knowledge, to know anything about the connection of the defendants with the throwing of that bomb? A. No.

"Q. Have you ever said to any one whether or not you believed the statements of facts in the newspapers to be true? A. I have never expressed it exactly in that way, but still I have no reason to think they were false.

"Q. Well, the question is not what your opinion of that was. The question simply is — it is a question made necessary by our statute, perhaps —— A. Well, I don't recall whether I have or not.

"Q. So far as you know, then, you never have? A. No, sir.

"Q. Do you believe that if taken as a juror you can try this case fairly and impartially, and render a verdict upon the law and the evidence? A. Yes."

At this stage of the examination the court remarked in reply to some suggestion of counsel as follows:

"The COURT. The defendants having challenged for cause, which is overruled, can, of course, stand where they are without saying anything more; but the effect of that, in my judgment, is that they accept the juror because they can't help

themselves. They have got no peremptory challenge; the challenge for cause is overruled, and, necessarily, the question now is for the State to say whether they will accept this juror or not. The common law is that all jurors not challenged, or to whom the challenge is not sustained, are the jurors to try the case. If they are not challenged for a cause which is sustained, and if they are not challenged peremptorily, then they are necessarily the jury to try the case. Now, in this instance, the defendants have no more peremptory challenges, and the challenge which they have made for cause is overruled; therefore, so far as the defendants are concerned, he is a juror to try the case."

This was accepted by both parties as a true statement of the then condition of the case, and after some further examination of the juror, which elicited nothing of importance in connection with the present inquiry, no peremptory challenge having been interposed by the State, Sanford was sworn as a juror, and the panel was then complete.

This, so far as we have been advised, presents all there is in the record which this court can consider touching the challenges of these two jurors by the defendants for cause.

In *Reynolds* v. *The United States*, 98 U. S. 145, 156, we said "that upon the trial of the issue of fact raised by" a challenge to a juror, in a criminal case, on the ground that he had formed and expressed an opinion as to the issues to be tried, "the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. . . . It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." If such is the degree

of strictness which is required in the ordinary cases of writs of error from one court to another in the same general jurisdiction, it certainly ought not to be relaxed in a case where, as in this, the ground relied on for the reversal by this court of a judgment of the highest court of the State is, that the error complained of is so gross as to amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime. We are unhesitatingly of opinion that no such case is disclosed by this record.

We come now to consider the objection that the defendant Spies was compelled by the court to be a witness against himself. He voluntarily offered himself as a witness in his own behalf, and by so doing he became bound to submit to a proper cross-examination under the law and practice in the jurisdiction where he was being tried. The complaint is, that he was required on cross-examination to state whether he had received a certain letter, which was shown, purporting to have been written by Johann Most, and addressed to him, and upon his saying that he had, the court allowed the letter to be read in evidence against him. This, it is claimed, was not proper cross-examination. It is not contended that the subject to which the cross-examination related was not pertinent to the issue to be tried; and whether a cross-examination must be confined to matters pertinent to the testimony-in-chief, or may be extended to the matters in issue, is certainly a question of state law as administered in the courts of the State, and not of Federal law.

Something was said in argument about an alleged unreasonable search and seizure of the papers and property of some of the defendants, and their use in evidence on the trial of the case. Special reference is made in this connection to the letter of Most about which Spies was cross-examined; but we have not been referred to any part of the record in which it appears that objection was made to the use of this evidence on that account. And upon this point the Supreme Court of the State, in that part of its opinion which has been printed with the motion papers, remarks as follows:

"The objection that the letter was obtained from the de-

fendant by an unlawful seizure is made for the first time in this court. It was not made on the trial in the court below. Such an objection as this, which is not suggested by the nature of the offered evidence, but depends upon the proof of an outside fact, should have been made on the trial. The defence should have proved that the Most letter was one of the letters illegally seized by the police and should then have moved to exclude or oppose its admission on the ground that it was obtained by such illegal seizure. This was not done, and therefore we cannot consider the constitutional question supposed to be involved."

Even if the court was wrong in saying that it did not appear that the Most letter was one of the papers illegally seized, it still remains uncontradicted that objection was not made in the trial court to its admission on that account. To give us jurisdiction under § 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time in the proper way. To be reviewable here the decision must be against the right so *set up or claimed*. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of a waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence is not before us, and, therefore, no foundation is laid under this objection for the exercise of our jurisdiction.

As to the suggestion by counsel for the petitioners Spies and

Fielden — Spies having been born in Germany and Fielden in Great Britain — that they have been denied by the decision of the court below rights guaranteed to them by treaties between the United States and their respective countries, it is sufficient to say that no such questions were made and decided in either of the courts below, and they cannot be raised in this court for the first time. Besides, we have not been referred to any treaty, neither are we aware of any, under which such a question could be raised.

The objection that the defendants were not actually present in the Supreme Court of the State at the time sentence was pronounced cannot be made on the record as it now stands, because on its face it shows that they were present. If this is not in accordance with the fact, the record must be corrected below, not here. It will be time enough to consider whether the objection presents a Federal question when the correction has been made.

Being of opinion, therefore, that the Federal questions presented by the counsel for the petitioners, and which they say they desire to argue, are not involved in the determination of the case as it appears on the face of the record, we deny the writ.

Petition for writ of error is dismissed.

MATHEWS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted October 17, 1887. — Decided October 31, 1887.

A diplomatic and consular appropriation act which transfers a consulate from the class in which it had previously stood to a lower class, with a smaller salary, operates to repeal so much of previous legislation as placed the consulate in the grade from which it was removed.

United States v. *Langston*, 118 U. S. 389, distinguished.

THIS was an appeal from a judgment of the Court of Claims. The case as stated by the court was as follows.

Statement of the Case.

This suit was brought by the appellant to recover from the United States the balance claimed to be due him on account of salary as consul of the United States at Tangier, in the Barbary States, from July 1, 1882, to June 30, 1886. He entered upon the duties of that office July 19, 1870; was paid at the rate of three thousand dollars per annum up to June 30, 1882; and, thereafter, only at the rate of two thousand dollars per annum. He claims that he was entitled to receive the larger sum during the entire period of his service. The Court of Claims, being of opinion that the claimant had no cause of action, dismissed the petition.

The act of August 18, 1856, regulating the diplomatic and consular systems of the United States, contained this provision: "That consuls-general, consuls and commercial agents appointed to the ports and places hereinafter specified in schedules B and C shall be entitled to compensation for their services, respectively, at the rates per annum hereinafter specified in schedules B and C. . . . Schedule B. I. Consuls-General. . . . II. Consuls. . . . Barbary States; *Tangier*, Tripoli and Tunis, each three thousand dollars." 11 Stat. 52, 54.

The same provision was carried into the Revised Statutes, § 1690.

The act of June 11, 1874, making appropriations for the diplomatic and consular service for the year ending June 30, 1875, 18 Stat. 66, contained this provision: "That schedules B and C in section three of the act entitled 'An act to regulate the diplomatic and consular systems of the United States,' approved August eighteenth, eighteen hundred and fifty-six, shall, from and after the first day of July next, read as follows: 'Schedule B. . . . The following consulates shall be divided into seven classes, to be known, respectively, as classes one, two, three, four, five, six, and seven, and the consuls at such consulates shall each be entitled to compensation for their services per annum at the rates respectively specified herein, to wit: Class one, four thousand dollars. Class two, three thousand five hundred dollars. Class *three*, three thousand dollars. Class four, two thousand five hundred dollars. Class five, two

thousand dollars. Class six, one thousand five hundred dollars. Class seven, one thousand dollars. . . . Class III. . . . Barbary States: Tripoli, Tunis, *Tangier*.'"

The diplomatic and consular appropriation act for the year ending June 30, 1876, 18 Stat. 321, 322, appropriated "for consuls-general, consuls, vice-consuls, commercial agents, and thirteen consular clerks, three hundred and thirty-three thousand two hundred dollars, namely: . . . Class III. Barbary States: Tripoli, Tunis, *Tangier*." The effect of this act was to leave the annual salaries of these officers as fixed by the act of June 11, 1874. The appropriation acts for the years ending June 30, 1877, and June 30, 1878, made no change. 19 Stat. 170, 233.

But that of June 4, 1878, provides: "That the following sums be, and the same are hereby, appropriated for the service of the fiscal year ending June 30, 1879, out of any money in the Treasury not otherwise appropriated, for the object hereinafter expressed, namely: . . . 'For salaries of consuls, vice-consuls, commercial agents, and thirteen consular clerks, $304,600, namely: . . . Class III, at $3000 per annum. . . . Barbary States: Tripoli, Tunis, *Tangier*.' . . . And the salaries provided in this act for the officers within named respectively shall be in full for the annual salaries thereof *from and after the first day of July, eighteen hundred and seventy-eight*, and all laws and parts of laws in conflict with the provisions of this act are hereby repealed." 20 Stat. 91, 93, 98.

The appropriation act for the year ending June 30, 1880, was the same as that for the previous year. 20 Stat. 267. Those for the years ending June 30, 1881, and June 30, 1882, also appropriated an aggregate sum for consuls, vice-consuls, and commercial agents, keeping the consul at Tangier in "Class III, at $3000 per annum," omitting, however, the provision — first put into the appropriation act for the year ending June 30, 1879, and repeated in the act for the year ending June 30, 1880 — to the effect that the salaries for the officers therein respectively provided for, "shall be in full for the annual salaries thereof from and after the 1st day of July, 1878." 21 Stat. 133, 135, 339, 341. But the act making

appropriations for the year ending June 30, 1883, placed the office of consul at Tangier in the *Fifth* class. Congress appropriated by that act, "for salaries of consuls, vice-consuls, commercial agents, and thirteen consular clerks, $332,100, namely: . . . Class V. *at* $2000 *per annum*. . . . Barbary States: *Tangier*." 22 Stat. 128, 129, 131. Each of the appropriation acts for subsequent years, covering the period here in question, contained the same language, keeping the office of consul at Tangier in "Class V, at $2000 per annum," and differing from the former acts only as to the aggregate amount appropriated for consuls, vice-consuls, commercial agents, and consular clerks; except, that the act of March 3, 1887, contained the additional clause, that the sums thereby severally appropriated were to be "in full compensation for the diplomatic and consular service of the fiscal year ending June 30, 1888." 22 Stat. 424; 23 Stat. 227, 322; 24 Stat. 112, 477.

Mr. George A. King for appellant relied upon *United States* v. *Langston*, 118 U. S. 389.

Mr. Attorney General and *Mr. Edward M. Watson* for appellee.

Mr. Justice Harlan delivered the opinion of the court.

There is no foundation for appellant's claim. In *United States* v. *Langston*, 118 U. S. 389, 394, we said, that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law." The present case does not come within that rule; for the consular appropriation acts for the fiscal years ending June 30, 1883, 1884, 1885, and 1886, while recognizing the division made by the act of 1874 of consulates into classes, put the office of consul at Tangier in "Class V, *at* $2000 *per annum*."

In other words, during the whole period covered by the claim in suit, the consul at Tangier was in the fifth class, and there was in force an act of Congress declaring that consuls of that class should receive $2000 per annum; in other words, that sum should be in full compensation for his services each year. The only possible object of transferring the office of consul at Tangier from the third to the fifth class was to reduce the annual salary of that officer to the sum fixed for the annual salaries of consuls of the latter class. The error in the argument in behalf of the appellant is, that he gives no effect whatever to the words "at $2000 per annum," to be found in every appropriation act covering the period in question. But, clearly, those acts, placing this consul in the fifth class, at $2000 per annum, repealed, by necessary implication, so much of previous enactments, including that of June 11, 1874, as placed the consul at Tangier in the third class, at $3000 per annum. The argument to the contrary is not at all aided by the circumstance that the diplomatic and consular appropriation act of March 3, 1887, for the first time after the passage of the act of June 11, 1874, expressly declared that the sums thereby appropriated should be "in full compensation" for the services therein mentioned. That act was passed after the decision in Langston's case, and the words "in full compensation" were introduced therein, out of abundant caution, to preclude any doubt in the future as to the intention of Congress.

Judgment affirmed.

UNITED STATES *v.* MULLAN.

APPEAL FROM THE COURT OF CLAIMS.

Submitted October 26, 1887. — Decided November 7, 1887.

An officer in the regular Navy, whose service therein was continuous in various grades from 1860 to 1868, and who held the rank of lieutenant-commander when the act of July 15th, 1870, c. 295, § 3, 16 Stat. 330, now § 1556 of the Revised Statutes, was passed, giving graduated pay

for various ranks, is entitled to the benefit of the act of March 3d, 1883, c. 97, 22 Stat. 473.

It is not necessary that he should have entered the service more than once.

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

Mr. Attorney General, *Mr. Assistant Attorney General Howard*, and *Mr. F. P. Dewees* for appellant.

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

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by the United States from a judgment of the Court of Claims, for the sum of $356.03, in favor of Dennis W. Mullan. Mullan is an officer in the regular Navy, who has served continuously therein since September 21st, 1860, on which day he was appointed acting midshipman. He was appointed acting ensign, October 21st, 1863; master, May 10th, 1866; lieutenant, February 21st, 1867; and lieutenant-commander, March 12th, 1868. He was paid for all of his services in those capacities, in accordance with the laws in force at the time they were performed. In addition, he claimed to be entitled to the benefit of the provisions of the act of March 3d, 1883, c. 97, 22 Stat. 473, which reads as follows: "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: *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."

The Court of Claims held that Mullan was entitled to $356.03 under that act. The amount is not questioned by the Government, if the Court of Claims decided the question of law correctly. Graduated pay for various ranks in the Navy was given by the act of July 15th, 1870, c. 295, § 3, 16 Stat. 330, now § 1556 of the Revised Statutes. At the time of the passage of the act of 1883, Mullan was a lieutenant-commander, who had served as an officer in the regular Navy from September 21st, 1860, by continuous service; and, while he held the rank of lieutenant-commander, graduated pay was given by statute to officers of that rank and other officers. By the provisions of the act of 1883, he is to be credited with his actual time of service, and is to receive all the benefits of that service in all respects, in the same manner, as if all of that service had been continuous in the lowest grade having graduated pay held by him since last entering the service.

It is contended on the part of the United States that the act of March 3d, 1883, applies to officers serving in the regular Navy only when their term of service has not been continuous. The view is urged, that the expression "since last entering the service" implies that the officer, to be entitled to the benefit of the statute, must have entered the service more than once. But we think that this is an overstrained interpretation. Mullan entered the service once. It was his last entry as well as his first entry. Where an officer has entered the service twice, the second entry is the last entry, and that entry is to be taken in applying the statute to his case; but where an officer has entered the service but once, that entry is to be taken as the last entry, within the meaning of the statute. So, too, the expression, "as if all said service had been continuous," is not to be held to confine the benefits of the statute to a service which has been non-continuous. The expression is satisfied by considering it as an extension of the benefits of the statute to interrupted, non-continuous service, and by crediting the officer with the actual time of such service, as if it had been continuous service. Otherwise, the statute cannot be carried out. It says 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 the benefits of such actual service are to be received, where the service has been continuous, in the regular Navy.

The judgment of the Court of Claims is

Affirmed.

CRAIG *v.* LEITENSDORFER.

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

Argued October 12, 13, 1887. — Decided October 31, 1887.

If an official act of an executive officer in the Land Office is challenged for error of law, or for fraud in a judicial proceeding between private parties, in a court of the United States, no jurisdiction attaches unless the controversy relates to rights existing in the parties, or one of them, derived from the act, and unless definite relief or redress under some known head of judicial jurisdiction is demanded.

The acts of June 21, 1860, 12 Stat. 71, and February 25, 1869, 15 Stat. 275, having referred to the Land Office and the Department of the Interior the adjustment of the claims of settlers within the Las Animas grant in Colorado, and their definition by the prescribed surveys and plats, and of all questions of possession and of boundary and of conflict, the free course of that administration, within the limit of the law, cannot be interrupted or interfered with by the judicial power.

If the plaintiff's contention is well founded that the duty of the Commissioner of the General Land Office to take up, hear and determine his appeal exists, that duty, so far as relates to entering upon its performance, is strictly ministerial, and his remedy is at law, by mandamus, and not in equity.

The controversy in this case being confined to the conflicting claims of actual settlers, "holding possession under titles or promises to settle," made by Cornelio Vigil and Ceran St. Vrain, and established under the provisions of the acts of June 21, 1860, 12 Stat. 71, and February 25, 1869, 15 Stat. 275; and it appearing from the pleadings, as amended, that the plaintiff below did not aver an equitable interest in himself in the lands which were so established in favor of the defendant, and that the only remedy, which he sought, was to have it judicially determined that the defendant's title was obtained by means of the fraudulent act

Statement of the Case.

of an executive officer in the Land Office, whereby the plaintiff was illegally deprived of a right of appeal from the decision of that officer touching his own claims; *Held*, That the pleadings presented no question to give a Circuit Court jurisdiction in equity over the case.

Under the treaty with Mexico of Guadalupe Hidalgo, Cornelio Vigil and Ceran St. Vrain claimed title, under a Mexican grant made in 1843, to a large tract of land embraced within the Huerfano, Pisipa, and Cucharos Rivers to their junction with the Arkansas and Animas, known as the Las Animas grant, and supposed to cover and include about 922 square leagues, lying in the Territory of New Mexico, but within the limits of the present State of Colorado, and equivalent to four millions of acres.

By the act to confirm certain private land claims in the Territory of New Mexico, approved June 21, 1860, 12 Stat. 71, Congress confirmed the claim of Vigil and St. Vrain, but only to the extent of eleven square leagues to each of said claimants. By the second section of that act it was provided "that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain the location shall be made as follows, namely: The survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the Surveyor General of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section."

The fourth section of the act provides "that the foregoing confirmation shall only be construed as quitclaims or relinquishments on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

This statute was amended by the act of February 25, 1869, 15 Stat. 275, 440, as follows:

"CHAP. XLVII. — *An Act to amend an act entitled 'An Act to confirm certain private Land Claims in the Territory of New Mexico.'*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the exterior lines of the Cornelio Vigil and *Cram* St. Vrain claims of eleven leagues each, subject to claims derived from said parties as confirmed by the act of Congress approved twenty-first June, eighteen hundred and sixty, United States Statutes, volume twelve, page seventy-one, shall be adjusted according to the lines of the public surveys, as nearly as practicable, with the limits of said claims, yet in as compact a form as possible; and the claims of all actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles or promises to settle, which have been made by said Vigil and St. Vrain, or their legal representatives, prior to the passage of this act, who may establish their claims within one year from the passage of this act, to the satisfaction of the register and receiver of the proper land district, shall in like manner be adjusted according to the subdivisional lines of survey, so as to include the lands so settled upon or purchased, and the areas of the same shall be deducted and excluded from the adjusted limits of the claims of said Vigil and St. Vrain respectively; and the claims of all other actual settlers falling within the limits of the located claims of Vigil and St. Vrain shall be adjusted to the extent which shall embrace their several settlements upon their several claims being established either as preëmption or homesteads, according to law; and for the aggregate of the areas of the latter class of claims the said Vigil and St. Vrain, or their legal representatives, shall be entitled to locate a like quantity of public lands, not mineral, according to the lines of the public surveys, and not to exceed one hundred and sixty acres in one section.

"SEC. 2. *And be it further enacted*, That it shall be the duty of the general land office to cause the lines of the public surveys to be run in the regions where a proper location would place the said Vigil and St. Vrain claims, and that the expense of the same shall be paid out of any moneys in the treasury

not otherwise appropriated; yet, before the confirmation of the said act of June twenty-first, eighteen hundred and sixty, shall become legally effective, the said Vigil and St. Vrain, or their legal representatives, shall pay the cost of so much of said surveys as enures to their benefit respectively, and that all settlers of the said third class, whose claims may be adjusted as valid, shall have the right to enter their improvements by a strict compliance with the preëmption or homestead laws.

"SEC. 3. *And be it further enacted*, That upon the adjustment of the Vigil and St. Vrain claims according to the provisions of this act, it shall be the duty of the surveyor general of the district to furnish proper approved plats to said claimants, or their legal representatives, and so in like manner to said derivative claimants, which shall be evidence of title, the same to be done according to such instructions as may be given by the Commissioner of the general land office.

"SEC. 4. *And be it further enacted*, That immediately upon running the lines as provided in section second of this act, the surveyor general of said district shall notify the said Vigil and St. Vrain, or their agents or legal representatives, of the fact of such survey being made, and said claimants shall, within three months after notice of such survey, select and locate their said claims in accordance with such survey and the provisions of this act and of the act to which this is amendatory, so far as the same is not changed by this act, and shall within said time furnish the surveyor general with the description of such location, specifying the lines of the same. And the party failing to make such selection and location, in such manner and within such time, shall be deemed and held to have abandoned their claim, and their rights and equities under this act, and the act to which this is amendatory, shall cease and terminate.

"SEC. 5. *And be it further enacted*, That in case of the neglect or refusal of the said Vigil and St. Vrain, or either of them, to accept of the provisions of this act, and the act to which this is amendatory, and to locate their said claim, as provided therein, no suit shall be brought or proceedings insti-

tuted in any of the courts of the United States, by such party or by any one claiming through or under them, to establish or enforce said claims, or for any cause of action founded upon the same, after six months from the passage of this act."

The time fixed by § 1 of the last recited act for establishing the derivative claims was extended by a joint resolution of April 28, 1870, 16 Stat. 373, 663, by which it was directed that the act should be so construed "as to authorize the presentation of such derivative claims within one year from the completion and approval of the subdivisional surveys contemplated by said act of twenty-fifth February, eighteen hundred and sixty-nine."

In pursuance of the act of February 25, 1869, and within the time limited by the joint resolution of April 28, 1870, there were presented to Irving W. Stanton and Charles A. Cook, the register and receiver at Pueblo, Colorado, claims on behalf of about thirty-nine derivative claimants to lands within the limits of the Las Animas grant, covering in all more than $183{,}553\frac{85}{100}$ acres; among them was the claim of William Craig for 127,000 acres, and that of Thomas Leitensdorfer for about 16,000 acres, which were filed on the 23d of October, 1872. The register and receiver acted upon all the claims, rejecting that of Leitensdorfer and twenty-two others, amounting to more than $85{,}939\frac{32}{100}$ acres. They decided favorably, in whole or in part, on thirteen claims. To twelve of these claimants they allowed $24{,}362\frac{98}{100}$ acres; the remaining $73{,}251\frac{55}{100}$ acres were awarded to Craig. The decisions of these officers upon these claims bear date February 23, 1874, and were immediately reported to the General Land Office. Nineteen of the claimants, whose claims had been rejected, and among them Leitensdorfer, appealed from the decisions in favor of Craig and against themselves, respectively. The Commissioner of the General Land Office entertained the appeals, so far as to decide that an appeal would lie in such cases, and from that decision Craig appealed from the Commissioner of the General Land Office to the Secretary of the Interior. This appeal was entertained, and the Secretary of the Interior rendered a decision sustaining the authority of the Commissioner of the Gen-

eral Land Office to entertain and determine the appeals from the register and receiver.

About the 25th of May, 1875, Craig applied to the President for an order directing that the Surveyor General of Colorado be required to issue a plat of the survey of the land awarded to Craig by the decision of the register and receiver. Being advised by the Attorney General, to whom the matter was referred, that under the terms of the acts of Congress relating to the subject the decisions of the register and receiver were final, from which no appeal would lie to the Commissioner, 15 Opinions Attorneys General 94, the President, on March 2, 1877, made an order directing the Commissioner of the General Land Office to instruct the Surveyor General of Colorado to deliver to Craig an approved plat of the land adjudged to him by the register and receiver of the Pueblo land district, in the State of Colorado, dated February 23, 1874. The Commissioner of the General Land Office, on March 7, 1877, instructed the Surveyor General of Colorado to prepare a plat of the lands specified and awarded by the register and receiver to Craig.

Before that plat was delivered Leitensdorfer, on May 4, 1877, filed his bill in equity in the Circuit Court of the United States for the District of Colorado, against William L. Campbell, the Surveyor General of the United States for Colorado, and Craig. In this bill he set out the matters above stated, and in addition thereto alleged that his own title was derived by mesne conveyances from Eugene Leitensdorfer, to whom Vigil and St. Vrain had conveyed an undivided one-sixth of the entire grant to them, which would have amounted to about 682,724⅙ acres if the whole grant had been confirmed, but which he had reduced to twenty-five sections, amounting to about 16,000 acres, to correspond with the reduced grant as confirmed by act of Congress.

The bill further alleged that the reduced tract thus claimed by the complainant before the register and receiver was in or near the valleys of the Las Animas or Purgatoire River and tributaries, in Pueblo land district, Las Animas County, Colorado, naming and identifying certain sections and half

sections as composing it; and admitted that the claim of the complainant, as thus reduced, did not conflict on the ground with the derivative claim of Craig.

The bill further alleged that the complainant produced evidence before the register and receiver to establish, in addition to the preceding allegations of his bill, "the continuous inhabitancy and cultivation of his claim by himself since May, 1862, which inhabitancy and cultivation still continue."

The bill also alleged that the final delivery by the Surveyor General of the plat of survey of the derivative claims of Craig, as ordered by the President, would be merely a ministerial act of the Surveyor General, and therefore the subject of an injunction; that such plats, under § 3 of the act of February 25, 1869, could only issue after the final adjustment of the whole of said confirmation of twenty-two leagues, and of the several derivative claims constituting the same, and that said plats, when so furnished, would be evidence of title, and would divest the United States of the fee simple in favor of the derivative claimants receiving such plats; "that the plat ordered to be delivered by the Surveyor General to or for Craig would leave no part of said confirmation applicable to complainant's claim or the claims of the other derivative claimants whose appeals are now pending before the Commissioner, and would, in fact, preclude the Commissioner from considering the appeals of complainant and of the other derivative claimants; that complainant's claim is not in conflict on the ground with Craig's claim, but is many miles distant, and the mass of the derivative claims under Vigil and St. Vrain, though greatly exceeding the quantity confirmed, are competitors for area, but not for specific locations; that for these reasons the delivery of Craig's plat, or of the plat of any derivative claim whatever, before the final decision by the Commissioner and Secretary of the said appeals now pending before the Commissioner, and the final adjustment by them of the whole mass of said derivative claims, would be against equity and the rights of complainant and other appellants in said appeals, and would inflict on complainant and said appellants irreparable injury."

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The prayer of the bill was for a perpetual injunction to restrain the delivery of the plat and survey of the derivative claim of Craig "until the appeals of complainant and of the other derivative claimants under them, now pending before the Commissioner of the General Land Office, shall be tried and finally and adjudged on their merits, under the direction of the Secretary of the Interior, according to law, and until it shall appear by such final judgment that said Craig, or other derivative claimants under said Vigil and St. Vrain, or either, are entitled to plats as evidence of title;" and also for an injunction to the same effect in the mean time.

The bill also contained a general allegation to the effect that the register and receiver were corrupted by Craig, and fraudulently induced to make the award in his favor.

On the 21st of May, 1877, a temporary injunction was granted as prayed for, on certain conditions, one of which was, that the complainant, within thirty days, should "commence proceedings in the proper court of the District of Columbia, having for their object an order on the General Land Office to hear and determine the appeals mentioned and described in the said bill of complaint as having been taken by the said complainant from the decision of the register and receiver of the land office at Pueblo, in respect to the lands described in the said bill."

On the 25th of June, 1877, an affidavit was filed showing that, on the 19th of June, the complainant had caused to be filed in the Supreme Court of the District of Columbia, a petition and affidavit for a mandamus against the Commissioner of the General Land Office, praying for a writ commanding him to proceed to hear and determine the said appeals.

On July 13, 1877, the present cause was heard on a demurrer to the bill, and on a motion to dissolve the injunction, when an order was made dissolving the injunction and sustaining the demurrer, with leave to the complainant to file an amended and supplemental bill, which he accordingly did. That bill, filed on October 6, 1877, reciting all the matters contained in the original bill, alleged in addition that, in the Supreme

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Court of the District of Columbia, on July 3, 1877, the motion of the complainant for a rule on the Commissioner of the General Land Office to show cause why the writ of mandamus should not issue against him, to require him to proceed with the hearing of the appeals alleged to be pending before him, was denied by that court at special term, on the ground, among others, that no appeal lay to the Commissioner of the General Land Office from such decisions, and that he did not appeal from said judgment because he was advised by counsel that no appeal would lie from such a judgment.

The bill further alleged that, after the dissolution of the injunction, the Commissioner of the General Land Office delivered to Craig an approved plat of the survey of the lands according to the area allowed to him by the register and receiver at Pueblo.

The bill reiterated the charges of corruption and fraud as against Craig and the register and receiver in the original bill, and further showed, "that, for the reasons hereinbefore stated, said duplicate plats of defendant Craig are intrinsically illegal and void *ab initio*, and that Craig had, or has, no title to said lands, St. Vrain having sold his interest before Craig purchased; that the order of the President, which said plats are intended to enforce, is, also, for reasons hereinbefore stated, intrinsically illegal and void *ab initio*, and was granted under the erroneous belief by the President that no controversy existed respecting the quantity of land embraced in said plats; that said plats were issued in mistake of law and fact, and leave no land applicable to the derivative claims of your orator and the other said appellants before the Commissioner of the General Land Office, and, in fact, prevent him from trying their appeals now lawfully pending before him, and are in the nature of a cloud on the titles of your orator and the said appellants to their respective derivative claims; and that your orator fears said duplicate plats, if left uncancelled, would cause irreparable mischief to him and to all the other said appellants before the said Commissioner."

The prayer of the amended bill, therefore, was, that "the approved plats of the derivative claim of defendant, William

Craig, signed by defendant Campbell, on the 26th of May, 1877, be decreed void from the beginning, and that said defendant, William Craig, be forever enjoined from prosecuting any suit in law or equity on said approved plat or plats as evidence of title, or that Craig be adjudged as holding the same in trust for plaintiff and other derivative claimants, and that defendant, William Craig, and agents, and defendant, William L. Campbell, as United States Surveyor General of Colorado, and his successors in office, and all under them, be ordered, within a time to be limited by this court, to deliver the said plats to the court, and that the said plats be thereupon cancelled, and he prays for all other general and special relief applicable to the case."

To this amended and supplemental bill, Campbell and Craig filed separate demurrers. The demurrer of Campbell was sustained, and the bill as to him ordered to be dismissed. The demurrer of Craig was overruled, and thereupon, on the 7th of October, 1878, Craig filed his answer to the amended bill.

The answer of Craig denied the title of Leitensdorfer to any interest in the land, and asserted the title of Craig himself to the land awarded to him by the decision of the register and receiver; it denied all charges of fraud and corruption against them and himself; and claimed that the award and decision of the register and receiver, under the act of Congress of February 25, 1869, was final and conclusive, subject to no appeal to the Commissioner of the General Land Office, or to the Secretary of the Interior, and set up the decision and judgment of the Supreme Court of the District of Columbia, dismissing the application for a mandamus, as a conclusive judgment on the question.

A replication was filed to this answer, and the cause being put at issue a large amount of proof was taken, consisting of documentary evidence and the testimony of witnesses.

It further appeared that after the 4th of March, 1877, when a new administration came into office, an application was made to the Secretary of the Interior on behalf of the complainant, asking for a stay of proceedings under the order of the President, and that the matter might be reopened for hearing be-

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fore the Commissioner of the General Land Office on the appeal from the decision of the register and receiver. This application was referred to the Attorney General, who gave an opinion that the official acts of the officers of the preceding administration could not be reviewed by their successors in office. 15 Opinions Attorneys General, 208.

On the 8th of January, 1878, a patent was issued by the United States to William Craig, and to his heirs and assigns forever, for the land included within the approved plat, in conformity, as it recited, with § 2447 of the Revised Statutes of the United States, and with the stipulation that, in virtue of the provisions of that section, the patent "shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

On January 30, 1879, before final hearing, the complainant dismissed the bill and amended bill so far as by the prayer it was sought to hold the defendant Craig liable as trustee for the complainant of the title to the lands conveyed to him.

The opinion and decision of the register and receiver in favor of Craig's claim recited the grounds of the award as follows: "His claim does not rest wholly upon the shadowy foundation of uncertain and vague promises, but is backed by conveyances which remove all suspicion or doubt from his asserted rights, and in our opinion cannot be postponed to any other claim than those above recited. If his claim rested on promises to settle only, it might be said that the promises dated as far back as 1855, and the month of March of that year; that he went on the land promised; that he offered his resignation in the army in consequence of it; that it was not accepted; that in December, 1862, he was appointed agent for the grant by St. Vrain, and then again resigned, and was refused acceptance; that in the spring of 1863 he began the improvement of his land, finally got out of the army in 1864, and moved on the land, where he has since resided continuously, and has expended $200,000 in improvements thereon;

the patent deeds of St. Vrain showing the extent of his rights — deeds which appear to have been duly recorded soon after execution — thus preventing any one being deceived as to the property claimed by him."

The decision of the register and receiver against the claim of Leitensdorfer was based upon these grounds, viz.: that there was no sufficient proof of the paper title by which he claimed an undivided one-sixth of the original Mexican grant; that that paper title, even if proven, would not entitle him to anything as against actual settlers, but only to one-sixth of any surplus which might be ascertained after satisfying the claims of that class; and that Leitensdorfer was not entitled to claim as an actual settler, even supposing that he had taken possession of a particular location, for the reason that he did not show himself to have acquired that possessory interest from either of the original grantees.

The cause having proceeded to final hearing, a decree was entered July 2, 1880, whereby it was "ordered, adjudged and decreed that the decision or award of the register and receiver of the land described in the bill and pleadings of date the 23d of February, 1874, in favor of the defendant, William Craig, is fraudulent and void; and it is further ordered, adjudged and decreed that the patent for the said lands issued to defendant, William Craig, on the 8th day of January, 1878, be and it is hereby declared and decreed to be null and void; and that the approved plat or plats delivered to defendant, William Craig, as evidence of title to the land described in the bill, by William Campbell, Surveyor General, be and the same are hereby declared and decreed to be null and void." From that decree this appeal was prosecuted. Pending the appeal in this court, both parties having died, the cause was revived in the names of their respective personal representatives.

Mr. Benjamin F. Butler and *Mr. O. D. Barrett* for appellant cited: *Indianapolis Railroad* v. *Stephens*, 28 Ind. 429; *Atwater* v. *Schenck*, 9 Wis. 160; *Prieger* v. *Exchange Ins. Co.*, 6 Wis. 89; *Butterworth* v. *Hoe*, 112 U. S. 50; *United States*

Citations for Appellee.

v. *Schurz*, 102 U. S. 378; *Field* v. *Seabury*, 19 How. 333; *United States* v. *Throckmorton*, 98 U. S. 61, 70; *Barribeau* v. *Brant*, 17 How. 43; *Vattier* v. *Hinde*, 7 Pet. 252; *Squire* v. *Harder*, 1 Paige, 494 [*S. C.* 19 Am. Dec. 446]; *Learned* v. *Tritch*, 6 Colorado, 432; *Whiting* v. *Gould*, 2 Wis. 552; *Wright* v. *Ellison*, 1 Wall. 16; *United States* v. *Porcheman*, 7 Pet. 51; *United States* v. *Patterson*, 15 How. 10; *United States* v. *Sutter*, 21 How. 170; *Castro* v. *Hendricks*, 23 How. 438; *Leitensdorfer* v. *Webb*, 20 How. 176; *Marye* v. *Parsons*, 114 U. S. 325; *Vernon* v. *Keyes*, 12 East, 632; *Johnson* v. *Towsley*, 13 Wall. 72; *Van Wyck* v. *Knevals*, 106 U. S. 360; *Moore* v. *Robbins*, 96 U. S. 530; *Lytle* v. *Arkansas*, 9 How. 314; *Cunningham* v. *Ashley*, 14 How. 377; *Barnard* v. *Ashley*, 18 How. 43; *Newhall* v. *Sanger*, 92 U. S. 761; *Vance* v. *Burbank*, 101 U. S. 514; *United States* v. *Stone*, 2 Wall. 525, 536; *United States* v. *Minor*, 114 U. S. 233; *United States* v. *Hughes*, 11 How. 552; *Hughes* v. *United States*, 4 Wall. 232; *Silver* v. *Ladd*, 7 Wall. 219; *Carroll* v. *Safford*, 3 How. 441; *Steel* v. *Smelting Co.*, 106 U. S. 447.

Mr. Robert H. Bradford and *Mr. Charles W. Hornor* for appellee cited: *Ober* v. *Gallagher*, 93 U. S. 199; *Ward* v. *Todd*, 103 U. S. 327; *McClung* v. *Silliman*, 6 Wheat. 598; *Bagnell* v. *Broderick*, 13 Pet. 436; *United States* v. *Stone*, 2 Wall. 525; *Johnson* v. *Towsley*, 13 Wall. 72; *Warren* v. *Van Brunt*, 19 Wall. 646; *Magwire* v. *Tyler*, 1 Black, 195; *Maguire* v. *Tyler*, 8 Wall. 650; *Snyder* v. *Sickles*, 98 U. S. 203; *Finley* v. *Williams*, 9 Cranch, 164; *McArthur* v. *Browder*, 4 Wheat. 488; *Rector* v. *Gibbon*, 111 U. S. 276; *Menard* v. *Massey*, 8 How. 293; *Commissioner* v. *Whitely*, 4 Wall. 522; *Gaines* v. *Thompson*, 7 Wall. 347; *Shepley* v. *Cowan*, 91 U. S. 330; *Moore* v. *Robbins*, 96 U. S. 530; *Jones* v. *Bolles*, 9 Wall. 364; *Blodget* v. *Blodget*, 42 How. Pr. (N. Y.) 19; *Doe* v. *Doe*, 37 N. H. 268; *Sossaman* v. *Powell*, 21 Texas, 664; *Low* v. *Staples*, 2 Nevada, 209; *Holland* v. *Challen*, 110 U. S. 15; *Brenner* v. *Bigelow*, 8 Kansas, 496; *Hendricks* v. *Montague*, 17 Ch. Div. 638; *Barron* v. *Robbins*, 22 Mich. 35; *Cunningham* v. *Ashley*, 14 How. 377; *Barnard*

v. *Ashley*, 18 How. 43; *Field* v. *Seabury*, 19 How. 323; *Orton* v. *Smith*, 18 How. 263; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Chapman* v. *Brewer*, 114 U. S. 158; *Livingston* v. *Woodworth*, 15 How. 546; *Yeaton* v. *Lynn*, 5 Pet. 223; *Society &c.* v. *Pawlet*, 4 Pet. 480; *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386; *United States* v. *Percheman*, 7 Pet. 51; *United States* v. *Sutter*, 21 How. 170; *Morehouse* v. *Phelps*, 21 How. 294; *Landes* v. *Brant*, 10 How. 348; *Hornsby* v. *United States*, 10 Wall. 224; *Chouteau* v. *United States*, 9 Pet. 147; *Ex parte Railroad Co.*, 95 U. S. 221; *Jones* v. *Axen*, 1 Ld. Raym. 119; *Railroad Co.* v. *Smith*, 9 Wall. 95; *Jackson* v. *Clark*, 1 Pet. 628; *Ruggles* v. *Illinois*, 108 U. S. 526; *Litchfield* v. *Register*, 9 Wall. 575; *United States* v. *Ferreira*, 13 How. 40; *League* v. *De Young*, 11 How. 185; *Decatur* v. *Paulding*, 14 Pet. 497; *Polk* v. *Wendall*, 9 Cranch, 87; *Doe* v. *Winn*, 11 Wheat. 380.

Mr. John Paul Jones, *Mr. F. P. Dewees*, and *Mr. D. W. Voorhees*, by leave of court filed a brief on behalf of Mrs. Leann S. King, the purchaser of Leitensdorfer's interest at a sheriff's sale, citing: *Conard* v. *Nicoll*, 4 Pet. 291; *United States* v. *Arredondo*, 6 Pet. 691; *Weitzell* v. *Fry*, 4 Dall. 218; *Leitensdorfer* v. *Campbell*, 5 Dillon, 422; *Johnson* v. *Towsley*, 13 Wall. 872; *Moore* v. *Robbins*, 96 U. S. 530; *Shepley* v. *Cowan*, 91 U. S. 330; *Barnard* v. *Ashley*, 18 How. 43; *United States* v. *Ferreira*, 13 How. 40; *Zellner's Case*, 9 Wall. 244; *Atocha's Case*, 17 Wall. 439; *Butterworth* v. *Hoe*, 112 U. S. 50; *United States* v. *Percheman*, 7 Pet. 51; *United States* v. *Sutter*, 21 How. 170; *Castro* v. *Hendricks*, 23 How. 438; *Mullan* v. *United States*, 118 U. S. 271; *Doe* v. *Winn*, 11 Wheat. 380; *Polk* v. *Wendall*, 9 Cranch, 87.

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

By reference to the provisions of the act of the 21st of June, 1860, 12 Stat. 71, and of the act of the 25th of February, 1869, 15 Stat. 275, it will appear that after the survey of the exte-

rior lines of the Las Animas grant, the claims first to be provided for were those of all actual settlers holding possession under "titles or promises to settle" made by Vigil and St. Vrain, or their legal representatives, prior to the passage of the act. It was required that those claims, within one year from the passage of the act, should be established to the satisfaction of the register and receiver of the proper land district, when they were to be adjusted according to the subdivisional lines of survey so as to include the lands so settled upon or purchased. It follows, of course, that these were to be surveys of distinct locations, which might be widely separated from each other in different parts of the original Mexican grant, but, of course, within its exterior limits. The grant itself, however, having been confirmed only to the extent of twenty-two square leagues, it also follows that these surveys in their aggregate areas were not to exceed that quantity. If, however, there were other actual settlers within the limits of the original grant to Vigil and St. Vrain, not claiming title from or under them, but merely by reason of their actual possession, their several settlements might be established either as preëmption rights or homesteads, according to law, but the quantities were not to be deducted from the twenty-two square leagues. If any part of this quantity of twenty-two square leagues should remain unexhausted by the claims of actual settlers holding possession under "titles or promises to settle" made by Vigil and St. Vrain, and, therefore, called in this record "derivative claims," any such surplus was to be located in two equal tracts, each of square form, in any part of the tract covered by the original grant, for the benefit of Vigil and St. Vrain, and their assigns or representatives.

It is conceded by all parties to this record, that, in point of fact, the claims of the first class, including Craig's, being those of actual settlers holding possession under titles or promises to settle made by Vigil and St. Vrain, exhausted the whole quantity of the grant as confirmed and reduced to twenty-two square leagues. The controversy now is, therefore, confined to the conflicting claims of this class.

It is further to be observed that the complainant Leitens-

dorfer lays no claim to any part of the lands embraced in the survey and plat, and covered by the patent issued to Craig; he does not allege or complain that any lands belonging in equity to him were awarded to another; he admits that he was not an actual settler upon, and held no possession of, any part of that tract. On the contrary, the possession which he does allege, and the title which he asserts, have reference to another and distinct tract of land, which, as he alleges, lies within the exterior boundaries of the original Las Animas grant, but several miles distant from any part of the tract allotted and patented to Craig. He, therefore, does not claim, as a part of his case in equity, that Craig holds the legal title to any lands in trust for him. The prayer of the amended bill, so far as it asserted any right to such relief, was expressly withdrawn, and has been abandoned by counsel in argument.

The case presented, therefore, by the complainant is not one of that class, of which many instances may be found in the reports of the decisions of this court, where a defendant holding the legal title under a patent from the United States has been declared to hold that legal title merely as trustee for a complainant with a superior equity, and decreed to hold for or to convey to the true owner. The right of the complainant in this case to relief is supposed to rest upon different grounds. The injury which he alleges is, that Craig wrongfully obtained from the register and receiver an award of lands to which he had no rightful claim, whereby the whole quantity of the confirmed grant has been reduced and absorbed, so as to exclude the complainant from that share to which he was entitled. The wrong of which he complains is, that Craig fraudulently and corruptly procured the award and decision of the register and receiver in his own behalf, and against Leitensdorfer, and that the latter has been illegally cut off from his right to appeal from the decision of the register and receiver in favor of Craig and against himself, by the illegal and unauthorized issue and delivery to Craig by the Surveyor General of the approved plat of the survey of the lands awarded to him, confirmed by the subsequent issue of a formal patent, relinquishing the title of the United States to the same

tract. This is a short, but accurate, statement of the complainant's case as he presents it for examination and analysis, and for which we are to seek a rule of decision.

The fraud and corruption alleged against Craig, and which, for the purpose of the case, we are at present to assume to have been proved, as it was in fact found by the decree appealed from, do not necessarily vitiate Craig's claim of title, nor establish that of Leitensdorfer. The charge is that Craig bribed the register and receiver to make the award which they did in his favor. It may, nevertheless, be true that the award ought to so have been made upon the merits. So the register and receiver may have been right in rejecting the claim of Leitensdorfer. This possibility is tacitly admitted, for the bill does not ask a declaration and decree that Craig has no valid claim, nor a decree establishing the claim of Leitensdorfer; and it is plainly not within the jurisdiction of the Circuit Court to grant any such relief, even if it were asked.

The ascertainment of what persons came within the description of actual settlers under titles or promises to settle upon the Las Animas grant, and the proper limits of their actual settlement and possession, and the adjustment thereof by suitable surveys, were entrusted by the acts of Congress on that subject in the first instance to the determination of the register and receiver of the proper land district, and in case by law an appeal lies from their decision, then to those superior officers in the Land Office and the Department of the Interior, to whom such an appeal might be taken. The adjustment of these claims and their definition by the prescribed surveys and plats, establishing them in their appropriate locations within the limits of the original grant, and all questions of possession, of boundary, and of conflict, constitute a part of the administration of the law confided to that branch of the Executive Department. The free course of that administration within the limits of the law cannot be interrupted or interfered with by the judicial power. Undoubtedly, private rights of great value and importance may be involved, and the exercise of executive discretion may require decisions in favor of some and against others in a conflict of interests and

claims. But, as all these claims and titles and interests arise under the law which refers their settlement to executive officers, that reference is itself a condition and qualification of the right, and the latter is altogether subject to its consequences. When the Department has exercised its discretion and exhausted its function, the legal and equitable effect of what it has done or failed to do may be drawn in question, when necessary to the determination of conflicting rights between private parties, in a judicial proceeding; but as long as the alleged rights, which are the subject of contention, are in the course of adjudication by the special tribunal, to which they are referred for settlement, the function of that tribunal cannot be displaced by courts of justice. And what the complainant in this case really asks for as his ultimate relief is, that the way may be cleared for him to the exercise of the right of appeal, which he claims, from the adverse decision of the register and receiver, to the Commissioner of the General Land Office, by the removal of those obstructions which he alleges have been illegally interposed against him by the issue of the approved survey and plat by the Surveyor General of Colorado upon the order of the President, in disregard and denial of his right of appeal, and the subsequent issue of the patent, in consequence of which the Commissioner of the General Land Office and the Secretary of the Interior have decided that they are precluded from now entertaining the complainant's appeal. It is supposed that these obstructions are removed by the decree of the Circuit Court, which adjudges that the decision and award of the register and receiver in favor of Craig is fraudulent and void, and annuls and declares void the approved plat delivered to Craig by the Surveyor General of Colorado, and the patent issued to him for the same lands. The decree seeks to destroy the foundation and muniments of Craig's title to the particular lands described in the plat and patent, but it does not award those lands to any one else, and it does not assume to establish the title of Leitensdorfer to those which he claims. What is the effect of this decree? In any action brought by a stranger to this record against Craig for the recovery of the lands covered by his patent, this

decree could not operate as evidence against him; it can only be effective by way of estoppel, and a stranger to the record cannot avail himself of an estoppel by which he is not himself bound. Nor can the decree be supposed to operate upon the record of the survey and plat and of the decision of the register and receiver as they remain recorded in the Land Department, so as to render them null and void as if they had never existed, and bind and oblige the officers of the Department of the Interior to proceed in the administration of the law with reference to these lands as if nothing of that sort had taken place. The decree operates only *in personam* and *inter partes*. The courts could have no control of the public records of the Land Department, nor supervision over the conduct of its officers, otherwise than as it can be exercised in appropriate cases by the writ of mandamus; besides which, to annul the decision of the register and receiver, if that were possible, would be to destroy the foundation of the complainant's appeal and restore the matter to the condition in which it was when all the claims were pending before the register and receiver. This result is not within the scope of the complainant's bill.

If, on the other hand, the operation of the decree is limited so as to cancel and annul the approved plat delivered by the Surveyor General, and the patent issued thereupon, leaving the decision of the register and receiver to stand as the subject of an appeal to the Commissioner of the General Land Office, supposed to be still pending, the case of the complainant for equitable interference does not seem to be bettered. For, in that event, what power has the Circuit Court, sitting in Colorado as a court of equity, to enforce and make effective the complainant's supposed right of appeal? The decree does not operate upon the officers whose action is invoked as necessary to secure the complainant's alleged rights. The process of a court of equity is not appropriate to the exigency, and the Circuit Court of the United States in Colorado has no jurisdiction, either at law or in equity, over the officers of the Land Department to compel them to entertain the appeal. Neither is there reason to suppose that the Land Department

will on the basis of such a decree, *sua sponte*, proceed with the appeal as pending, or take such action on the application of the complainant.

The ground on which Mr. Schurz, as Secretary of the Interior, upon the advice of the Attorney General, Mr. Devens, declined to reopen and rehear the case was that the matter had been finally acted upon by his predecessor in office. 15 Opinions Attorneys General, 208. That fact remains, notwithstanding a decree in this case declaring the survey and plat and patent to Craig to be illegal and invalid. Such a declaration and decree operate only in the case and between the parties to this record. It does not operate, as has been already stated, upon the public records of the Land Department in which they are recorded, nor does it bind and oblige the executive officers of the government in control of that department. Such a decree, therefore, would grant to the complainant no practical relief; it would be vain and nugatory.

The ground which it is claimed in argument justifies such a decree is, that, pending Leitensdorfer's appeal to the Commissioner of the General Land Office, the delivery by the Surveyor General of the approved survey and plat, under the order of the President, was illegal and void, and that by reason thereof the subsequent issue of the patent could not operate as a confirmation or conveyance of the title. But if the order of the President, interrupting the course of the appeal in the Land Department, and the action of the officers of that department in compliance with it, were illegal and therefore void, they were and are of no force and efficacy, either at law or in equity, and are not binding on any succeeding incumbents of the offices of Commissioner of the General Land Office or Secretary of the Interior. It follows that the case of the complainant, based upon his right to prosecute his appeal, is as complete without such a decree as with it. If the duty of the Commissioner of the General Land Office to entertain and determine that appeal exists as contended, it is a legal duty. That duty is to take up, consider, and adjudge the rights of the parties in interest, and the entertaining of the appeal is a purely ministerial act, although the questions

to be considered in the course of that appeal are to be resolved by the exercise of official discretion and judgment. Nevertheless, it is quite clear, as it has been oftentimes decided, that the duty of entering upon their consideration and proceeding to their determination, is strictly ministerial. The remedy in such cases is at law, by means of a writ of mandamus, and not in equity. *Ex parte Parker*, 120 U. S. 737; *Ex parte Brown*, 116 U. S. 401. If, to such a writ, issued by a competent court, the officer should make return that he was precluded from entertaining the appeal by reason of the prior action of a predecessor in office, under the order of the President, the question of the sufficiency of that return would be presented to the court issuing the writ, and would involve necessarily the adjudication of the questions mooted in this case. If such a return should, in such a tribunal, be adjudged to be sufficient, then the complainant would be without remedy, for the right which he claims, if it exists, is a legal right cognizable in courts of law, and not a right resting upon any equity within the jurisdiction of chancery courts. If, on the other hand, such a return in such a proceeding should be adjudged to be insufficient, then the complainant would have the remedy which he is here seeking, by a direct and effective process binding upon the parties whose conduct he is seeking to control. In either alternative, therefore, it is equally conclusive that the complainant cannot obtain, in this cause, the relief which he seeks, and which alone is adequate to the redress of the wrong of which he complains.

This conclusion is not disturbed or affected by the assumption that the decision and award of the register and receiver was obtained by corrupt and fraudulent practices for which Craig is responsible. The right of appeal from that decision to the Commissioner of the General Land Office, if it exists in any case, is not hindered by the fraudulent character of the decision appealed from, and the appeal itself is the mode pointed out by law for the correction of any error that may be shown in the decision complained of, whether that error has been produced by the practice of fraud and corruption, or was merely an honest mistake. The proof of such fraud

and corruption does not, as has been already stated, demonstrate error. The decision may be right, notwithstanding the fraud, and on the appeal Craig's title, as it now stands upon the approved survey and plat and the patent, may be adjudged to be valid, and any error in it we must assume will be corrected, whether fraudulent or innocent. The question of fraud, therefore, alleged against Craig and the register and receiver, in view of the relief asked, is immaterial.

There is an alternative in which it might be supposed that the question of fraud in procuring the decision of the register and receiver, and thereby obtaining the muniments of title on which Craig's claim now rests, might become material for determination in a judicial cause. That alternative is the supposition, contrary to that on which the complainant rests his case, that the decision of the register and receiver, the issue of the approved survey and plat, and of the patent based thereon, are final and conclusive upon the Department of the Interior, and not subject to the appeal taken to the Commissioner of the General Land Office. It may be asked whether such a determination of inferior officers of the Land Department, involving private rights and interests of great magnitude and value, infected with fraud, is to be protected from attack by judicial process. We are told that "equity has always had jurisdiction of fraud, misrepresentation, and concealment, and it does not depend upon discovery." *Jones* v. *Bolles*, 9 Wall. 364, 369. That equity will interfere by a proper proceeding where the executive power has exhausted itself. *Commissioner* v. *Whiteley*, 4 Wall. 522; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *Samson* v. *Smiley*, 13 Wall. 91; *Johnson* v. *Towsley*, 13 Wall. 72; *Warren* v. *Van Brunt*, 19 Wall. 646. That "the officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands with a view to secure rights of preëmption. If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a

controversy arises between private parties founded upon their decisions." *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S. 530. This doctrine is undoubtedly true, but its limitation is found in the statement that such rulings "may be reviewed and annulled by the courts when a controversy arises between parties founded upon their decisions." The jurisdiction to determine such questions does not arise in the courts of the United States by virtue of any power of supervision given to them whereby they have a right to control, to correct, to reverse, and to dictate the procedure and action of executive officers within the scope of the duties confided to them by law. No such power of revision is given, and none such can be exercised. Such a function is not judicial; it is administrative, executive, and political in its nature. The abstract right to interfere in such cases has been uniformly denied by judicial tribunals, as breaking down the distinction so important and well defined in our system between the several, separate, and independent branches of the government; and where the character of the interference sought falls within that designation, the application for it has been uniformly denied.

The case is different in a litigation between parties involving a contest of conflicting claims, where under some known head of jurisdiction definite relief or redress may be conclusively administered in favor of one and against the other party. In such cases, the right at law or in equity belongs to one or the other of the contestants; to which of the two it should be awarded is the judicial question involved. The solution of that question may depend upon the effect to be given, either at law or in equity, to some action or determination of the executive officers charged in the first instance with duties of administration in connection with the subject of the litigation, such as, for example, the officers of the Land Department in the administration of the system of law in reference to the public domain of the United States. It is in such cases that the question has most frequently arisen. In those cases it has, indeed, been held, as claimed, that if the executive officer has made a mistake of law in his administration; if he has exer-

cised power without authority of law; if his determination has been procured by the fraudulent practices of one party upon the officer or upon the opposite party; or if the officer has himself fraudulently decided in favor of one and against the other, a court of justice will give effect to the rights of the parties as between themselves, notwithstanding the errors and the frauds alleged and shown. The principle is that "the decision of the officers of the Land Department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and, in cases where it is clear that those officers have by a mistake of the law given to one man the land which on the undisputed facts belonged to another, to give appropriate relief." *Moore* v. *Robbins*, 96 U. S. 530, 535; *Shepley* v. *Cowan*, 91 U. S. 330; *Johnson* v. *Towsley*, 13 Wall. 72; *Marquez* v. *Frisbie*, 101 U. S. 473; *Vance* v. *Burbank*, 101 U. S. 514; *Quinby* v. *Conlan*, 104 U. S. 420, 425; *White* v. *Cannon*, 6 Wall. 443; *Silver* v. *Ladd*, 7 Wall. 219, 228.

In *Smelting Co.* v. *Kemp*, 104 U. S. 636, 647, it was said: "If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands."

And in *Silver* v. *Ladd*, 7 Wall. 219, 228, the doctrine was

stated in these terms: "The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may be well doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title which has passed from the United States to the defendant enured in equity to the benefit of the plaintiff; and a court of chancery gives effect to this equity, according to its forms, in several ways."

But if the court, by reason of other circumstances, is powerless to adjust and adjudge with final and conclusive effect the opposing claims of the litigating parties, so as to award to one what has been wrongfully given to another, then the mere circumstance that the official act of the executive authority is challenged for error of law or for fraud does not and cannot constitute the ground of an independent jurisdiction. It is only as necessarily incident to the proper decision of a case at law or in equity between parties regularly in court for a determination of their rights, as between themselves, that such questions can be discussed or decided. Where the whole force of the judgment is spent upon a mere declaration that the act in question is void for want of authority, or voidable by reason of being infected with fraud, and it cannot consistently with known principles of law or equity go further by changing the relations between the parties to the suit towards each other, or towards the subject-matter of the litigation, the case is not judicial. This is precisely the present case. Here a declaration by a decree that the decision of the register and receiver was fraudulent, and therefore voidable; that the action of the President in ordering the issue of the approved survey and plat by the Surveyor General of Colorado, and its delivery in pursuance thereof, and the subsequent issue of the patent to Craig, were without warrant of law, and therefore void absolutely, does not decide the controversy raised by Leitensdorfer, nor settle and adjudge the rights of any of the parties thereto. Nor does it, as we have already shown, remove any obstacles

which have been wrongfully and unjustly interposed by the defendant to the prosecution in another forum of the rights which the complainant seeks to recover. It is entirely inefficacious for any such result, because, as already intimated, if the acts complained of are, as complainant contends, void as being without authority of law, then they can have no legal effect whatever, and cannot be set up by the officers of the Department of the Interior, as reasons for refusing to entertain and determine the appeals of Leitensdorfer from the decision of the register and receiver to the Commissioner of the General Land Office. If, in point of fact, such a right of appeal is secured to him by the law, and the officer whose duty it is to hear and determine it refuses without just reason so to do, the proper remedy is by a writ of mandamus, and not by a bill in equity.

But it is shown in this record that Leitensdorfer, in pursuance of an interlocutory order of the Circuit Court, and as a condition on which the original injunction was granted, in June, 1877, made his application to the Supreme Court of the District of Columbia for a mandamus against the Commissioner of the General Land Office, to require him to proceed with the hearing of the appeals alleged to be pending before him, and that his application was denied by that court; and he alleges that he did not appeal from that judgment, because he was advised by counsel that no appeal would lie from such a judgment; but this is not sufficient to confer jurisdiction upon a court of equity. We are not called upon in this cause to decide whether the judgment of the Supreme Court of the District of Columbia at special term is or is not erroneous, nor whether an appeal would lie from it, nor whether by law Leitensdorfer is entitled to be heard before the Commissioner of the General Land Office upon his appeal from the decision of the register and receiver. What we do say, and all we say, is that if he is entitled to such an appeal his remedy is not by a bill in equity.

For these reasons the decree of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the bill; and it is so ordered.

STATE OF MISSOURI, *ex rel.* HARSHMAN *v.* WINTERBOTTOM.

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

Submitted October 18, 1887. — Decided October 31, 1887.

A statute of Missouri authorized county collectors to collect county taxes, and required them to receive in payment thereof warrants issued by the county when presented by the legal holder. A, a holder of two county warrants, presented them to the treasurer for payment, and payment was refused, because there was no money in the treasury. A brought suit against the collector and his official bondsmen, to collect the amount due on these warrants, alleging that the collector was authorized by law to receive warrants in payment of taxes only from the holder in payment of his own taxes; that this provision had been disregarded by the collector in receiving warrants from persons who were not legal holders, entitled to use them; that all the tax-payers had thus made payments of taxes and received acquittances without the actual payment of money from 1879 to 1881; and that the collector had once in each month during that period settled with the county court, and his course in this respect had been ratified and approved. The defendants demurred. The demurrer is sustained by this court, (1) because it appeared that there was no contract relation between A and the collector on which he had a right to bring the suit; and (2) because it appeared that the proper county officials had settled with the collector, and ratified his acts, and discharged him from any liability which might have existed by reason of them.

This was an action brought in the Circuit Court of the United States for the Eastern District of Missouri against John Winterbottom, as principal, and the other defendants as sureties, on a bond given by Winterbottom to the State of Missouri as collector of the revenue of the county of Knox in said State. No copy of the bond is found in the record, but the allegation of the petition in regard to the substance of it was, "that on the 30th day of December, 1878, said Winterbottom, as principal, and the other defendants, as sureties, executed a bond, whereby they acknowledged themselves to be held and firmly bound unto the State of Missouri in the sum of one hundred thousand dollars, for the payment of which

they bound themselves, their heirs, executors, and administrators; that said bond was conditioned that said Winterbottom should faithfully and punctually collect and pay over all state, county, and other revenue for two years next ensuing the first day of March, 1879, and should in all things faithfully perform all the duties of the said office of collector according to law, and that said bond was, on the day last aforesaid, approved by the said county court."

The petition also declared "that by law it was the duty of said Winterbottom, as such collector, to collect all county taxes of said county in money, except that he was authorized and required to receive any county warrants issued by said county, when presented to him by the legal holder thereof, in payment of any county tax existing against said holder and accruing to said county; that he was not required or authorized to receive any such warrant from any one other than the legal holder thereof, and not from such holder except in payment of a county tax assessed against him; that the legal holder of a county warrant is the person to whom the same is issued as payee, or to whom the same has been transferred by one or more assignments in full; that by law all county warrants must be made payable to a person therein named, and no county warrant can be made payable to bearer, and any county warrant payable to bearer is null and void."

The petition also alleged that Harshman, for whose use the action was brought, was the owner of two county warrants, one for the sum of $3315.05 and the other for the sum of $6821.74, with interest, which he had presented to the treasurer of said county for payment, and it was refused because there was no money in the treasury out of which they could be paid. This fact was certified on the back of the warrants, which the treasurer entered in his registry of warrants as required by the statute of Missouri. This occurred on the 18th day of March, 1879, and the petition filed June 13, 1883, alleged that no part of said warrants had been paid though demand had been made for said payment. It was then alleged that Winterbottom, intending to prevent any money coming into the treasury of the county out of which these warrants could be paid, had, in the

collection of the taxes, received other county warrants in payment, and had thus collected and given receipts to all the tax-payers for their taxes.

This action of Winterbottom, he alleged, was an unlawful violation of his duty as collector of the county and a breach of his official bond. He then described with more minuteness the particulars in which this conduct was a violation of his official duty, alleging that by the law the collector had no authority to receive any warrant in payment of taxes which was not originally issued to the man who offered it in such payment, or was regularly assigned to him, and that even such holder could only use it to pay his own taxes. The petition alleged a disregard of this provision of the law by the collector, who "did, during his said term of office, unlawfully and wrongfully receive from divers and sundry persons, in payment of taxes of said county, divers and sundry warrants of said county, the said persons not being the legal holders thereof, because the said warrants were in no case payable to such persons, and were in no case transferred to such persons by assignment in full, and said persons, not being entitled to pay the same in for taxes, because no taxes were assessed or existing against them; that said Winterbottom, upon receiving such warrants, gave receipts discharging from further payment the persons against whom said taxes were so assessed and existing, to an amount equal in each case to the amount of warrants so received; that from the 18th day of March, 1879, to the 1st day of March, 1881, said Winterbottom collected all the county taxes of and in said county in warrants as aforesaid, and not otherwise; that all the tax-payers of said county from whom any county taxes were due during said period have received from said Winterbottom full acquittances without the payment of any money, and without any payment except in warrants as aforesaid."

The petition then stated "that the said Winterbottom, as required by law, once in each month during the said period, made settlements to the clerk of said county court of the county taxes so collected by him, and delivered to the treasurer of said county the said warrants so received as aforesaid;

Citations for Plaintiff in Error.

that the said Winterbottom, as such collector, and the said treasurer, at various times during the years 1879, 1880, and 1881, made settlements of their official accounts, as required by law, with the said county court, and the said treasurer exhibited to the said court, and filed with the clerk of said court, all the county warrants so received by the said collector, and by him delivered to the said treasurer, and the said county court accepted and approved the settlements of the said collector and the said treasurer, and approved the acts of the said collector in receiving warrants in payment of taxes, as aforesaid, and ratified and confirmed the release and discharge of said tax-payers from payment of their taxes, as aforesaid, so that the same cannot again be demanded of them."

To this petition there was a demurrer, which being sustained by the Circuit Court, judgment was rendered for the defendants.

The assignments of error related to this action of the court in sustaining the demurrer.

Mr. T. J. Skinker for plaintiff in error cited: *United States* v. *Clark County*, 96 U. S. 211; *Knox County Court* v. *Harshman*, 109 U. S. 229; *Edwards* v. *Kearzey*, 96 U. S. 595; *Balls County Court* v. *United States*, 105 U. S. 733; *United States* v. *Lincoln County*, 5 Dillon, 184; *Tracy* v. *Swartwout*, 10 Pet. 80; *Steines* v. *Franklin County*, 48 Missouri, 167; *Amy* v. *Supervisors*, 11 Wall. 136; *McCutchen* v. *Windsor*, 55 Missouri, 149; *Schoettgen* v. *Wilson*, 48 Missouri, 253; *Dritt* v. *Snodgrass*, 66 Missouri, 286; *Lampert* v. *Laclede Gas Light Co.*, 14 Missouri App. 376; *Jenks* v. *Fassett*, 65 Missouri, 418; *Wilson* v. *The Mayor*, 1 Denio, 595 [*S. C.* 43 Am. Dec. 719]; *Clark* v. *Miller*, 54 N. Y. 528; *Raynsford* v. *Phelps*, 43 Mich. 342; *Wasson* v. *Mitchell*, 18 Iowa, 153; *Pickering* v. *James*, L. R. 8 C. P. 489; *Hover* v. *Barkhoof*, 44 N. Y. 113; *Robinson* v. *Chamberlain*, 34 N. Y. 389 [*S. C.* 90 Am. Dec. 713]; *Nowell* v. *Wright*, 3 Allen, 166 [*S. C.* 80 Am. Dec. 62]; *Moulton* v. *Jose*, 25 Maine, 76; *Harrington* v. *Ward*, 9 Mass. 251; *Dilchee* v. *Raap*, 73 Ill. 266; *State* v. *Shacklett*, 37 Missouri, 280; *State* v. *Powell*, 44 Missouri, 436; *State* v. *Davis*, 35 Missouri, 406;

Citations for Defendants in Error.

Cummings v. *St. Louis*, 90 Missouri, 259; *Water Commissioners* v. *East Saginaw*, 33 Mich. 164; *Newmeyer* v. *Railroad Co.*, 52 Missouri, 81; *Willard* v. *Comstock*, 58 Wis. 565; *Commissioners* v. *McClintock*, 51 Ind. 325; *Mayor* v. *Gill*, 31 Maryland, 375; *Page* v. *Allen*, 58 Penn. St. 338; *United States* v. *Morgan*, 11 How. 154; *Olmstead* v. *Brush*, 27 Conn. 530; *Taylor* v. *Mygatt*, 26 Conn. 184; *Paul* v. *Slason*, 22 Vt. 231 [*S. C.* 54 Am. Dec. 75]; *Parker* v. *Kett*, 12 Mod. 472; *Alexander* v. *Helber*, 35 Missouri, 334; *Doolittle* v. *McCullough*, 7 Ohio St. 299; *Pierce* v. *Benjamin*, 14 Pick. 356 [*S. C.* 25 Am. Dec. 396]; *Cressey* v. *Parks*, 76 Maine, 532; *Howard* v. *Cooper*, 45 N. H. 339; *Felton* v. *Fuller*, 35 N. H. 229; *Kaley* v. *Shed*, 10 Met. 317; *Baldwin* v. *Porter*, 12 Conn. 484; *Curtis* v. *Ward*, 20 Conn. 207; *Hopple* v. *Higbee*, 23 N. J. L. (3 Zabr.) 342; *Mountford* v. *Gibson*, 4 East, 441; *Butts* v. *Edwards*, 2 Denio, 164; *Mayo* v. *Springfield*, 138 Mass. 70.

Mr. John W. Dryden and *Mr. Clinton Rowell* for defendants in error cited: *Harrington* v. *Ward*, 9 Mass. 251; *Travellers' Ins. Co.* v. *Harris*, 89 Ind. 363; *Dehn* v. *Heckman*, 12 Ohio St. 181; *Ware* v. *Brown*, 2 Bond, 267; *Terrell* v. *Andrew County*, 44 Missouri, 309; *State* v. *Todd*, 57 Missouri, 217; *Kahl* v. *Love*, 37 N. J. L. 5; *Strong* v. *Campbell*, 11 Barb. 135; *Fish* v. *Kelly*, 17 C. B. (N. S.) 194; *Savings Bank* v. *Ward*, 100 U. S. 195; *Davis* v. *Bader*, 54 Missouri, 168; *Logan* v. *Barton County*, 63 Missouri, 336; *People* v. *Ingersoll*, 58 N. Y. 1; *King of Spain* v. *Oliver*, 1 Pet. C. C. 276; *Dale* v. *Grant*, 34 N. J. L. 142; *Anthony* v. *Slaid*, 11 Met. 290; *Cunningham* v. *Brown*, 18 Vt. 123 [*S. C.* 46 Am. Dec. 140]; *Rockingham Ins. Co.* v. *Bosher*, 39 Maine, 253 [*S. C.* 63 Am. Dec. 618]; *Conn. Mut. Life Ins. Co.* v. *New York & New Haven Railroad*, 25 Conn. 265 [*S. C.* 65 Am. Dec. 571]; *Smith* v. *Hurd*, 12 Met. 371 [*S. C.* 46 Am. Dec. 690]; *Smith* v. *Poor*, 40 Maine, 415 [*S. C.* 63 Am. Dec. 672]; *Hersey* v. *Veazie*, 24 Maine, 9 [*S. C.* 41 Am. Dec. 364]; *Railroad Co.* v. *Railroad Co.*, 54 Maine, 173; *Abbott* v. *Merriam*, 8 Cush. 588; *Memphis* v. *Dean*, 8 Wall. 64; *Brewer* v. *Boston Theatre Co.*, 104 Mass. 378; *Greaves* v. *Gouge*, 69 N. Y. 154; *Wilkie* v. *Rochester &*

State Line Railway, 19 N. Y. Supreme Ct. (12 Hun) 242; *Allen* v. *Curtis*, 26 Conn. 456; *Gardiner* v. *Pollard*, 10 Bosworth, 674; *East St. Louis* v. *Zebley*, 110 U. S. 321; *Clay County* v. *McAleer*, 115 U. S. 616; *Smith* v. *Jones*, 15 Johns. 229; *Willard* v. *Sperry*, 16 Johns. 121; *Colvin* v. *Corwin*, 15 Wend. 557; *Stevens* v. *Lockwood*, 13 Wend. 644 [*S. C.* 28 Am. Dec. 492]; *Flaherty* v. *Taylor*, 35 Missouri, 447; *State* v. *Roberts*, 60 Missouri, 402; *Marion County* v. *Phillips*, 45 Missouri, 75; *Saline County* v. *Wilson*, 61 Missouri, 237.

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

We are of opinion that the action of the court was right. While there are other reasons, perhaps, why this petition is insufficient to sustain the action, the two principal ones are: First, that the actual plaintiff, Harshman, for whose use this action was brought, shows no relation of contract or legal obligation, between Winterbottom and himself, on which he has a right to bring this suit.

Second, that the obligation of the defendants is to the State for the collection of the state taxes, and to the county for the collection of the county taxes. There are no state taxes in the case. The county taxes were collected and paid over to the county treasury in the class of current obligations of the county, which the law recognizes as valid payment of taxes, and the county court, to whom the obligation of accounting for the taxes collected, or for failure to collect taxes, was due, has settled with Winterbottom and accepted its own warrants issued upon the treasurer as a full and satisfactory payment and discharge of that obligation. This formal accounting and settlement between the county court and the defendant, Winterbottom, as set out by the plaintiff himself in his own declaration, is one which the county court undoubtedly had a right to make, and, in paying over these county warrants to the treasury of the county, and in receiving the acknowledgment of the county court that he was fully discharged from his obligations in that respect, he presents a defence to this action which nothing in the declaration removes or invalidates. He

had a right to receive county warrants in payment of taxes. The law in express terms declares it to be his duty to receive them. Whether they were received by him under the exact circumstances which the law directs as to original ownership or assignment to the party who presented them, were matters for which he might have been called to account by the county court, and that body, in making the settlement with him, might possibly have had the power to reject warrants so received in making up the account; but, inasmuch as they were actual obligations of the county, payable out of the county funds, and receivable in discharge of taxes if properly tendered, the county court, which, by law, has full charge of all the financial operations of the county, could waive any such irregularity in the time and mode of presenting their own obligations, and credit the collector with them in the account.

We are of opinion that this settlement with the county court is of itself a sufficient bar to the present action on the collector's bond. If this were not so, and if, as the plaintiff's counsel contends, the payment of these taxes by the county warrants thus irregularly presented is void, then the tax-payer himself is not discharged. He had no more right to tender the county warrants in payment of his taxes, under the circumstances mentioned in the petition, than the collector had to receive them. If the act is a void act as to the one, it is a void act as to the other, and the right of the plaintiff to sue the tax-payer is much clearer than his right to sue the collector, because the tax-payer owes his taxes yet, having never lawfully paid them, while the collector has settled his accounts with the authority which had a right to accept these county warrants, and has been discharged from further obligation. If he can sue the collector on this official bond, and the sureties who are bound with him on that bond, why can he not sue the tax-payers? The obligation to pay taxes, and the obligation to pay the taxes when collected into the treasury, is the same and bears exactly the same relation to the right of Harshman to get his money out of the county treasury.

The truth is there is no contract or legal obligation of the

collector in that matter to Harshman. Harshman is a creditor of the county of Knox. He has no more right to interfere between that county and its collector as to the manner in which that official shall discharge his duties, except perhaps in case of fraud or conspiracy, or by way of mandamus, than he would have as a creditor of any individual to interfere between him and his debtors. Where such things are permitted at all it is by way of a garnishee process or attachment, which is regulated by statute, or by a bill in chancery. The proceeding here has nothing of that character. The want of privity between Harshman and the obligors in the bond on which they are sued is established by the decision of this court in *Savings Bank* v. *Ward*, 100 U. S. 202.

It does not appear that if all the taxes had been paid in money which the plaintiff alleges were erroneously paid in warrants, that when that money was paid into the treasury the relator would have been entitled to any of it. The discretion of the county court, and indeed its obligation to provide for the current necessities of the county, could not be interfered with by any one to direct the payment of this money to that particular debt. We do not see, therefore, that he was damaged, certainly not damaged in a manner which the law can recognize, by the collection of these taxes in warrants instead of money. *East St. Louis* v. *Zebley*, 110 U. S. 321; *Clay County* v. *McAleer*, 115 U. S. 616.

The judgment of the Circuit Court for the Eastern District of Missouri is

Affirmed.

HOARD *v.* CHESAPEAKE AND OHIO RAILWAY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Argued October 19, 20, 1887. — Decided November 7, 1887.

The relief prayed for in this case was the construction and maintenance of a piece of railway in specific performance of a contract attached to the bill as an exhibit; but upon examination it appeared that the contract did not call for its construction and maintenance.

Opinion of the Court.

If a railway company abandons part of its line and ceases to maintain a piece of track which it had contracted to maintain, it has the right to do so, subject to the payment of damages for the violation of the contract; to be recovered, if necessary, in an action at law.

A railway company organized to receive, hold and operate a railroad sold under foreclosure of a mortgage, in the absence of a statute or contract, is not obliged to pay the debts and perform the obligations of the corporation whose property the purchasers buy.

In equity. Respondents demurred. The demurrer was sustained, and the bill dismissed. Complainants appealed. The case is stated in the opinion of the court.

Mr. Enoch Totten for appellants.

Mr. William J. Robertson for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is a bill in chancery brought by Charles B. Hoard against the Chesapeake and Ohio Railway Company in the District Court of the United States for the District of West Virginia.

The main object of the bill, so far as it can be ascertained, is to enforce specifically the contract set out in writing between the complainant and the Chesapeake and Ohio *Railroad* Company, which is made an exhibit to the bill, and purports to have been executed on the 28th of July, 1873. The first part of the instrument professes to be a deed of conveyance, whereby, in consideration of the sum of one thousand dollars in hand paid, the receipt of which is acknowledged, the complainant sold and conveyed to the Chesapeake and Ohio *Railroad* Company several pieces of land in the town of Ceredo, in the State of West Virginia, which are minutely described, and which seem to be parts or parcels of land laid out in town lots by the plaintiff, through which it was expected the road of the company would be located. This grant is expressed to be on the condition that in the event the property so conveyed should cease to be used for railroad purposes by the company, its successors or assigns, the estate thereby granted shall revert to the grantor, his heirs or assigns.

There was also a covenant that the complainant was to have leave and permission to connect a single siding or branch with the track of the railroad at a point near the Ceredo Hotel, owned by him, and that the company would erect lawful fences and protect said tracks. There is no contract or covenant in this agreement, although it is signed by the railroad company, that it would build its road along and through the property so conveyed, and certainly no contract that it would continue it there, because one of the conditions is that if it should cease to use the road there the title to the land should revert to the grantor. Yet the main foundation of the relief sought in this action is based upon the allegation of a covenant in this contract, that the railroad company would build their road over the grounds designated in this conveyance, and the relief asked is that the *railway* company shall now be compelled, although they have for ten or twelve years been using the track through other grounds than these, to abandon that and construct their road through the lots mentioned in this contract and continue the same.

The prayer of the bill for relief is "that the Chesapeake and Ohio *Railway* Company be made a party defendant to this bill; that process may issue; that defendant may be compelled to answer the same; that the contract of 28th July, 1873, be specifically enforced; that the defendant may be compelled to permanently maintain, establish, and run its road through the village of Ceredo, as specified in the contract, and to erect and maintain a depot and place for the convenient and regular receipt and delivery of freight and passengers in the town of Ceredo, near Ceredo Hotel; that it may be decreed to pay to the complainant the sum of $1000, with interest from the date of the contract; that it may be decreed to do and perform all and everything covenanted to be done and performed by the railroad company by the contract aforesaid; that the defendant may be inhibited, restrained, and enjoined from all further proceedings in the condemnation case pending in this court in the name of The Chesapeake and Ohio *Railway* Company *v.* Hoard and als; and after the answer shall have come in, and the cause shall

have been fully heard, that defendant be perpetually enjoined, inhibited, and restrained from running its cars, engines, and trains over the complainant's land on the present location of their road, and as now constructed."

It will be perceived by this statement of the case that the defendant in this suit is not the Chesapeake and Ohio *Railroad* Company with whom the plaintiff made his contract, but the allegation of the bill on this subject is that the "Chesapeake and Ohio Railroad Company" was sold out under a mortgage foreclosure, and that the purchasers by virtue of the law of West Virginia became a corporation by the name of "The Chesapeake and Ohio *Railway* Company," the present defendant, "and entitled to all the works, property, estate, rights, franchises, and privileges theretofore owned and possessed by the Chesapeake and Ohio *Railroad* Company, and subject to all the restrictions imposed by law upon said last-named company."

The bill also contains allegations that, while the first company never built its road through any part of the town of Ceredo, the present company defendant did build its road through that town, but selected a route somewhat different from that which embraced the lots conveyed by plaintiff to the first corporation; that afterwards the second corporation instituted proceedings in the proper court for the condemnation of the land over which its line did run, which proceeded to a report of the commission ordered to examine and assess the value of the land taken, and the damages; that this assessment was reported at $1075.00 in favor of the plaintiff in this suit for land taken by the new company for the new route, and that this sum was paid into court. It appears that the plaintiff in this suit had notice of these matters, and, as the exhibits show, consented to the appointment of the assessors, but that after the report was made he objected to it, and demanded a jury. He also filed a pleading, in which he set up the contract already mentioned as a bar to the condemnation or taking of the property under the authority of the action of the commission. In this condition of affairs the case for condemnation was removed on the application of the railway company into

the District Court of the United States, where, after some additional proceedings, the present bill was filed.

It also appears that the present defendant deposited the sum awarded to Hoard with the clerk of the state court, under the jurisdiction of which the condemnation was had, and that this money has, by order of the United States court, been placed in the hands of the clerk of that court, and that the defendant has built and been using its road over the property thus condemned for ten or twelve years. The bill also contains an allegation that the one thousand dollars recited in the contract as the consideration for the conveyance was never actually paid, although the deed acknowledges its receipt.

A demurrer was filed to this bill, which, on hearing, was sustained, and the bill dismissed, and from this decree of dismissal the present appeal is taken.

It is very clear that the bill presents no feature which justifies or requires the interposition of a court of equity.

First. The contract with the Chesapeake and Ohio Railroad Company contains no such covenant for laying the track of that company through the lands purchased of plaintiff as his bill alleges. Therefore, if even that company was defendant in this suit, there is nothing which the court could specifically compel it to do found in this contract.

Second. If there were such a contract, both the law and this contract contemplate the right of the railroad company to change its route before being built, and to abandon it afterwards, and if the plaintiff is injured by this change, the remedy is clearly by an action at law for damages.

Third. The present defendant, the *railway* company, is not shown to be under any obligation to perform the covenant of its predecessor, the *railroad* company, which is set up here as a matter of specific performance. The persons who purchased the railroad at the mortgage foreclosure sale did not thereby, under any statute of the State, act of February 1, 1871, Session Laws, p. 91, or any contract of which we are aware, become obliged to pay the debts and perform the obligations of the railroad company. *Railroad Co.* v. *Miller*, 114 U. S. 176. They bought the property of that company and its franchises;

but if, as such purchasers, they thereby became bound to pay all the debts and perform all the obligations of the corporation whose property they bought, it would put an end to purchases of railroads. The plaintiff provided his own remedy for what has happened by the condition in his conveyance, that the land should revert to him, his heirs or assigns, in the event of which he now complains.

As regards the sum to which he would be entitled for the taking of the lots or parts of them where the railroad now runs by the defendant company, the law has provided him with the remedy, which is still in the hands of the court in the proceedings for condemnation. If the money paid into court is insufficient, he is probably entitled to a further trial by jury. If it is a sufficient compensation, the money awaits him when he is ready to accept it.

The bill makes no case for the interposition of a court of equity, and the decree of the court dismissing it is therefore

Affirmed.

FINN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted October 17, 1887. — Decided October 31, 1887.

It is a condition or qualification of the right to a judgment against the United States in the Court of Claims, that the claimant, when not laboring under one of the disabilities named in the statute, voluntarily put his claim in suit, or present it at the proper department for settlement, within six years after suit could be commenced thereon against the United States.

The general rule that limitation does not operate by its own force as a bar, but is a defence which must be set up, to be availed of, does not apply to suits in the Court of Claims against the United States; and it is the duty of that court to dismiss the petition of its own motion, when it appears that the claim is barred, although the statute may not have been pleaded.

THE following is the case, as stated by the court.

The plaintiff seeks judgment in this case against the United

States for the sum of $15,678 as the value of certain horses and mules which he claims to have purchased for, and delivered to, the United States, at their special instance and request, on or about October 14, 1863. He also asks interest from that date, on said sum, at the rate of six per cent per annum, until his demand is paid. The claim was never presented to any executive department of the Government until July 3, 1874, on which day it was filed in the office of the Quartermaster General. That officer decided adversely to it, and transmitted it to the accounting officers of the Treasury. It was disallowed by the Third Auditor of the Treasury, June 14, 1879, and in that ruling the Second Comptroller concurred. But on the 20th of July, 1886, the Second Comptroller ordered the case to be opened for newly discovered evidence produced by the claimant; and, on the 13th of August, 1886, the claim, with all the vouchers, papers, proofs, and documents pertaining thereto, was transmitted by the Secretary of the Treasury to the Court of Claims, under § 1063 of the Revised Statutes. The petition in the present suit was filed in that court on the 13th of October, 1886; and, after a hearing upon the merits, it was dismissed.

The Government contends here that the judgment should be affirmed, because it appears that the claim was not put in suit by the voluntary action of the claimant, within six years after it first accrued, nor presented at the proper department within six years after suit could have been commenced thereon in the Court of Claims.

The act of February 24, 1855, establishing the Court of Claims, invested it with authority to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress." 10 Stat. 612, § 1. This act did not authorize judgment to be entered against the United States, nor fix a period within which parties must assert their claims against the Government. The court was, however, required to report to Con-

gress the cases upon which it acted, stating the material facts established by the evidence, with its opinion thereon. § 7.

But the act of March 3, 1863, 12 Stat. 765, enlarged the jurisdiction of the court, and, among other things, provided for an appeal from its final judgment, in certain cases, to this court, and "that in all cases of final judgments by said court, or on appeal by the said Supreme Court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment," &c. The 10th section of that act is in these words: "Sec. 10. That every claim against the United States, cognizable by the Court of Claims, shall be forever barred, unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this act, within six years after the claim first accrues: *Provided*, That claims which have accrued six years before the passage of this act shall not be barred if the petition be filed in the court, or transmitted as aforesaid, within three years after the passage of this act: *And provided further*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court, or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively." Rev. Stat. § 1069.

By an act of Congress, approved June 25, 1868, 15 Stat. 75, 76, it was made lawful "for the head of any executive department, whenever any claim is made upon said department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the

amount involved in the particular case, or when any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, to cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant. And the Secretary of the Treasury may, upon the certificate of any auditor or comptroller of the Treasury, direct any account, matter, or claim of the character, amount, or class described or limited in this section to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said Court of Claims, for trial and adjudication: *Provided, however*, That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases to which, by reason of the subject-matter and character, the said Court of Claims might, under existing laws, take jurisdiction, on such voluntary action of the claimant. And all the cases mentioned in this section, which shall be transmitted by the head of any executive department, or upon the certificate of any auditor or comptroller, shall be proceeded in as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations; and appeals from the final judgments or decrees of said court therein to the Supreme Court of the United States, shall be allowed in the manner now provided by law. The amount of the final judgments or decrees in such cases so transmitted to said court, where rendered in favor of the claimants, shall in all cases be paid out of any specific appropriation applicable to the same, if any such there be; and where no such appropriation exists, the same shall be paid in the same manner as other judgments of said court." Rev. Stat. §§ 1063, 1064, 1065.

All these statutory provisions are carried, with but slight change of words, into c. 21 of Title 13 of the Revised Statutes.

Mr. Thomas C. Fletcher for appellant.

Mr. Solicitor General and *Mr. Heber J. May* for appellee.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

In *United States* v. *Lippitt*, 100 U. S. 663, 668, 669, it was held that "limitation is not pleadable in the Court of Claims against a claim cognizable therein, and which has been referred by the head of an executive department for its judicial determination, provided such claim was presented for settlement at the proper department within six years after it first accrued; that is, within six years after suit could be commenced thereon against the Government. Where the claim is of such a character that it may be allowed and settled by an executive department, or may, in the discretion of the head of such department, be referred to the Court of Claims for final determination, the filing of the petition should relate back to the date when it was first presented at the department for allowance and settlement. In such cases the statement of the facts upon which the claim rests, in the form of a petition, is only another mode of asserting the same demand which had previously, and in due time, been presented at the proper department for settlement." "These views," the court said, "find support in the fact that the act of 1868 describes claims presented at an executive department for settlement, and which belong to the classes specified in its seventh section as *cases* which may be transmitted to the Court of Claims. 'And all the *cases* mentioned in this section, which shall be transmitted by the head of an executive department or upon the certificate of any auditor or comptroller, shall be *proceeded* in as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations,' with right of appeal. The cases thus transmitted for judicial determination are, in the sense of the act, commenced against the Government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the Court of Claims, they are to be 'proceeded in as other cases pending in said court.'" See, also, *Ford* v. *United States*, 116 U. S. 213; *United States* v. *McDougall's Administrator*, 121 U. S. 89.

We are of opinion that the claim here in suit — although

by reason of its character "cognizable by the Court of Claims" — cannot properly be made the basis of a judgment in that court. As the United States are not liable to be sued, except with their consent, it was competent for Congress to limit their liability, in that respect, to specified causes of action, brought within a prescribed period. *Nichols* v. *United States*, 7 Wall. 122, 126. It appears from the finding of facts that more than ten years had expired after the claim first accrued before it was presented to the proper department for settlement; and more than six years after the passage of the act of 1868, Rev. Stat. §§ 1063, 1064, which authorized the head of an executive department to transmit to the Court of Claims, for adjudication, any claim which involved disputed facts or controverted questions of law, or the decision of which would affect a class of cases, or furnish a precedent for future action. Consequently, in any view, this claim belonged to the class which, under the express words of the act of 1863, Rev. Stat. § 1069, were "forever barred," so far, at least, as the claimant had the right to a judgment in that court against the United States. The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that — except where the claimant labors under some one of the disabilities specified in the statute — the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the Government. Under the appellant's theory of the case, the Second Comptroller could open the case twenty years hence, and, upon the claim being transmitted by the Secretary of the Treasury to the Court of Claims, that court could give judgment upon it against the United States. We do not assent to any such interpretation of the statutes defining the powers of that court.

The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit

of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous.

The judgment is

Affirmed.

RICHTER *v.* JEROME.

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

Argued October 20, 1887. — Decided November 7, 1887.

If the trustee in a deed of trust in the nature of a mortgage acts in good faith in foreclosing it, and obtains a decree of foreclosure and sale, whatever binds the trustee in the proceedings which are begun and carried on to enforce the trust, binds the *cestuis que trust* as if they were actual parties to the suit.

If, in a suit in equity by the trustee in a deed of trust in the nature of a mortgage to foreclose the mortgage the decree or the sale is obtained in fraud of the rights of the *cestuis que trust*, their remedy is a direct proceeding to set aside the sale or the decree and proceed anew with another foreclosure; and not an attempt to reforeclose what had been fully foreclosed before, under a decree which remains in force.

On the facts alleged in the complainant's bill and set forth in the opinion of the court: *Held*, that the complainant is not entitled to the relief prayed for in his bill, and that the decree of foreclosure obtained by the corporation trustee, under the mortgage of which he is a *cestui que trust*, binds him.

Statement of the Case.

THIS was a suit in equity brought by Morris Richter, the appellant, and the case made by the bill and its exhibits was in substance this:

In 1864 the Portage Lake and Lake Superior Ship-Canal Company was organized as a corporation under the laws of Michigan to build a ship-canal from the most westerly point of Portage Lake through a neck of land, called "The Portage," to Lake Superior. In 1865 and 1866 Congress made two grants of land to the State of Michigan, of 200,000 acres each, to aid in this work, and both these grants were tranferred by the State to the canal company. The company afterwards executed three mortgages on the lands so granted, to secure bonds amounting in all to $2,000,000.

On the 3d of March, 1863, Congress granted the State other lands, containing in the aggregate 220,000 acres and upwards, to aid in building a military road, called in the pleadings a "wagon road," from Fort Wilkinson, Copper Harbor, Michigan, to Fort Howard, Green Bay, Wisconsin. By the terms of this grant thirty sections could be sold at once, and thereafter thirty sections as each ten miles of road was completed. If the road was not completed in five years no further sales could be made, and the unsold lands were to revert to the United States. 12 Stat. 798, c. 104, § 3. On the 6th of May, 1870, this time was extended until January 1, 1872. 16 Stat. 121, c. 93.

In 1868, Francis W. Anthony contracted with the State to build the road, and in consideration thereof was to receive "all the benefits, emoluments, rights and interests arising from" the land grant. He was to have at once the first thirty sections authorized to be sold, and as any continuous ten miles (afterwards changed to two miles) was completed he was "entitled to apply for and receive a certificate for the number of sections granted to aid in the construction" thereof. In August, 1870, thirty miles of the road had been completed, and $47,958\frac{85}{100}$ acres of land were conveyed to him therefor in fee.

In November, 1870, as is alleged in the bill, about eighty miles of the road had been completed, and 153,000 acres of land earned, including that which had been patented, but

Anthony had exhausted his financial resources and credit, and was in debt to the amount of $30,000. Being in this condition he went to New York to get money. While there, as is alleged, he entered into a verbal arrangement with the stockholders and directors of the canal company to raise the necessary funds to complete both the canal and the road, by which he was to transfer to Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery all his rights under the road contract, including the $47{,}958\frac{85}{100}$ acres patented lands; the canal company was to change its name to the Lake Superior Ship-Canal, Railroad and Iron Company; the directors of the canal company, as individuals, were to subscribe $2,000,000 to its capital stock, and pay their subscription by their warranty deed of 200,000 acres of the road lands; and thereupon the canal company was to issue bonds to the amount of $3,500,000, secured by a mortgage to the Union Trust Company of New York, "to raise money for the Portage Lake Canal enterprise and for the wagon-road enterprise."

On the 25th of April, 1871, Anthony entered into a contract with Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery, by which he agreed to sell to them, and they agreed to buy from him, all the wagon-road lands at seventy-five cents an acre, to be paid for as follows:

"Thirty-six thousand ($36,000) dollars within thirty days from this date.

"Eight thousand ($8000) dollars by the fifth day of June.

"Eight thousand ($8000) dollars by the fifth day of July.

"Eight thousand ($8000) dollars by the fifth day of August.

"Eight thousand ($8000) dollars by the fifth day of September.

"Eight thousand ($8000) dollars by the fifth day of October.

"Eight thousand ($8000) dollars by the fifth day of November; all in the year 1871, and the balance in three payments; one of one-quarter of the whole amount, in six months from November first, 1871; and one of like amount, payable on the first of November, 1872; and the other of one-half the whole amount, payable on the first day of November, 1873; the last three payments to be secured by the joint and several notes of

the parties of the second part, with the bonds of the Lake Superior Ship-Canal Railroad and Iron Company, at sixty per cent, assigned as collateral to said notes."

The contract of Anthony for building the road was transferred by him to the purchasers, "with all the rights, privileges, powers, and claims arising from the same," and he agreed to convey all the lands for which he then held patents as soon as the $36,000 were paid. The lands which had been earned and not patented, amounting, with those patented, to 150,000 acres, "more or less," were to be conveyed as soon as title should be obtained, and Anthony was to go on and complete the road and convey the remainder of the lands as fast as they were earned and he got title thereto. Upon the execution of a deed for the lands which had already been earned, but not then patented, the purchasers were to assign to Anthony, as security for the six monthly payments of $8000 each, $72,000, at par, of the bonds of the canal company, he agreeing to surrender $12,000 of them as each monthly payment of $8000 was made. Upon the conveyance of the lands which had not then been earned, but which were to be earned by the completion of the road, the purchasers were to execute notes for the price, in accordance with the terms of their agreement, and secure them with the bonds of the canal company, at 60 per cent on the face value of such bonds.

On the first of May, 1871, Perez J. Avery, Alfred Wild, and J. Edwin Conant, three out of the four purchasers of the lands from Anthony under this contract, executed a deed to the canal company, in which, after reciting that they were the owners in fee of 220,000 acres of land granted to the State of Michigan to build the road, and had subscribed for five hundred shares of the capital stock of the company, to be paid for by a conveyance of 200,000 acres of such land, they did, in consideration of the stock, convey to the company in fee simple, with full covenants of warranty, "all and singular those two hundred and twenty thousand acres of land, being the same granted by act of Congress of the United States, entitled 'An act granting lands to the States of Michigan and Wisconsin, to aid in the construction of a military road from Fort

Wilkinson, Copper Harbor, Keweenaw County, in the State of Michigan, to Fort Howard, Green Bay, in the State of Wisconsin,' approved March 3d, 1863; which said lands are fully described and designated on the maps and record books of the office of the register of the land office at Marquette, Michigan, and to which records and maps reference is hereby made for a fuller and more perfect description of said lands, saving and reserving from the operation of this deed twenty thousand acres of land, to be selected by taking the sections reserved in their order as they come, commencing at the Wisconsin state line, and taking the sections on both sides of said road far enough north to get twenty thousand acres of land."

On the same day that this deed was delivered, the company executed to the Union Trust Company of New York a deed of trust covering the two land grants to the canal company, "and also two hundred thousand acres of land situate, lying, and being in said State of Michigan, subscribed to the capital stock of the party of the first part, and fully and particularly described in a full covenant deed made by Perez J. Avery, Alfred Wild, and J. Edwin Conant, and their wives, dated on the first day of May, A.D. 1871, conveying said last-mentioned two hundred thousand acres of land" to secure a proposed issue of bonds to the amount of $3,500,000. Of this amount of bonds $1,300,000 were issued by the trustee to the directors of the canal company with the usual certificate of security thereon. The bill then alleged that the directors of the canal company and Anthony, upon the faith and credit of these bonds, raised in open market $36,000, in money, which was paid over to Anthony on his contract for the sale of the lands, and afterwards $16,000 more which was used in the same way. The remainder of the $1,300,000 "were sold or pledged in the open market of New York, and elsewhere, and money raised thereupon and applied to the use and benefit of said Lake Superior Ship-Canal Railroad and Iron Company."

On the 25th of May, 1872, a bill was filed against the canal company for the foreclosure of its mortgage on the lands embraced in the first Congressional grant, and on the 3d of July, 1872, for the foreclosure of that on the lands in the sec-

ond grant. On the 5th of July, 1872, another bill was filed for the foreclosure of the third mortgage executed by the company, which covered all the lands in both grants. Then, on the 19th of June, 1875, the Union Trust Company filed its bill to foreclose the mortgage which was executed to that company May 1, 1871, and covered both the land grants and the 200,000 acres embraced in the conveyance of Avery, Wild, and Conant. The same solicitor appeared for the plaintiff in each of the several foreclosure suits. On the 27th of August, 1872, the canal company was declared a bankrupt, and thereafter George Jerome and Fernando C. Beaman, its assignees, became parties to the litigation.

In the bill filed by the Union Trust Company for the foreclosure of its mortgage, the issue of the $1,300,000 of bonds was set out, and the following allegations made in respect to the "wagon-road lands," so called:

"That of the 200,000 acres mortgaged to the complainant, in addition to said 400,000 acre land grants, it is claimed that said company has no title, save to $47{,}958\frac{85}{100}$ acres, and that the title to the remainder has been patented to other parties. Complainant annexes hereto a list of said last named lands, to wit, of said $47{,}958\frac{85}{100}$ acres, marked Exhibit 'C.' Complainant is informed and believes that said lands are worth about $3.00 per acre, or about $150,000; that said lands are known as the 'wagon-road lands,' and were acquired from the State of Michigan by one Francis W. Anthony, and were conveyed to said bankrupt company mortgagee. Exhibit 'C' is a copy of the list on file in the office of the Secretary of State of Michigan, being certificate of purchase No. 1 of military road land under act No. 20 of the laws of 1864, approved February 4th. That March 4th, 1873, Henry S. Wells, a bondholder secured by complainant's said mortgage, filed his bill in this court, impleading, among others, said Francis W. Anthony, said assignees, and this complainant, and sought by said bill to subject the said 'wagon-road lands,' other than said $47{,}958\frac{85}{100}$ acres, to the lien of complainant's mortgage, and to prevent their conveyance by the State to third parties, and afterwards such proceedings were had that the relief sought was denied.

Statement of the Case.

That in article ten of a cross-bill, filed by said assignees in this court September 13th, 1873, said assignees state that certain stockholders of said bankrupt had contracted to buy lands to the amount of 200,000 acres, parcel of a larger amount granted by the State of Michigan for the construction of a military wagon-road, and, assuming to be owners, had conveyed the same to the said bankrupt; that said grantors had acquired title to only about 49,000 acres, and only about that amount became vested in said bankrupt, and that the residue had been patented by the State of Michigan to other parties and lost to said corporation, and that said assignees made the same statement substantially in their answer to a bill by this complainant to foreclose said mortgage in the said district court, which bill was discontinued."

The prayer, so far as it related to the road lands, was, "that said $47{,}958\frac{85}{100}$ acres of land known as 'wagon-road lands' may also be sold; and that all the estate, right, title, and interest of the defendants in the rest and residue of said 200,000 acres of wagon-road lands may be sold," and the proceeds applied to the payment of the outstanding bonds. The decree, which was entered March 13, 1877, established the lien of the Union Trust Company mortgage on the $47{,}958\frac{85}{100}$ acres of wagon-road lands to which the canal company had title, and, as to the rest, found as follows: "That the title to the remainder of said wagon-road lands passed from the State of Michigan to third parties, so that, as to the same, the said Union Trust mortgage covers only a possible equity, which equity in the residue of said 200,000 acres of wagon-road lands, is also a security for said 1300 bonds." It was then ordered, among other things, that "the equity of redemption or other right or interest of said mortgagor corporation in the residue of said wagon-road lands" be sold with the other mortgaged property, including the $47{,}958\frac{85}{100}$ acres, to pay the bonds.

Under this decree the mortgaged property was sold in June or July of 1877 to Albon P. Man and Nathaniel Wilson, and this sale confirmed in due course of practice. Soon afterwards, Man and Wilson released to James C. Ayer, then in life, but since deceased, the right to or equity of redemption in all the

200,000 acres of wagon lands which had not been actually conveyed to Anthony, and by him to the purchasers from him, and by them to the canal company.

The present bill was filed on the 12th of July, 1882, by Morris Richter, as "the holder, as purchaser in good faith," of two hundred and thirty of the thirteen hundred bonds secured by the Union Trust Company mortgage, against the Union Trust Company, the assignees in bankruptcy of the canal company, and the widow, heirs, devisees, and trustees under the will of Ayer, then deceased. Richter had received on each of his bonds from the master the sum of nine dollars as his share of the proceeds of the Union Trust Company foreclosure. No other payment of principal or interest had ever been made. The bill charged in substance that Theodore M. Davis, receiver of the Ocean National Bank, being the holder of 910 of the various issues of the bonds of the canal company as security for a debt of the company to the bank of about fifty per cent of the face of the bonds, J. Boorman Johnston & Co. holding 200 of one of the issues of bonds as security for a debt of the company of about eighty per cent of the amount of the bonds, and James C. Ayer & Co., of which James C. Ayer was the principal proprietor, holding 760 of the various issues of bonds as security for a debt of the company of about fifty per cent of the amount of the bonds, formed a syndicate at the instance of Davis, and "agreed to pool their bonds and debts aforesaid for the common interest of said syndicate, and to run down the value of said bonds upon the market, and to wreck the enterprise aforesaid." By the fraud and connivance of the members of this syndicate, as is alleged, "the legal title to the whole of said pledged bonds was procured," before May 27, 1872, "at a mere fraction of their face value." This being done, the syndicate, on the 27th of May, 1872, caused proceedings to be commenced for the foreclosure of the first of the land-grant mortgages, and on the 3d of July, 1872, similar proceedings for the foreclosure of the second of that class of mortgages, and on the 5th of the same month for the third. The bill then alleged that before these suits were begun the directors of the canal company had proceeded so far with

negotiations for raising money for their enterprise that "a successful conclusion was assured on a basis of satisfactory title of said 600,000 acres of land being found in said . . . canal company, and on the value of said property being verified as represented by report of agents for that purpose, who had been delegated by foreign capitalists to investigate to that end, of which promised success, the said syndicate having been advised, they, the said members of said syndicate, set themselves about thwarting the success of said negotiations, and accomplished their purpose" by buying over Anthony from his allegiance to the canal company under his contract with the Averys, Wild, and Conant, furnishing the money necessary to complete the wagon-road contract, and getting the title to the unpatented lands in Ayer. This scheme was accomplished, and lands amounting in the aggregate to something more than 173,000 acres were conveyed to Ayer — 153,000 acres in 1873, and the remainder in 1875. To induce Anthony to come into the scheme he was paid a bonus of $20,000 by Ayer, and furnished the money necessary to complete his contract for building the road. The date of this transaction does not appear, except, generally, that it was in 1872. This, as was alleged, prevented the canal company from raising money, and the syndicate, with the intent to secure to Ayer the title to the "residue of said wagon-road lands," enlisted the said Union Trust Company of New York in their designs, and procured the said Union Trust Company . . . to allow . . . Alfred Russell, the solicitor of the said syndicate, upon the retainer of said syndicate, to foreclose the said Union Trust mortgage in the interest of said syndicate, but with the understanding that such foreclosure should be conducted . . . for the protection of the aforesaid legal title to the said residue of said wagon-road lands in the said James C. Ayer, as far as practicable and possible under the decree to be obtained therein."

The bill then alleged in substance that the suit for foreclosure was begun and carried on for this purpose among others, and that Ayer got the mortgage title to the residue of the lands under the decree in that way and pursuant to that under-

standing. And finally it was alleged that the decree rendered in the cases under which the title was got "was not, in fact, an adjudication of the said court upon consideration of the pleadings and proofs in the said several causes which, as appears by said decree, were heard and decided together, but was, in fact, a decree drawn by the said Alfred Russell, solicitor of the syndicate aforesaid, and submitted to by compulsion by those representing collateral interests therein, and assented to by the Union Trust Company of New York aforesaid in collusion with the syndicate aforesaid through their solicitor aforesaid, and by the said George Jerome and Fernando C. Beaman, assignees in bankruptcy of said ship-canal company aforesaid, through ignorance of the rights and equities of the said last-mentioned corporation against the legal title of the said James C. Ayer to the said residue of the said wagon-road lands beyond the 47,000 and odd acres which were actually sold under said decree; and said Jerome and Beaman were actually misled as to the lien of the said Union Trust mortgage upon said residue of said wagon-road lands by the collusion, neglect, and failure of the said Union Trust Company, in its foreclosure bill aforesaid, to make said James C. Ayer a party defendant, charging the legal title to said lands in his hands with a trust for the payment of said mortgage, and by the collusive concession in said foreclosure bill that the title to said residue of said wagon-road lands had been lost to the said ship canal company and taken out from under the lien of said mortgage by reason of a grant thereof to third parties by the State of Michigan, whereby the lien of said mortgage had been lost, and hence the said Jerome and Beaman, seeing no interest which they could conserve by opposing said decree as drawn, and insisted on by said Russell, consented to said decree as proposed by said Russell, and said decree was entered accordingly by consent as aforesaid, and so it was represented to the judge who allowed the same to be entered without opposition or argument or consideration, and it was signed accordingly.

The prayer of the bill was "that your orator may be allowed by this court to have the benefit of said decree herein set forth as 'Schedule D,' hereto, in behalf of your orator, and any other

holders of said 1300 bonds secured by the said mortgage to the said Union Trust Company of New York, who are *bona fide* holders of said bonds in said decree mentioned, and that in behalf of your orator and said bondholders the said residue of 200,000 acres of wagon-road lands so deeded to said James C. Ayer in his lifetime, as heretofore stated, may be by the decree of this court charged in the hands of said widow and heirs, or of said trustees, with a trust for the payment of the unpaid portion of said 1300 bonds and interest thereon, and that the said residue of said land be sold under the decree and direction of this court to pay the moneys remaining due upon said unpaid bonds, or so much thereof as shall be necessary to that end; subject, however, to the lien of the said widow and heirs, or of said trustees under the will of the said James C. Ayer, for all money advanced by said James C. Ayer in completion of said wagon-road land contract, as the same shall be ascertained upon an accounting of the same, with interest, as the same shall appear upon an accounting thereof."

The Union Trust Company failed to appear, and as to it the bill was taken *pro confesso.* The other defendants demurred to the bill, and upon hearing the demurrer was sustained, and the bill dismissed. From a decree to that effect this appeal was taken.

Mr. Don M. Dickinson (with whom were *Mr. J. P. Whittemore* and *Mr. John S. Seymour* on the brief) for appellant cited: *Koehler* v. *Black River Falls Iron Co.*, 2 Black, 715; *Penn* v. *Baltimore*, 1 Ves. Sen. 444; *Massie* v. *Watts*, 6 Cranch, 148; *Van Ness* v. *Hyatt*, 13 Pet. 294; *Hart* v. *Sansom*, 110 U. S. 151; *Gay* v. *Parpart*, 106 U. S. 679; *Morsell* v. *First National Bank*, 91 U. S. 357; *Freedman's Saving & Trust Co.* v. *Earle*, 110 U. S. 710; *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446; *Sheldon* v. *Fortescue*, 3 P. Wms. 104; *Kennedy* v. *Daly*, 1 *Sch. & Lefroy*, 355; *Saunders* v. *Dehew*, 2 Vernon, 271.

Mr. Walter D. Davidge and *Mr. James Lowndes* for appellees cited: *Morgan* v. *Morgan*, 2 Wheat. 290; *Symmes* v. *Guthrie*,

Citations for Appellees Ayer.

9 Cranch 19; *Mallow* v. *Hinde*, 12 Wheat. 193; *Findlay* v. *Hinde*, 1 Pet. 241; *Willard* v. *Tayloe*, 8 Wall. 557; *Marble Company* v. *Ripley*, 10 Wall. 339; *Brashier* v. *Gratz*, 6 Wheat. 528; *Pratt* v. *Carroll*, 8 Cranch, 471; *Colson* v. *Thompson*, 2 Wheat. 336; *Dorsey* v. *Packwood*, 12 How. 126; *Boone* v. *Missouri Iron Co.*, 17 How. 340; *Holt* v. *Rogers*, 8 Pet. 420; *Graham* v. *Railroad Co.*, 102 U. S. 148; *Mitchell* v. *Homfray*, 8 Q. B. D. 587; *Sanger* v. *Upton*, 91 U. S. 56; *People's Bank* v. *National Bank*, 101 U. S. 181; *McQuiddy* v. *Ware*, 20 Wall. 14; *Badger* v. *Badger*, 2 Wall. 87; *Harwood* v. *Railroad Company*, 17 Wall. 78; *Grymes* v. *Sanders*, 93 U. S. 55; *McKnight* v. *Taylor*, 1 How. 161.

Mr. E. W. Meddaugh filed a brief for the appellees Ayer, citing: *Bryan* v. *Kennett*, 113 U. S. 179; *Hornsby* v. *The United States*, 10 Wall. 224; *Soulard* v. *United States*, 4 Pet. 511; *Wing* v. *McDowell*, Walker's Ch. (Mich.) 175; *Freedman's Saving & Trust Co.* v. *Earle*, 110 U. S. 710; *Campbell* v. *Railroad Co.*, 1 Woods, 368; *Shaw* v. *Norfolk County Railroad Co.*, 5 Gray, 162; *Richards* v. *Chesapeake & Ohio Railroad*, 1 Hughes, 28; *Bank* v. *Hopkins*, 2 Dana, 395; *Dunn* v. *Pipes*, 20 La. Ann. 276; *Fletcher* v. *Holmes*, 25 Ind. 458; *Chamberlain* v. *Preble*, 11 Allen, 370; *Derby* v. *Jacques*, 1 Clifford, 425; *Holmes* v. *Rogers*, 13 Cal. 191; *Gifford* v. *Thorn*, 1 Stockton (9 N. J. Eq.) 720, 722; *Edgerton* v. *Muse*, 2 Hill (S. C. Eq.), 51; *Brown* v. *Sprague*, 5 Denio, 545; *Nashville, &c., Railway Co.* v. *United States*, 113 U. S. 226; *Kropholler* v. *St. Paul, &c., Railroad Co.*, 2 Fed. Rep. 302; *S. C.* 1 McCrary, 300; *Sahlgard* v. *Kennedy*, 13 Fed. Rep. 242; *Groustra* v. *Bourges*, 141 Mass. 7; *Miller* v. *Rutland & Washington Railroad*, 36 Vt. 452; *Sturges* v. *Knapp*, 31 Vt. 1; *Denniston* v. *Coquillard*, 5 McLean, 253; *Boone* v. *Missouri Iron Co.*, 17 How. 340; *Marble Co.* v. *Ripley*, 10 Wall. 339; *Bank of Columbia* v. *Hagner*, 1 Pet. 454; *Colson* v. *Thompson*, 2 Wheat. 336; *Thompson* v. *Bruen*, 46 Ill. 125; *Russell* v. *Nester*, 46 Mich. 290; *Jones* v. *Lynds*, 7 Paige, 301; *Frazier* v. *Broadnax*, 2 Little, 249; *Harwood* v. *Railroad Co.*, 17 Wall. 78; *Gordon* v.

Ross, 63 Ala. 363; *Evans* v. *Bacon*, 99 Mass. 213; *Embury* v. *Klemm*, 3 Stewart (30 N. J. Eq.), 517; *Spaulding* v. *Farwell*, 70 Maine, 17; *Royal Bank of Liverpool* v. *Grand Junction Railroad*, 125 Mass. 490; *Campau* v. *Van Dyke*, 15 Mich. 371; *Plymouth* v. *Russell Mills*, 7 Allen, 438; *Marsh* v. *Whitmore*, 21 Wall. 178; *Godden* v. *Kimmel*, 99 U. S. 201; *Credit Co.* v. *Arkansas Cent. Railroad*, 15 Fed. Rep. 46; *McVicker* v. *Filer*, 31 Mich. 304; *Smith* v. *Davidson*, 40 Mich. 632; *Sullivan* v. *Portland & Kennebec Railroad*, 94 U. S. 806; *Corcoran* v. *Chesapeake & Ohio Canal Co.*, 94 U. S. 741; *Shaw* v. *Railroad Co.*, 100 U. S. 605; *Glenny* v. *Langdon*, 98 U. S. 20; *Trimble* v. *Woodhead*, 102 U. S. 647; *Phelps* v. *McDonald*, 99 U. S. 298; *Hodgson* v. *Sidney*, L. R. 1 Ex. 313; *Brobst* v. *Brock*, 10 Wall. 519; *Gilbert* v. *Cooley*, Walker's Ch. (Mich.) 494; *Trimble* v. *Woodhead*, 102 U. S. 650; *Dial* v. *Reynolds*, 96 U. S. 340; *Chamberlain* v. *Lyell*, 3 Mich. 448; *Eagle Fire Co.* v. *Lent*, 6 Paige, 635; *Banks* v. *Walker*, 3 Barb. Ch. 438; *Jones* v. *St. John*, 4 Sandf. Ch. 208; *Bogey* v. *Shute*, 4 Jones Eq. (Nor. Car.) 174; *Peters* v. *Bowman*, 98 U. S. 56; *San Francisco* v. *Lawton*, 18 Cal. 465; *S. C.* 79 Am. Dec. 187; *Merchants' Bank* v. *Thomson*, 55 N. Y. 7; *Banning* v. *Bradford*, 21 Minn. 308; *Pelton* v. *Farmin*, 18 Wis. 222; *Summers* v. *Bromley*, 28 Mich. 125; *Graham* v. *Railroad Co.*, 102 U. S. 148; *Brush* v. *Sweet*, 38 Mich. 574; *De Hoghton* v. *Money*, L. R. 2 Ch. App. 164; *Hill* v. *Boyle*, L. R. 4 Eq. 260.

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

We are unable to find any authority for granting the relief which is sought in this case. The bill was not filed to set aside the decree in the suit brought by the Union Trust Company to foreclose its mortgage. On the contrary, the complainant asks in express terms to have the benefit of that decree, so that, as we suppose, he may keep the money he has got as his share of the proceeds of the sale under it. Neither is it sought to hold the Union Trust Company accountable for its alleged misconduct and breach of faith in the proceedings for the fore-

closure of the mortgage. Nor is the suit brought to obtain a specific performance of the contract between Anthony and the Averys, Wild, and Conant, nor to recover back the money paid by the canal company on that contract over and above what was necessary to pay for the lands which had been patented to Anthony, and which were actually sold under the Union Trust Company decree for the benefit of the complainant and the other bondholders.

But it is, if we understand it correctly, a suit to charge the wagon-road lands, now in the hands of the legal representatives of Ayer, with a trust in favor of bondholders as security for the amount due them respectively, subject only to a lien for the moneys actually advanced to enable Anthony to complete his contract for building the road and thus become entitled to patents.

There can be no doubt but the mortgage by the canal company conveyed to the Union Trust Company, as trustee for the bondholders, all the interest in the lands which was conveyed to the canal company by the warranty deed of Perez J. Avery, Wild, and Conant; but that was no more than the interests which those grantors acquired by the contract with Anthony. As their deed was with covenants of warranty, any title which they afterwards acquired under the Anthony contract would enure to the benefit of the bondholders through the Trust Company as their trustee holding for their benefit, and as their representative. All the rights the bondholders have or ever had in the mortgage, legal or equitable, they got through the Trust Company, to which the conveyance was made for their security. As bondholders claiming under the mortgage, they can have no interest in the security except that which the trustee holds and represents. If the trustee acts in good faith, whatever binds it in any legal proceedings it begins and carries on to enforce the trust, to which they are not actual parties, binds them. *Kerrison* v. *Stewart*, 93 U. S. 155, 160; *Corcoran* v. *Chesapeake, &c., Canal Co.*, 94 U. S. 741, 745; *Shaw* v. *Railroad Co.*, 100 U. S. 605, 611. Whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them. This is the undoubted rule.

Opinion of the Court.

Here the Trust Company began its suit for the foreclosure of its mortgage, and has sold under the decree in that suit all the interests, legal and equitable, which it held in the land as trustee for the bondholders, and distributed the proceeds, the complainant receiving his share without complaint and without objection. All the rights which the Trust Company, as trustee, had in the lands at the time of the mortgage passed to the purchaser at the sale. That sale, it is conceded, binds the Trust Company as trustee and therefore it binds the complainant as a bondholder. If the decree or the sale under it was in fraud of the rights of the bondholders, their remedy is by a direct proceeding to set aside the sale or the decree, and to proceed anew with another foreclosure of the mortgage, and not to undertake to reforeclose what had been fully foreclosed before under a decree which remains in force.

But it is said that the original foreclosure was of no effect, because neither Anthony nor Ayer was a party to the suit, and the rights of the Trust Company and its beneficiaries under the mortgage were neither set forth with certainty in the bill nor found in the decree. No relief was sought either against Anthony or Ayer. The sole purpose of the bill was to sell the interest of the mortgagee in the lands, whatever that interest might be. To a suit for that purpose neither Anthony nor Ayer was a necessary party, because it was not important to them who held the rights that were to be sold, and such a sale would not affect them. The canal company, or its assignees in bankruptcy, were parties to the suit, and instead of objecting, as they might, to a sale of the property without a more specific adjudication as to what was to be sold, consented to it. The bondholders were represented in the suit by their trustee, and are bound by the decree so long as it stands unreversed, and is not set aside or vacated.

The argument of counsel for the appellants seems to proceed on the ground that there are two equities growing out of the mortgage to the Trust Company, which may be dealt with in two separate suits as they are separate and distinct in their character. One he calls the mortgagor's equity, consisting of the rights of the canal company in the lands growing out of

the contract by Anthony for their sale to the Averys, Wild, and Conant. This equity, if we understand counsel correctly, it is conceded was sold under the proceedings for foreclosure, and now belongs to the purchaser. The other he denominates the "bondholders' equity," and it arises out of the purchase by Ayer from Anthony of his rights under the contract with the State of Michigan for building the wagon road when he (Ayer) had knowledge of the former contract under which the canal company could have perfected its title to the unpatented lands included in the mortgage if he had not interfered. Under this equity counsel say they now seek to recover for the bondholders "only the profits which Ayer made by stepping into Anthony's shoes in the premises."

We are unable to see how these two equities, if there are two, can be separated in the way contemplated. They both grow out of the canal company's rights under the contract between Anthony, and the Averys, Wild, and Conant. If the canal company could not recover from Ayer, neither the bondholders nor their trustee in the mortgage can. The title upon which their right of recovery rests, if such a right ever existed at all, was in the Trust Company, as the trustee of their security, at the time the original foreclosure was had, and it was part of the mortgagor's equity which was sold. It was then what this bill seeks to make it now, part of the security of the bondholders under the Trust Company mortgage, and being such it passed with the rest to the purchaser at that sale.

Something is also said in the argument about the equitable claims of the bondholders upon Ayer as the successor of Anthony, growing out of the false representations made to them as to the title of the lands covered by the mortgage when they paid the money and took their bonds; but all such claims come from the mortgage, as to which, in all proceedings for foreclosure, they are represented by their trustee when its interests are not in conflict with theirs. All the equities now asserted were proper subjects for adjudication in the former suit if they existed. They formed part and parcel of the security which was then enforced, and, not being excepted from the sale, passed by it.

Statement of the Case.

This makes it unnecessary to consider whether there was such fraud on the part of Anthony as to charge the lands in the hands of Ayer, even if the Trust Company were now proceeding against him under the mortgage.

The decree is

Affirmed.

SMITH & GRIGGS MANUFACTURING COMPANY *v.* SPRAGUE.

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

Argued October 24, 1887. — Decided November 14, 1887.

The use of his own invention by an inventor, for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is not a public use under Rev. Stat. § 4886, and if a profit is derived from the sale of the product of its operation, merely as incident to such use, the character of the use is not thereby changed; but if the use is mainly for the purpose of trade and profit, the experimenting being incidental only, and it is public, and is continued for a period of more than two years prior to the application for a patent for the invention, it comes within the prohibition of that statute.

When it is clearly established that there was a public use of an invention by the inventor for more than two years prior to his application for a patent for it, the burden is on him to show by convincing proof that the use was not a public use, in the sense of the statute, but that it was for the purpose of perfecting an incomplete invention by tests and experiments.

Claims 1, 2, 3, 4, and 6 in letters-patent No. 228,136, dated May 25, 1880, and Claims 2, 3, and 5 in letters-patent No. 231,199, dated August 17, 1880, both granted to Leonard A. Sprague for improvements in machines for making buckle-levers, are void by reason of a public use of the invention by the patentee for a period of more than two years prior to his application for patent No. 231,199; as to claim 5 in letters-patent No. 228,136, and claims 1 and 4 in letters-patent No. 231,199, this court agrees with the Circuit Court, for the reasons stated in the opinion of the latter.

In equity, for infringement of letters-patent. Decree in favor of the complainant; 12 Fed. Rep. 721. From this decree an appeal was taken. The case is stated in the opinion of the court.

Mr. M. B. Philipp and *Mr. George E. Terry* for appellant.

Mr. Charles E. Mitchell for appellee.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity for an injunction and account based upon the alleged infringement by the appellant of letters-patent No. 228,136, dated May 25, 1880, and letters-patent No. 231,199, dated August 17, 1880, for improvements in machines for making buckle-levers, issued to Leonard A. Sprague, the appellee. The defences relied on are, 1st, a denial of the infringement alleged in respect to the fifth claim of patent No. 228,136 and the first and fourth claims of patent No. 231,199; 2d, as to all the other claims of both, that a machine embodying them was in public use for more than two years prior to the application for the patents. The application for patent No. 228,136 was filed on November 11, 1879, while that for patent No. 231,199 was filed December 2, 1878, the two being divisions of an application based on the same model. The machines described in the two patents, it is admitted, are substantially the same in construction and operation, both patents being for different parts and combinations of a single machine. For the purposes of this case, therefore, the date of the application is to be taken as of December 2, 1878, being the earlier of the two.

The machine is for making levers of buckles used almost exclusively on "arctic" overshoes. These levers are made from a single piece of brass, with slots through them near each end to fasten them to the strap of a shoe, and are bent by formers and swaged by dies so that they have what is termed a lip or bead, which bears upon the holding strap, two grooves within which lies the bar or pivot of the buckle, and two beads at the upper edge for a finish and to prevent the strap from cutting when it is fast through the slots and bears upon them when in use. There is no claim in these patents for the buckle-lever itself as a new article of manufacture, for which,

however, Sprague, the appellee, had a prior patent dated May 27, 1862. The levers are made from a strip of metal by a succession of operations in the patented machine. The first step is to produce the slotted blank; the next, to bend it by doubling it upon itself into a U-shape; the next, to produce the central double bead forming the grooves; and the next, to produce the double beads between the slot and the edge of the lever. The machine is organized to feed a strip of sheet brass under punches which punch the slots in the blank, and then cut it from the strip; to feed this blank over a matrix where it is bent into U-form; to feed it on to a mandrel, on which, by a pair of dies, it is partially formed, and then along that mandrel to a second pair of dies, where its form is completed. The machine is automatic, and while these successive steps take place in the complete manufacture of a single lever, all the various steps in the process, with respect to successive levers, take place simultaneously. So that as each lever is completely and finally formed on the mandrel it is pushed from the mandrel by another to take its place in that stage of formation.

The 1st, 2d, 3d, 4th, and 6th claims of patent No. 228,136, and the 2d, 3d, and 5th claims of patent No. 231,199, are those in respect to which the alleged infringement is admitted, and as to which the defence of two years' prior public use is urged. These claims are as follows:

Of patent No. 228,136 —

"1. In combination with the mandrel M, provided at its lower edge with the rib m and with the short ribs m^2 m^2, the dies N N′ O O, whereby, after the partially formed lever has been acted upon by dies N N′, the rib m serves as a support or guide over which said lever may be moved to a proper position relative to dies O O, substantially as set forth.

"2. In a machine for making buckle-levers, the combination of the mandrel M, the dies N N′, advanced on planes substantially at right angles to the planes of the partially formed buckle-lever, and the tongue n^2, attached to the die N, substantially as set forth.

"3. In a machine for making buckle-levers, the combination,

with the mandrel, the punch which punches blanks from a continuous sheet of metal, and two or more dies which successively form the metal into the desired shape, of a carrier which moves a blank from the punches to the forming-dies and advances the partially formed levers against the preceding lever, substantially as set forth.

"4. In a machine for making buckle-levers, the combination, with the matrix L and folder l^2, of the dies N N′, the mandrel arranged to receive the blank from the matrix, and the carrier, substantially as set forth."

"6. In a machine for making buckle-levers, the combination, with the folder, l^2, of the pusher-pin c^3, attached to and moving with the punch-stock C, and a returning-spring, which lifts the folder, substantially as set forth."

Of patent No. 231,199 —

"2. In a machine for making buckle-levers, the combination, with the die which punches blanks from a continuous sheet of metal, of two or more dies which successively form the metal into the desired shape, and a carrier which moves a blank from the punching-die to the forming-dies and advances the partially formed lever against the preceding lever, substantially as set forth.

"3. In a machine for making buckle-levers, the combination, with the mandrel M, provided with the rib m, of the dies N N′ and a stop adapted to engage with the lower end of the lever and determine the length of the bit u, substantially as described."

"5. The herein-described method of manufacturing buckle-levers — that is to say, by bending the blank into U-shape, then forming the bit u and seats u^2 u^3, and subsequently forming the grooves u^4, substantially as herein set forth."

The claims in respect to which infringement is denied are as follows:

Of patent No. 228,136 —

"5. In a machine for making buckle-levers, the combination, with the mandrel M and dies N N′, of the springs N^2 N^2, to press the dies forward into proper position relative to the mandrel, substantially as set forth."

Of patent No. 231,199 —

"1. In a machine for making buckle-levers, the combination of the mandrel M, provided with the ribs m m^3, of the dies N N′ O O, and a support, which presses the part u of the lever against the rib m, substantially as set forth."

"4. In a machine for making buckle-levers, the combination, with the mandrel M, having rib m, of the dies N N′ and stops adapted to engage both ends of the partially formed lever, to regulate its position relative to the mandrel and dies, substantially as set forth."

It will be observed that the claims in respect to which the infringement is denied do not embrace the whole invention claimed in the two patents. They cover only certain definite and specific combinations of parts of the mechanism. It is possible, therefore, that a defendant might be guilty of infringement in respect to all the other claims in the two patents, and yet not infringe the three claims specified above. That is to say, he might use a machine which embodied all the combinations except those specified in these three claims. These he might entirely omit without any substitute, or he might have a substitute for them so different as to amount to a separate invention, and therefore not mere equivalents for them.

In the examination of the question, therefore, of the prior public use, for two years before the date of the application, of the invention as embodied in those claims in respect to which the infringement is admitted, we assume for the present that the machine used by the defendant is an infringement of that covered by the complainant's patents only so far as it is covered by them, excluding the three claims in respect to which the infringement is denied.

The testimony on the subject of the prior public use by the complainant is, that from the fall of 1874 until the fall of 1877, and thus more than two years prior to December 2, 1878, the complainant had in use for the purpose of profit in his business, operated in his factory by his workmen for the production of arctic overshoe buckles, a machine which contained all the elements and combinations covered by the

claims in the two patents in respect to which the defendant confesses infringement. This machine was practically successful in that during the period of its use the complainant produced and sold about 50,000 gross of levers used on these shoe buckles, which he sold to his customers in the market. It was a public use in the sense of the statute and within the decisions of this court, inasmuch as it was used by the complainant in the regular conduct of his business by workmen employed by him in its operation, and in the view of such part of the public as chose to resort to his establishment, either for the purpose of selling material for the manufacture or of purchasing its product. It is claimed, however, and it was so decided by the Circuit Court, that this prior use of the machine in that form was not a public use within the prohibition of the statute so as to defeat the patent, because that use was experimental only, of an imperfect machine, embodying an incomplete invention, in order to enable the inventor to perfect it by improvements actually added, and to overcome defects developed by this use, which improvements are contained in the three additional claims, and which were added as parts of the invention within two years before the date of the application.

The matters under this head are stated by the learned judge of the Circuit Court in his opinion contained in the record, as follows:

"The facts are, that from 1862 to 1868 the patentee made another kind of buckle from those produced by this machine upon two or more different machines. Between 1868 and the fall of 1873 another kind of buckle was made by one machine. For a year prior to the fall of 1874, he made the 'beaded' buckles — *i.e.*, the kind now under consideration, — upon two machines.

"In 1874 he ordered the skeleton of the patented machine from Bliss & Williams, his workmen or himself making the patented portions. This machine was in a condition in which it was used to manufacture buckle-levers in the fall of 1874, and continued to be so used, without substantial change, until the spring of 1878; but it was not a perfected invention. It

had two defects — one, that it choked, and the overlapping blanks had to be picked apart by a workman; another, that the bead was not parallel with the slot, because the blank could not be forced upon the mandrel evenly. Nevertheless, it was used, in some seclusion from the public, to make levers, and it made about 50,000 gross which were sold; but the organization was defective until it was perfected in the early part of 1878, after repeated experiments. The inventor always adhered to the idea of perfecting the invention, and then obtaining a patent upon it. The two improvements which were introduced in 1878, were the springs between the levers and the dies, which prevented overlapping, and the rib m^3, in order to keep the blank in position when it was forced upon the mandrel. These changes, which are apparently not of great importance, perfected the invention, and enabled the inventor to take the final step between partial and complete success. It is perfectly true that a patentee cannot be permitted to use for profit a machine which embodies a perfected invention for a period of two years or more, and then obtain a valid patent for the old machine by means of the addition of some new improvements, which, in the language of Judge Lowell, 'were intended to benefit the patent rather than the machine.' *Perkins* v. *Nashua Card, &c., Co.*, 2 Fed. Rep. 451, 454. The present case is that of a machine which was imperfect, and which demanded and received the continuous experiments of the inventor to remedy the defects in its organization. It is not true that the inventor cannot safely use for profit such a machine in its imperfect state, lest two years should elapse during the experimental period before the invention is completed and the patent is applied for." *Sprague* v. *Smith & Griggs Mfg. Co.*, 12 Fed. Rep. 721.

We think this view might be correct and applicable to the case if the invention of the complainant, which he sought to embody and protect by the patents, consisted of the entire machine as he ultimately constructed and operated it, considered as a unit; for, in that view, it would have been imperfect and incomplete, and merely experimental, until it had received from its inventor every element necessary to its operation.

But that supposes that his invention is nothing less than the single, entire, and completed machine. We do not think that to be the present case. Here the invention is not one, but many; each of the claims in both of the patents is for a specific combination in a practically successful machine for making buckle-levers, and each is a separate and distinct invention, and claimed as such. All the elements of these combinations were old; it was the specific arrangement and several combinations and sub-combinations of them that are claimed as new. The use of any one of these combinations, or of any number of them, in such a machine, would be an infringement of the complainant's rights as patentee. And if, without the use of the combinations contained in the excluded claims, the complainant had a machine practically useful for the purpose for which it was designed, which could be used with commercial success as superior to modes of manufacture previously in use, and which, in fact, he did so use for profit in the ordinary course and conduct of his business, and for the purpose of a successful prosecution of that business, it can hardly be said with propriety that such use was merely experimental, although during the period of its operation he was also engaged in the invention of improvements by which he hoped and expected to make it more valuable and useful.

A use by the inventor, for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible; and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character; but where the use is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, the principal and not the incident must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition. The language of § 4886 of the Revised Statutes is, that "any person who has invented or discovered

any new and useful . . . machine, . . . not in public use or on sale for more than two years prior to his application, . . . may . . . obtain a patent therefor."

A single sale to another of such a machine as that shown to have been in use by the complainant more than two years prior to the date of his application would certainly have defeated his right to a patent; and yet, during that period in which its use by another would have defeated its right, he himself used it, for the same purpose for which it would have been used by a purchaser. Why should the similar use by himself not be counted as strongly against his rights as the use by another to whom he had sold it, unless his use was substantially with the motive and for the purpose, by further experiment, of completing the successful operation of his invention?

On the other hand, the use of an invention by the inventor himself, or by another person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded in this court as such a public use as under the statute defeats his right to a patent. *Shaw* v. *Cooper*, 7 Pet. 292; *Elizabeth* v. *Pavement Co.*, 97 U. S. 126; *Egbert* v. *Lippmann*, 104 U. S. 333. In this last case it was said (p. 336): "A use necessarily open to public view, if made in good faith, solely to test the qualities of the invention, and for the purpose of experiment, is not a public use within the meaning of the statute." In *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 134, it was said: "When the subject of invention is a machine, it may be tested and tried in a building either with or without closed doors. In either case, such use is not a public use, within the meaning of the statute, so long as the inventor is engaged, in good faith, in testing its operation. He may see cause to alter it and improve it, or not. His experiments will reveal the fact whether any and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished. And though, during all that period, he may not find that any changes are necessary, yet he may be justly said to be using

his machine only by way of experiment; and no one would say that such a use, pursued with a *bona fide* intent of testing the qualities of the machine, would be a public use within the meaning of the statute. . . . Whilst the supposed machine is in such experimental use, the public may be incidentally deriving a benefit from it. If it be a grist mill, or a carding machine, customers from the surrounding country may enjoy the use of it by having their grain made into flour, or their wool into rolls, and still it will not be in public use, within the meaning of the law. But if the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it will be in public use and on public sale within the meaning of the law."

The only witness called to prove the fact of two years' prior use was the patentee himself. It is to be supposed that his statement of the circumstances is as favorable to himself as the facts will justify. It appears from this that he commenced making buckles under his patent of May 27, 1862, No. 35,401, in the course of that year. The manufacture of the levers for these buckles required the use of three separate machines, one for cutting the blank with the holes punched, another for drawing it into a U-shape, and the other for pressing the U-shaped blank into its final form on a mandrel. This continued until 1867 or 1868, from which time until the fall of 1873, he testifies that he made a certain class of levers in one operation, but that they were "not arctics." In order to make the levers for the arctic buckles, from the fall of 1873 to the fall of 1874, two machines were used, one for making the whole of the lever, "except putting on a bead on the tail of the lever;" this operation was performed by a second machine. While producing the buckle-levers in this way upon two separate machines, the patentee states that he made changes in the mechanism with a view of producing the entire lever with a bead on by means of one machine. One change was, to put in an apparatus "to stop the machine when it worked imperfectly." Another was to put "a friction-joint in the lever," that is, the lever of the machine, which he thinks he put in dur-

ing the year 1866. The change whereby he was enabled to put the bead on, and which he says was made in 1870, or 1871, or 1872, he states was not successful. In describing the causes of the failure in this machine to produce the beaded arctic buckle-lever he says: "One feature, it broke the levers that done the pressing, and, by not driving on to mandrel true, it would not strike it in the right place, and had to be sent back by customers." The result was, that in the year 1874 he abandoned the use of this machine for the purpose of making beaded arctic buckle-levers, and constructed, in the spring of that year, a new one. This press was manufactured for him by Bliss & Williams, in March, 1874, and, as made by them, included the press, the main shaft, one of the levers, the lever for driving the carrier, the arrangement for working the levers for operating the striking dies, and the bed of the buckle-lever machine was planed for receiving the dies and the working parts of the buckle-lever machine. The other parts of the machine were made by the patentee himself and his own workmen. On the subject of this machine, the following is a portion of his examination:

"Q. 115. After carefully examining your patent 231,199 again, please state wherein that machine, as it was used by you in the latter part of the year 1874, differed, if at all, from the machine described in your said patent and shown therein.

"A. The springs between the levers that worked the striking dies are in the patent, but were not in the machine, and this rib m^3 on top of the mandrel, which projects over the matrix to keep the U-shaped blank down in position when forced on to the mandrel to keep it true and straight, was not in the machine. The point in the lower side of the carrier or driver is not in the patent, as I used the bar m^3 in its place. It gave me a great deal of trouble, and so I changed it. I don't know as I see a great deal more. I don't see anything more that I can describe.

"Q. 116. When did you put the springs between the levers and the striking dies in that machine?

"A. It was in 1877, in the fall.

"Q. 117. When did you put the extension of the mandrel,

referred to as m^3 in your patent, in that machine in place of the point on the carrier to hold the U-shaped blank down in the matrix?

"A. It was either in January or February, 1878; I think it was.

"Q. 118. Did you use that machine between the fall of '74 and the fall of '77 for making buckle-levers such as are described in your patent 231,199?

"A. Yes.

"Q. 119. How many did you make during that period of time on that machine?

"A. Well, I must have made about fifty thousand gross, as near as I can come at it.

"Q. 120. And what did you do with that fifty thousand gross?

"A. Sold them. I might have made a few more and I might have made a few less; I can't tell till I look at my books; I could come nearer to it.

"Q. 121. Which of the figures of the drawings of your patents in suit illustrates these fifty thousand gross of buckle-levers?

"A. Figure 9 of 231,199."

The witness further states that into the room where this machine was being operated people came at will, some to sell brass; others, people from the neighboring factories; and others to buy buckles; that the machine was open to their inspection; and in answer to the question whether an attempt was made to keep the operation of the machine secret during this period of time, the witness states: "From parties whom we thought were manufacturing buckles; we endeavored not to let them see them closely;" "not from those that we became acquainted with, and did not suppose would want to use any such machine."

In respect to the changes made in the machine in 1877 and 1878, and which are covered by claims in the patents, he further testifies on cross-examination as follows:

"Q. 171. After you had completed the new machine in the way described in reply to question 115 in your testimony, did you have any practical trouble in its working?

"A. Not near as much.

"Q. 172. What had been the trouble up to that time?

"A. Forming the bead or telescoping or failing to drive on the mandrel.

"Q. 173. Describe what you mean by telescoping.

"A. The buckle-levers, when the die formed the first impression on to the mandrel — the next blank from the matrix has to force that along, and it would spread open and go on the outside of the tongue formerly on there, and what I call telescope.

"Q. 174. Was this telescoping a real practical difficulty in the operation of this machine up to that time?

"A. It was, and gave me considerable trouble.

"Q. 175. Did you experiment from time to time to devise means to prevent it?

"A. Yes, sir.

"Q. 176. Now, about the trouble in the beading which you say existed up to the time when, in the fall of 1877, and in January or February, 1878, you made the change you have described. Please explain what the trouble was.

"A. One trouble was, that if it was not held in the right position in the matrix, it would go on to the mandrel one side longer than the other to match the ribs. It would not come in the centre.

"Q. 177. What would be the result of one side of the bent blank being longer than the other when it went on to the mandrel?

"A. It made a bad lever, which was rejected by my customers, and consequently was lost.

"Q. 178. Did you have any trouble from the bead not being made precisely parallel with the slot before you made these improvements of 1877 and '78?

"A. Yes, sir.

"Q. 179. How did that come about?

"A. One cause that I have described, and telescoping, not being held in the right position in the matrix to be forced on to the mandrel.

"Q. 180. State whether or not it was a very delicate operation to make the bead precisely parallel with the slot, and why.

"A. It gave me a great deal of trouble to do it. If it was not forced on to the mandrel evenly it would come that way.

"Q. 181. Did you have any practical trouble in any of these respects after you completed the machine in 1877 and '78 by the changes which you have described?

"A. Not when the dies and tools were in order — mandrel, carrier, &c.

"Q. 182. I suppose you mean that the parts were liable to wear and get out of order like other machines; am I right?

"A. Yes, sir.

"Q. 183. State whether or not it was your intention, while you were experimenting upon and improving this last machine, to obtain a patent when it should be completed.

"A. It was."

"Q. 187. State whether to complete the machine for making these arctic buckle-levers with a slot and bead so that all, or practically all, the levers would come out of the machine with a perfect bead required the later improvements which you put upon the machine.

"A. Yes, sir; or I would not have put them on.

"Q. 188. What would be the effect of telescoping upon the machine itself before you devised the improvements which you made in 1877 and 1878?

"A. It would break the mandrel sometimes, and choke up the machine so that we had to get it out.

"Q. 189. In what way did you get out the telescoping blanks when the machine was choked?

"A. Stopped the machine, and took a pointed steel with a hook on and drew them back, and sometimes worked them off the further end of the mandrel."

On reëxamination, he further testifies as follows:

"Q. 190. Did you ever have any trouble with the machine in choking after you had made the slight alterations you have spoken about, of extending the mandrel and putting in the springs?

"A. Yes, sir; some, but it was not near as much.

"Q. 191. What caused this choking, since those alterations —telescoping, or what?

"A. Sometimes telescoping and sometimes the blank not being cut smooth.

"Q. 192. In what way did you get out the telescoping blanks when the machine was choked, after it was altered?

"A. By stopping the machine, and using a sharp-pointed hook, the same as before.

"Q. 193. Since those alterations were made, have you had any trouble about putting the bead on, on account of the blank not going on the mandrel just right in this machine?

"A. Yes, sir; when the matrix was worn and the die was worn, the die, not cutting smooth, will throw it around.

"Q. 194. Would the telescoping of the blanks, after the alterations were made in this machine, also injure the machine, and, if so, what part?

"A. The telescoping would produce the same injury as before when it did telescope."

Also, on further cross-examination, he testified as follows:

"Q. 203. After your machine was completed, by the changes of 1877 and 1878, did you have any practical trouble in forming the bead, or pushing the blank into the mandrel, or from telescoping, or from waste, when the machine was in good running order and in repair?

"A. No, sir; not any practical trouble."

And on further examination:

"Q. 204. Wasn't the telescoping that you have testified about, that occurred in this machine after it was altered by extending the mandrel and putting in the springs, a practical difficulty?

"A. Yes; one of them.

"Q. 205. What caused this practical difficulty after those changes were made?

"A. There was several. The matrix wearing, the dies wearing smooth, not holding the brass evenly upon the mandrel, and the end of the carrier wearing so as not to force the U-shaped blanks on evenly.

"Q. 206. And those same things caused the telescoping in the machine before it was altered, didn't they?

"A. Yes; and when the die wasn't worn it would telescope."

The effect of this testimony, it is claimed by the appellee, is that "before the changes the telescoping took place when the machine was in order, the defect residing in the organization; after the changes, it would only take place when the machine was out of repair." On the other hand, it is contended on the part of the appellant, that, although the patentee, on being asked the question whether he experimented from time to time to devise means to prevent the difficulty of telescoping which he had experienced, answered in the affirmative, yet "there is nothing to show that these experiments were made prior to the fall of 1877, and he is entirely silent as to what, if any, they were, and what, if anything, was done by him by way of experimenting. As the record stands, this machine was not changed or altered, nor was any experiment made with it or on it, during the period of some three years while it made over 7,000,000 buckle-levers, which were sold. Sprague does not intimate anywhere that he made any experiments to overcome the objection which he said existed in the guiding of the U blanks upon the mandrel, at any time before he added to the mandrel an ordinary guide or rib, m^3, which was in January or in February, 1878;" and that "the only testimony as to his intention of patenting the machine while experimenting is his answer to X-Q 183, as follows: 'X-Int. 183. State whether or not it was your intention, while you were experimenting upon and improving this last machine, to obtain a patent when it should be completed. A. It was.'"

In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defence is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing.

The testimony of the patentee seems to be indefinite and vague. The question whether, during the period of his use of the machine, he was experimenting for its improvement, put to him by his counsel, suggested its own answer, which was in the affirmative, as also that respecting his intention during that time to apply for a patent. He gives no account of the dates of any such experiments, nor any particulars respecting them. He does not say whether more than one mode of overcoming the difficulties experienced was suggested and tried, or not; nor, if more than one device was attempted, what they were. The statements are meagre and bald, and quite insufficient to satisfy us that the problem of perfecting the machine, in the particulars in which it was proved to be deficient, was one that was exercising the ingenuity and inventive faculty of the patentee continuously, with the ever-present intention, during the whole period, to make an application for the patents as soon as he had reached a satisfactory solution.

In the present case, the use of the machine was apparently for the purpose of conducting an established business; the machine itself was the only one used for the manufacture, of which the patentee, by a prior patent, already had a monopoly. He alone supplied the market with the article, and the whole demand was satisfactorily met by this single machine. To this extent, it operated successfully. That it was capable of improvement need not be denied, nor that, while it was in daily use, its owner and inventor watched it with the view of devising means to meet and overcome imperfections in its operation; but this much can be said in every such case. There are few machines, probably, which are not susceptible of further development and improvement, and the ingenuity of mechanics and inventors is commonly on the alert to discover defects and invent remedies. The alterations made in the machine in question, however useful, were not vital to its organization. Without them, it could and did work so as to be commercially successful.

The impression made upon us by the evidence, the conclusion from which we cannot resist, is, that the patentee unduly

neglected and delayed to make his application for the patents, and deprived himself of his right thereto by the public use of the machine in question, so far as it is embodied in the claims under discussion.

The proof falls far short of establishing that the main purpose in view, in the use of the machine by the patentee, prior to his application, was to perfect its mechanism and improve its operation. On the contrary, it seems to us that it shows that the real purpose in the use was to conduct the business of the manufacture, the improvement and perfection of the machine being merely incidental and subsidiary.

The case upon the proofs seems to us to fall within the principle of the decision of this court in *Hall* v. *Macneale*, 107 U. S. 90, 96, 97. It was there said: "It is contended that the safes were experimental and that the use was a use for experiment. But we are of opinion that this was not so, and that the case falls within the principle laid down by this court in *Coffin* v. *Ogden*, 18 Wall. 120. The invention was complete in those safes. It was capable of producing the results sought to be accomplished, though not as thoroughly as with the use of welded steel and iron plates. The construction and arrangement and purpose and mode of operation and use of the bolts in the safes were necessarily known to the workmen who put them in. They were, it is true, hidden from view after the safes were completed, and it required a destruction of the safes to bring them into view. But this was no concealment of them or use of them in secret. They had no more concealment than was inseparable from any legitimate use of them. As to the use being experimental, it is not shown that any attempt was made to see if the plates of the safe could be stripped off, and thus to prove whether or not the conical bolts were efficient."

It follows that patent No. 228,136, to the extent of the 1st, 2d, 3d, 4th, and 6th claims, and patent No. 231,199, in respect to the 2d, 3d, and 5th claims, must be held void by reason of a prior public use of the invention covered thereby for more than two years before the date of the application. In respect to the alleged infringement of the 5th claim of patent No.

Counsel for Parties.

228,136, and the 1st and 4th claims of patent No. 231,199, we agree with the conclusions of the Circuit Court for the reasons stated in its opinion, which it is not necessary here to repeat. *Sprague* v. *Smith & Griggs Mfg. Co.*, 12 Fed. Rep. 721.

As we find the decree of the Circuit Court to be erroneous in respect to the other claims, it must be

Reversed, and the cause remanded with instructions to take further proceedings therein, in conformity with this opinion.

ANDREWS *v.* HOVEY.

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

Argued October 18, 19, 1887. — Decided November 14, 1887.

Reissued letters-patent No. 4372, granted to Nelson W. Green, May 9th, 1871, for an "improvement in the method of constructing artesian wells," the original patent, No. 73,425, having been granted to said Green, as inventor, January 14th, 1868, on an application filed March 17th, 1866, are invalid, because the invention was in public use by others than Green more than two years prior to his application for the patent.

The proper construction of § 7 of the act of March 3d, 1839, (5 Stat. 354,) is, that if, more than two years before the application for a patent, the invention covered by it was in public use, whether with or without the consent of the subsequent patentee, the patent was rendered invalid.

In equity; for alleged infringement of letters-patent. Decree dismissing the bill, from which complainant appealed. The case is stated in the opinion of the court.

Mr. Joseph C. Clayton and *Mr Anthony Q. Keasbey* for appellants.

Mr. Jed Lake for appellee. *Mr. M. W. Harmon* was with him on the brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity brought by the appellants for the infringement of reissued letters-patent No. 4372, granted to Nelson W. Green, one of the appellants, May 9, 1871, for an "improvement in the method of constructing artesian wells," the original patent, No. 73,425, having been granted to said Green, as inventor, January 14, 1868, on an application filed March 17, 1866.

This patent was before this court in the cases of *Eames* v. *Andrews* and *Beedle* v. *Bennett*, at October Term, 1886, reported in 122 U. S. 40 and 71. In those cases, this court sustained the validity of the reissued patent and affirmed the decrees of the Circuit Courts. In the present case, the decree of the Circuit Court was against the validity of the patent, and the bill was dismissed. 5 McCrary, 181. From that decree the plaintiffs have appealed.

The patent is familiarly known as the "driven well" patent. The specifications and drawings of the original and reissued patents are set forth in the opinion of this court in *Eames* v. *Andrews*. Numerous defences are set up in the answer in the present case, and voluminous proofs have been taken in respect to those defences; but it is necessary to consider only one of them, which, in our view, is fatal to the validity of the patent, and that is, that the invention was used in public, at Cortland, in the State of New York, by others than Green, more than two years before the application for the patent.

The brief of the appellants concedes that it is shown in this case that other persons than Green put the invention into public use more than two years before his application was filed. It is contended for the appellants that this was done without his knowledge, consent, or allowance. The appellee contends that such knowledge, consent, or allowance was not necessary in order to invalidate the patent; while the appellants contend that it was necessary. The whole question depends upon the proper construction of § 7 of the act of March 3, 1839, 5 Stat. 354, interpreted in connection with §§ 6, 7, and 15 of the act of July 4, 1836, 5 Stat. 119, 123.

A list of the various cases decided in the Circuit Courts, brought on the reissued "driven well" patent, is given in the case of *Eames* v. *Andrews*, at page 47. In none of those cases, except the present one and those heard at the same time with it, did the question thus presented arise. In *Andrews* v. *Carman*, 13 Blatchford, 307, 324, the question involved and considered by the court was that of a dedication and abandonment to the public of his invention by Green prior to his application, founded upon acts done by him. The conclusion of the court was, that there was no evidence of any use or sale of the invention by Green prior to his application for a patent, nor any direct proof of knowledge on his part of any use or sale of the invention by others within two years prior to his application, nor sufficient evidence from which to properly infer that he had such knowledge. The question of the use of his invention by others more than two years prior to his application does not appear to have been raised.

Nor was it raised in *Andrews* v. *Cross*, 19 Blatchford, 294. One of the defences set up in the answer in that case was "that the claim of Green as inventor was barred because the improvement was in use more than two years prior to the granting of his patent," and, as was said in the opinion in that case, there was "no allegation that the invention was in public use in the United States for more than two years before Green applied for his original patent, or that any use was with his consent or allowance, or that he abandoned the invention to the public in fact, or otherwise than inferentially from the fact alleged, that it was in use for more than two years before his original patent was granted." The conclusion of the Circuit Court in *Andrews* v. *Cross* was, that no abandonment or dedication of the invention to the public by Green was shown; and that there was no evidence of any use or sale of the invention by Green before his application, and no sufficient evidence from which to conclude that any use of any driven well by others before his application was consented to or allowed by him. The use by others thus referred to was, as in *Andrews* v. *Carman*, a use within two years prior to the application.

The point was not presented in *Eames* v. *Andrews* or in

Beedle v. *Bennett*, and in the opinion in the latter case, it was said (p. 77): "There is no evidence in the record of any use or sale of the invention by Green before his application for a patent, and no evidence from which to conclude that any use of any driven well by others before his application was consented to or allowed by him, except in the instances mentioned at Cortland, which were merely experimental tests, made by himself. Much less is there any evidence to show that there was any use of the invention by others for more than two years prior to his application."

The question involved has never been decided by this court. In *Egbert* v. *Lippman*, 104 U. S. 333, 334, it was said: "Since the passage of the act of 1839, it has been strenuously contended that the public use of an invention for more than two years before such application, even without his," the inventor's, "consent and allowance, renders the letters-patent therefor void. It is unnecessary in this case to decide this question, for the alleged use of the invention covered by the letters-patent to Barnes is conceded to have been with his express consent." In that case, the Circuit Court had, in *Egbert* v. *Lippman*, 15 Blatchford, 295, held that the effect of the act of 1839 was to require that the inventor should not permit his invention to be used in public at a period earlier than two years prior to his application for a patent, under the penalty of having his patent rendered void by such use; and that consent and allowance by the inventor were not necessary to such invalidity. The Circuit Court said, that the policy introduced by the act of 1839, and continued by §§ 24 and 61 of the act of July 8th, 1870, 16 Stat. 201, 208, now §§ 4886 and 4920 of the Revised Statutes, was, "that the inventor must apply for his patent within two years after his invention is in such a condition that he can apply for a patent for it, and that, if he does not apply within such time, but applies after the expiration of such time and obtains a patent, and it appears that his invention was in public use at a time more than two years earlier than the date of his application, his patent will be void, even though such public use was without his knowledge, consent, or allowance, and even though he was

in fact the original and first inventor of the thing patented and so in public use." The Circuit Court, in that case, appears to have decided the question on the view that the defence set up in the answer was that the invention had been known and in use in the United States more than two years before the application, and that there was no issue as to whether the public use for more than two years was with the consent or allowance of the patentee; but this court decided the case on the question of the consent of the patentee to the use for more than two years before the application.

The original patent in the present case having been applied for and issued prior to the passage of the act of 1870, is to be governed by the provisions of the acts of 1836 and 1839. Section 6 of the act of 1836 provided for the issuing of a patent to an inventor for an invention not known or used by others before his discovery or invention thereof, "and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer." Section 7 of the same act provided for the issuing of a patent if, on examination, it should not appear to the Commissioner that the invention had been made by any other person in this country prior to its being made by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, "or had been in public use or on sale with the applicant's consent or allowance prior to the application." Section 15 of the same act provided that the defendant, in an action for the infringement of a patent, might show, among other things, that the thing patented "had been in public use, or on sale, with the consent and allowance of the patentee, before his application for a patent;" and that, if that was shown, judgment should be rendered for the defendant.

The seventh section of the act of 1839 was in these words: "That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific

machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in said invention; and no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

The act of July 8, 1870, repealed the act of 1839, but provided, § 111, that such repeal should not affect, impair, or take away any right existing under the act of 1839. Section 24 of the act of 1870, now embodied in § 4886 of the Revised Statutes, was in these words: "That any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter or any new and useful improvement thereof, not known or used by others in this country, and not patented, or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the duty required by law, and other due proceedings had, obtain a patent therefor."

Section 37 of the act of 1870, now embodied in § 4899 of the Revised Statutes, provided as follows: "That every person who may have purchased of the inventor, or with his knowledge and consent may have constructed any newly invented or discovered machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or sold or used one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor."

In § 61 of the act of 1870 it was enacted, that, in any action for infringement, the defendant might prove on the trial, as a defence, among other things, that the thing patented "had been in public use, or on sale in this country, for more than two years before his application for a patent, or had been abandoned to the public," and that, if such special matter

alleged should be found for the defendant, judgment should be rendered for him. This provision is now found in § 4920 of the Revised Statutes.

It is very plain, that, under the act of 1836, if the thing patented had been in public use or on sale with the consent or allowance of the applicant for any time, however short, prior to his application, the patent issued to him was invalid. Then came § 7 of the act of 1839, which was intended as an amelioration in favor of the inventor, in this respect, of the strict provisions of the act of 1836. The first clause of that section provides for the protection of a person who, prior to the application for the patent, purchases or constructs a specific machine or article, and declares that he may use and sell such specific machine or article after the patent is issued, without liability to the patentee. The section does not require, in order to this protection, that the purchase or construction shall have been with the consent or allowance of the person who afterwards obtains the patent and seeks to enforce it against such purchaser or constructor. The words "consent or allowance" are not found in the provision. The only requirement is, that the specific machine or article shall have been purchased or constructed at some time prior to the application for a patent. The second clause of the section then passes to consider the effect upon the validity of the patent "of such purchase, sale, or use prior to the application" for the patent, and declares that "no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent." The expression "such purchase" clearly means the purchase from any person, and not merely from the person who becomes the patentee of the machine or article. The expression "such sale or use" clearly refers to the use or sale by the person who has purchased or constructed the machine or article, the right to use and sell which is given to him by the first part of the section. That right is given to a person who has constructed the machine or

article, as well as to one who has purchased it; and the plain declaration of the second part of the section is, that, where the purchase or construction of the machine or article took place more than two years prior to the application for the patent, or where the use or sale by the person who so purchased or constructed the machine or article took place at a time more than two years prior to the application, the patent becomes invalid. It is not possible in any other way to give full effect to the word "constructed," in the first part of the section. The word "purchased" and the word "constructed" are used in the same connection, and in connection with the words "so made or purchased," which occur afterwards; and the word "purchased" cannot be limited to a purchase from the applicant for the patent, nor can the word "constructed" be limited to a construction with the consent and allowance of such applicant, without interpolating into the statute the words "consent or allowance." We can find no warrant for doing this. The evident purpose of the section was to fix a period of limitation which should be certain, and require only a calculation of time, and should not depend upon the uncertain question of whether the applicant had consented to or allowed the sale or use. Its object was to require the inventor to see to it that he filed his application within two years from the completion of his invention, so as to cut off all question of the defeat of his patent by a use or sale of it by others more than two years prior to his application, and thus leave open only the question of priority of invention. The evident intention of Congress was to take away the right (which existed under the act of 1836) to obtain a patent after an invention had for a long period of time been in public use without the consent or allowance of the inventor; it limited that period to two years, whether the inventor had or had not consented to or allowed the public use. The right of an inventor to obtain a patent was in this respect narrowed, and the rights of the public as against him were enlarged, by the act of 1839. The language of § 24 of the act of 1870, now § 4886 of the Revised Statutes, is to the same effect, and carries out the policy inaugurated by the act of 1839. It

allows a patent to be granted only for an invention which was not in public use or on sale for more than two years prior to the application for the patent, subject to the defence of abandonment within such two years, which is also the requirement of § 61 of the same act; while § 37 of that act requires that a person, in order to have the right to use and sell, without liability, a specific thing made or purchased prior to the application for the patent, shall have purchased it of the inventor or constructed it with his knowledge and consent.

In view of the fact that § 37 of the act of 1870 reënacts the first part of § 7 of the act of 1839, with the addition, *ex industria*, of the requirement, in order to confer the right to use the specific thing in question, that the purchase of it should have been from the inventor or the construction of it should have been with his knowledge and consent, and of the further fact that § 24 of the act of 1870 reënacts the second part of § 7 of the act of 1839, and does not contain a requirement that the public use or sale for more than two years prior to the application shall have been with the consent or allowance of the patentee, in order to invalidate the patent, it may fairly be said, that it was the view of Congress, that § 7 of the act of 1839 did not require, as an element, the knowledge, consent or allowance of the applicant.

Views are to be found in decisions of Circuit Courts, not in harmony with the construction we have thus put upon § 7 of the act of 1839. That construction was upheld in the very full opinion given by Judge Love, one of the judges who sat in the present case in the Circuit Court. 5 McCrary, 204. It was indicated as the proper construction in the opinion of this court in *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 134, which was the case of a patent issued under the act of 1839, and where this court, speaking by Mr. Justice Bradley, said, in regard to that act: "An abandonment of an invention to the public may be evinced by the conduct of the inventor at any time, even within the two years named in the law. The effect of the law is, that no such consequence will necessarily follow from the invention being in public use or on sale, with the in-

ventor's consent and allowance, at any time within two years before his application; but that, if the invention is in public use or on sale prior to that time, it will be conclusive evidence of abandonment, and the patent will be void."

The decree of the Circuit Court is

Affirmed.

SIEMENS'S ADMINISTRATOR *v.* SELLERS.

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

Argued October 17, 1887. — Decided November 14, 1887.

The English letters-patent dated January 22, 1861, and sealed July 19, 1861, issued to Charles William Siemens and Frederick Siemens for "improvements in furnaces," and the American letters-patent No. 41,788, dated March 1, 1864, issued to C. W. and F. Siemens for "improved regenerator furnaces" describe the same furnace, in all essential particulars, and are substantially for the same invention.

When American letters-patent are issued covering the same invention described in foreign letters-patent of an earlier date, the life of the American patent is not prolonged by the fact that it also covers improvements upon the invention as patented in the foreign country.

The condition imposed by the act of July 4, 1836, 5 Stat. 117, that the term of a patent for an invention which has been patented in a foreign country shall commence to run from the time of publication of the foreign patent, was not repealed or abrogated by the act of March 2, 1861, 12 Stat. 246.

In the construction of a statute, although the words of the act are generally to have a controlling effect, yet the interpretation of those words must often be sought from the surrounding circumstances and previous history.

In equity for an account, and for an injunction to restrain infringement of letters-patent. Decree dismissing the bill from which the complainants appealed. After the cause was docketed in this court, one of the appellants died, and his administrator with the will annexed appeared and prosecuted his appeal. The following is the case as stated by the court.

This is a suit on a patent granted to the appellants, Charles

Statement of the Case.

W. and Frederick Siemens of Great Britain on the 12th day of January, 1869, being a reissue of a patent originally granted to the appellants on the 1st day of March, 1864. This patent was for an improved regenerator furnace, so called, intended to be used where a high degree of heat is required. By the arrangements of this invention, the products of combustion, after passing through the furnace, and before entering the chimney, are utilized in heating what are called the regenerators, consisting of bricks, or other refractory materials, loosely piled up in two pair of separate chambers through which, alternately, after being thus heated, the air and the gases are made to pass on their way to the furnace, and thus become raised to an intense degree of heat before entering it. Whilst one pair of regenerators are being thus heated by the outgoing products of combustion, or flame, the other pair are giving out their heat to the air and gases which are passing into the furnace; and then, by a reversal of dampers, the current is changed, and the air and gases are made to pass through the newly heated regenerators, and the products of combustion, or flame, through those that have become partially cooled; and so on alternately.

The apparatus has various incidental appliances necessary to its successful operation. Thus, as the regenerator chambers are placed underneath the furnace, spaces are formed between them and the furnace bottom, for the purpose of admitting a circulation of air to cool the parts and prevent their being destroyed by the intense heat. Another arrangement is that of a separate and distinct furnace, of peculiar form, for the consumption of the raw fuel, so constructed and operated that the gases produced thereby are carried over by a suitable flue to one of the heated regenerators, whilst atmospheric air is admitted into the other regenerator of the same pair. The air and gases are thus kept separate until about to enter the furnace by separate flues, when they meet and commingle and produce a rapid combustion and a most intense heat.

This is the general nature of the invention, and this explanation will be sufficient for understanding the claims of the patent, which are four in number, and are as follows, to wit:

Statement of the Case.

"We claim, in combination with a furnace A, and its chimney or smoke-discharge flue P, a system or series of air and gas regenerators B^1 B^2 B^3 B^4, constructed substantially as specified, and having conduits and dampers arranged so that air and gas may be led into and through such regenerators and furnace and out of the chimney, in manner and so as to be operated as and for the purpose or purposes hereinbefore described.

"We also claim the arrangement and combination of the air space or open chamber C with the furnace and its system of regenerators, arranged and applied together substantially in manner and so as to operate as described. [The air space here referred to is that by which the hearth of the furnace and other parts are cooled and prevented from destruction by the intense heat.]

"We also claim the arrangement and combination of the air chamber or space D, or the same and the space E, with the furnace, regenerators, conduits, and damper chests applied thereto, the whole being substantially as specified. [The air chamber D admits the atmospheric air to the regenerator.]

"We also claim the combination of a furnace with one or more regenerators or means of receiving its waste smoke and gaseous products, and intercepting or receiving heat therefrom, and also with means or devices by which all or a portion of the heat so intercepted or received may be absorbed by the influent air or gas during its passage into or to such furnace, for the purpose of improving or promoting combustion therein."

The defendants do not deny that the appellants were the authors of the very ingenious invention claimed by the patent; and they do not seriously deny that they use it. The principal defence which they set up is, that the appellants took out an English patent for the same invention, dated January 22, 1861, and sealed July 19, 1861; and that, by force of the acts of 1839 and 1861, the American patent expired at the end of seventeen years from the sealing of the English patent, namely, on the 19th day of July, 1878; and they deny that they used the said invention before the last-mentioned date, and no evidence is given that they did do so.

Argument for Appellants.

Mr. Charles S. Whitman for appellants.

I. The invention claimed in the complainants' reissued letters-patent was not "patented in a foreign country more than six months prior to the application," because: (1) It is not claimed in the English Letters-Patent, No. 167, of 1861. [Mr. Whitman compared the two specifications at length in support of this contention.] (2) It is not described in the said English patent in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practise the invention patented.

A person skilled in the art of building furnaces could not construct a furnace capable of use from the specification and drawing of English patent No. 167. The grant of the foreign patent raises no presumption that the description is sufficiently full and clear to enable this to be done. *Seymour* v. *Osborne*, 11 Wall. 516; *Hill* v. *Evans*, 6 Law Times N. S. 90; *Cohn* v. *United States Corset Co.*, 93 U. S. 366; *Cahill* v. *Brown*, 15 Off. Gaz. 697.

The defendant, upon whom the burden of proof rests, has introduced no testimony on that point. Novelty can only be negatived by proof which puts the fact beyond reasonable doubt. *Coffin* v. *Ogden*, 18 Wall. 120; *Parham* v. *Machine Co.*, 4 Fish. 468, 482; *Shuley* v. *Sanderson*, 8 Fed. Rep. 905; *Green* v. *French*, 11 Fed. Rep. 591; *Wood* v. *Mill Co.*, 4 Fish. 561; *Hawes* v. *Antisdel*, 2 B. & A. 10; *Bignall* v. *Harvey*, 5 B. & A. 636.

The commissioner having granted the extension for seventeen years from its date, it will be presumed that he acted within the law. *Corning* v. *Burden*, 15 How. 271; *Wilder* v. *McCormick*, 2 Blatchford, 31; *Alden* v. *Dewey*, 1 Story, 336; *Hotchkis* v. *Greenwood*, 4 McLean, 456; *S. C.* on appeal, 11 How. 248.

For, if it was his duty to limit the term, and he has not done so, the conclusion must be that the invention was not described or shown in the English patent. *Philadelphia & Trenton Railroad* v. *Stimpson*, 14 Pet. 448.

There are two sources to which we are entitled to resort in

construing the claims: (1) The state of the art prior to the patentee's invention; (2) the description in the specification. The state of the art prior to the joint invention of C. W. & F. Siemens is illustrated by the patent granted to Frederick Siemens in 1856. The scope of a joint invention and the claims of a patent founded thereon will be ascertained and limited in view of pre-existing devices, which were the sole invention of one of the joint patentees. *Hopkins & Dickinson Manufacturing Co.* v. *Corbin*, 14 Blatchford, 396. It is not, of course, contended that the English patent of Frederick Siemens, above referred to, describes or shows an invention which may be reduced to practice, but it is submitted that it should be considered in construing the claims of the reissue. Letters-patent may be construed in the light of the cotemporaneous construction of the inventor. *Trader* v. *Messmore*, 1 B. & A. 639. The application of this rule will establish that the theories of the defendants' experts regarding the scope of English patent 167, and also of the reissue, are erroneous, and that they have entirely misunderstood the invention disclosed by these patents. It will be obvious, from a perusal of their testimony, that what they consider the primary and essential features of the Messrs. Siemens's joint invention is the sole invention of Mr. Frederick Siemens, and is claimed by him as such in his English patent of 1856.

II. But if it be admitted that this claim is anticipated by the English patent of 1861, this would not invalidate the first three claims of the patent. We maintain that a patent granted in this country, subsequent to the act of 1861, and prior to the act of 1870, for a term of seventeen years from the date of issue for an invention which was also patented in a foreign country by the same person, "more than six months prior to his application," under the act of 1861, "remains in force for the term of seventeen years from the date of issue."

Under the act of 1861, the patent upon which this suit is brought, runs, according to its tenor, and "remains in force, for the term of seventeen years from March 1, 1864," even if it is proved that the whole or any part of the invention claimed in said patent was patented in England "more than six months

prior" to the application in this country; because the proviso of the act of 1839, "that in all such cases every such patent shall be limited to the term of fourteen years from the date of publication of such foreign patent," was repealed by the act of 1861, which provides that "*all* patents hereafter granted shall remain in force for the term of seventeen years from the date of issue," and repeals "all acts or parts of acts heretofore passed which are inconsistent with the provisions of this act."

If violence is to be done to the usage of the English language in giving words a meaning which they never were supposed to have before, and construing the 16th section of the act of 1861 to say one thing and mean another, such a departure from the literal meaning of the words used in the statute can only be excused on the ground that it is permissible to ascertain the source of the intention of the legislature by a consideration of other acts in *pari materia*, the mischiefs of which were the cause of the passage of the act of 1861. Let us first consider the acts in *pari materia*, which were not in force at the date of the patent.

[Mr. Whitman then examined the statutes from 1790 to 1870, and continued:]

It is obvious that the act of 1861 introduced two new features: First. It abolished extensions, except by special act of Congress. Second. It established a fixed and certain term of seventeen years for all patents in lieu of a term depending upon the discretion of the Commissioner of Patents.

That the object of the law was to abolish extensions appears upon its face, and also from the action of Congress. In exchange for the right of applying for a seven years' extension it gave to the inventor an absolute and certain term of seventeen years, and as aliens and persons who had patented their inventions abroad more than six months prior to taking out a patent in this country, possessed the right of applying for a seven years' extension, and as extensions were frequently granted to such persons, it is obvious that they were also entitled to this absolute term of seventeen years. The statute abolished the power of the commissioner to limit the term of

the patent, which, as we have seen, he possessed under the act of 1836, in order to render it certain that in all cases the patentee should enjoy the full term of seventeen years given in lieu of the privilege of obtaining an extension.

The section under consideration provides that "all patents hereafter granted shall remain in force for the term of seventeen years *from the date of issue*." What is the meaning of the word "issue"? Webster defines it as the act of sending out or causing to go forth, delivery, the issue of an order from a commanding officer or a court, the issue of money from the treasury. Obviously it is used in this sense in the patent laws. In reading the section of the act of 1861, under consideration, it strikes one forcibly that there is really nothing to construe. The object of the law was to abolish extensions, which, owing to the bad methods at the Patent Office, had become unpopular, and to grant in lieu thereof a longer term to persons who, under the former legislation, would have been entitled to apply for an extension, including, of course, inventors who had first patented their inventions abroad. This is universally admitted. The object and policy of the law being known, and its language perfectly plain and unambiguous, it would seem that there can be no construction where there is nothing to construe. For the court to say that § 16 of the act of 1861 applies only to a particular class of patents, would be the exercise of legislative power which the court does not possess; it would change the terms and language of the section, and would, in fact, make it another enactment.

Mr. S. S. Hollingsworth and *Mr. Joseph C. Fraley* for appellees.

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

The questions to be decided, therefore, are whether the English patent (which was given in evidence) was for the same invention as the American patent; and, if so, whether the latter is limited to expire at the end of seventeen years

from the sealing of the former. We think that both of these questions must be answered in the affirmative.

As to the first question, we have carefully compared the two patents, the English and American, and can see no essential difference between them. They describe the same furnace in all essential particulars. The English specification is more detailed, and the drawings are more minute and full; but the same thing is described in both. There is only one claim in the English patent, it is true. But that claim, under the English patent system, entitled the patentees to their entire invention, and is at least as broad and comprehensive as all four claims in the American patent. It is in these terms:

"Having now described the nature of our invention and the best modes we are acquainted with of performing the same, we wish it to be understood that we do not confine ourselves to the precise details shown on the accompanying drawings; but we claim as our invention the various arrangements of regenerative furnaces worked by the gases resulting from an imperfect combustion of solid fuel in separate places, as hereinbefore set forth."

It is contended by the counsel of the complainants, that the American patent contains improvements which are not exhibited in the English patent. But if this were so, it would not help the complainants. The principal invention is in both; and if the American patent contains additional improvements, this fact cannot save the patent from the operation of the law which is invoked, if it is subject to that law at all. A patent cannot be exempted from the operation of the law by adding some new improvements to the invention; and cannot be construed as running partly from one date and partly from another. This would be productive of endless confusion.

We have, then, to examine the question whether the term of the American patent was limited to run from its own date, or from the date (or sealing — which is equivalent to the publication) of the English patent. The reissued patent sued on is dated January 12, 1869, but the original patent, which is

the one to be looked at, was dated March 1, 1864. It was issued, therefore, before the act of July 8, 1870, 16 Stat. 198, c. 230, by which the patent laws were revised, and whilst the acts of July 4, 1836, 5 Stat. 117; March 3, 1839, 3 Stat. 353; and March 2, 1861, 12 Stat. 246, were in force. The act of 1836, as well as previous acts, made the term of a patent fourteen years; but it authorized an extension of the term for seven years longer, if it should appear that the patentee, without neglect or fault on his part, failed to obtain a reasonable remuneration for his invention. By the same act (§ 7) if an invention for which a patent was sought had been patented in a foreign country, before the application for a patent here, it was a bar to obtaining a patent in this country, unless (§ 8) such foreign letters-patent had been taken out by the applicant himself within six months previous to the filing of his specification and drawings. The act of 1839, § 6, removed the limitation of six months, and allowed a patent to be taken out here at any time after the inventor had taken out a patent for the same invention in a foreign country, provided it should not have been introduced into public and common use in the United States prior to the application for a patent here: "*And provided also*, that in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters-patent."

The act of 1861 introduced several changes in the administration of the Patent Office, and gave a right to patents for designs. The last section (§ 16) declared as follows, to wit, "that all patents hereafter granted shall remain in force for the term of seventeen years from the date of issue; and all extension of such patents is hereby prohibited."

The act of 1870, which was a revision of all previous laws relating to patents, continued the period of seventeen years as the term of a patent, and in case a foreign patent had been previously issued, declared that the American patent should expire at the same time with the foreign patent, or, if more than one, at the same time with the one having the shortest term; but, in no case, for a longer term than seventeen years. This provision is substantially carried forward into the Revised Statutes, § 4887.

Opinion of the Court.

The appellants contend that the act of 1861 repealed that portion of the act of 1839 which declared that a patent should be limited to the term of fourteen years from the date or publication of prior foreign letters-patent for the same invention. So far as the period of fourteen years is concerned, this is, undoubtedly, true. Prior to 1861 all patents, as we have seen, were granted for the term of fourteen years, with a right, under certain circumstances, to an extension for seven years longer. This right of extension was attended with many inconveniences and much expense to meritorious patentees, and Congress, by the act of 1861, cut it off, and made the term of all patents seventeen years — a compromise between fourteen and twenty-one years. The act had nothing to do with the question of foreign patents, but only with the term for which patents should ordinarily run; and the period of seventeen years, without any privilege of extension, was adopted in lieu of fourteen years with a provisional right of extension. That was the sole point before the legislative mind. Seventeen years limit was substituted for fourteen years. That was all that was intended or thought of. We are of opinion, therefore, that the condition imposed by the act of 1839, that the term of a patent for an invention which has been patented in a foreign country, shall commence to run from the time of publication of the foreign patent, was not repealed or abrogated by the act of 1861. If it was, it follows that there was a period of nine years, from 1861 to 1870, in which our patent system presented the anomaly of allowing patents to be taken out in this country at any length of time after the invention had been patented abroad, and without being subject to any condition, limitation, or restriction. This can hardly be supposed to have been the intention of Congress.

No doubt, the words of a law are generally to have a controlling effect upon its construction; but the interpretation of those words is often to be sought from the surrounding circumstances and preceding history. From the history of the law in this case, as exhibited in previous enactments, and from the evident object and purpose of § 16 of the act of 1861,

we are satisfied that the words there used to define and limit the term during which patents thereafter granted should remain in force, namely, "seventeen years from the date of issue," were only intended to change the length of the term, and not the point of its commencement. The latter continued as before, at "the date of issue," as defined by previous laws — referring either to the issue of the American patent itself, when no foreign patent had been previously obtained, or to that of the latter when such a patent had been obtained. This view of the construction and meaning of the act of 1861 was fully explained and enforced by Mr. Justice Blatchford in the case of *De Florez* v. *Raynolds*, 17 Blatchford, 436; *S. C.* 8 Fed. Rep. 434.

The decree of the Circuit Court is affirmed.

WILKINSON *v.* NEBRASKA, *ex rel.* CLEVELAND SOCIETY FOR SAVINGS.

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

Submitted November 1, 1887. — Decided November 14, 1887.

The proviso in § 6 of the act of March 3, 1887, 24 Stat. 552, c. 373, concerning the jurisdiction over suits which had been removed from a state court prior to the passage of the act, relates only to the jurisdiction of Circuit Courts of the United States, and does not confer upon this court jurisdiction over an appeal from a judgment remanding a cause to a state court; but such jurisdiction was expressly taken away by the last paragraph of § 2 of the act, taken in connection with the repeal of § 5 of the act of March 3, 1875, 18 Stat. 470.

THIS was a motion to dismiss, united with a motion to affirm. The case is stated in the opinion of the court.

Mr. J. M. Woolworth for the motions.

Mr. A. J. Poppleton and *Mr. John M. Thurston* opposing.

Opinion of the Court.

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

This is a writ of error for the review of an order of the Circuit Court remanding a suit which had been removed from the Supreme Court of the State of Nebraska. The suit was for a mandamus to compel Wilkinson, the treasurer of Dakota County, to apply certain moneys in his hands, collected for that purpose, to the payment of past-due coupons detached from bonds issued by the county. It was begun February 14, 1887. The defendants answered March 1, 1887, denying the validity of the bonds, and at the same time they presented their petition for the removal of the suit to the Circuit Court of the United States for the district of Nebraska, on the ground that the relator was a citizen of Ohio and they were citizens of Nebraska. The state court directed the removal April 6, 1887, and a copy of the record was entered in the Circuit Court on the 19th of the same month. On the 27th of May the relator moved to remand the suit "on the ground that the Circuit Court was without jurisdiction to review the said cause, and to hear and determine the same." This motion was granted the same day, and thereupon the present writ of error was sued out by the defendants, which the relator now moves to dismiss for want of jurisdiction.

We have already decided at the present term, in *Morey* v. *Lockhart*, *ante*, page 56, that since the act of March 3, 1887, 24 Stat. 552, c. 373, no appeal or writ of error lies to this court under the last paragraph of § 5 of the act of March 3, 1875, from an order of the Circuit Court remanding a suit which had been removed from a state court. That, however, was a case in which the suit was begun and the removal had after the act of 1887 went into effect. Here the suit was begun and a petition for removal filed in the state court before the act, and this it is contended saves to these parties their right to a writ of error under the act of 1875, 18 Stat. 470, because of a proviso in § 6 of that of 1887, in these words: "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."

This, in our opinion, relates only to the jurisdiction of the Circuit Court and the disposition of the suit on its merits; and has no reference to the jurisdiction of this court under the act of 1875 for the review by appeal or writ of error of an order of the Circuit Court remanding the cause. That was "expressly provided" for in the last paragraph of § 2 of the act of 1887, in which it was enacted that "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." This provision, when taken in connection with the repeal by § 6 of the last paragraph of § 5 of the act of 1875, shows unmistakably an intention on the part of Congress to take away all appeals and writs of error to this court from orders thereafter made by Circuit Courts, remanding suits which had been removed from a state court, and this whether the suit was begun and the removal had before or after the act of 1887.

The motion to dismiss is granted.

SANDS *v.* MANISTEE RIVER IMPROVEMENT COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Argued October 31, 1887. — Decided November 14, 1887.

The exaction of tolls, under a state statute, for the use of an improved natural waterway is not within the prohibition of the Constitution of the United States that no State shall deprive a person of his property without due process of law.

The internal commerce of a State, that is, the commerce which is wholly

Statement of the Case.

confined within its limits, is as much under its control as foreign or interstate commerce is under the control of the national government; and to encourage the growth of this commerce and render it safe, States may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, and levy a general tax or toll upon those who use the improvement to meet their cost; provided the free navigation of the waters, as permitted under and by the laws of the United States, is not impaired, and provided any system for the improvement of their navigation, provided by the general government, is not defeated.

There was no contract in the fourth article of the Ordinance of 1787 respecting the freedom of the navigable waters of the territory northwest of the Ohio River emptying into the St. Lawrence, which bound the people of the territory, or any portion of it, when subsequently formed into a State and admitted into the Union; but from the very conditions on which the States formed out of that territory were admitted into the Union, the provisions of the Ordinance became inoperative, except as adopted by them.

Huse v. *Glover*, 119 U. S. 543, affirmed.

THE plaintiff below was a corporation organized under a statute of Michigan for the improvement of Manistee River, a stream wholly within that State. The present action was brought to collect from the defendant the amount of tolls levied for the use, in the years 1878, 1879, 1880, and 1881, of the river as improved. The improvements consisted in the removal of obstacles to the floating of logs and lumber down the stream, principally by cutting new channels at different points, and by confining the waters at other points by embankments. The statute, under which the plaintiff below was organized, contained various provisions to secure a careful consideration of the improvements proposed, of their alleged benefit to the public, and, if adopted, of their proper construction, and of the tolls to be charged for their use. The company must first obtain the assent of the Governor and of the Attorney General to the proposed improvements, and then submit to the Board of Control designated a map of the sections of the stream which it proposed to improve, and plans showing the nature and character of the improvements. If, in the opinion of the Board, the construction of the proposed improvements would be a public benefit, and the company was a proper one to make them, the Board was required to

endorse its approval upon the map and plans, give the consent of the State to their construction, and fix the time for their completion. Upon such approval, the corporation was authorized to make the improvements; and, whenever they had been completed to the satisfaction of the Board of Control, and accepted, that body was to fix the rates of toll which the company might charge for running vessels, boats, rafts, timber, logs, or lumber through the improved stream. These rates were to be graduated with reference to the distance run upon the river, and were not to be increased or changed without the consent of the Board, and could not be increased at any time, so that they would amount to more than fifteen per cent of the cost of the improvements after deducting necessary expenses and repairs. The collection of tolls was to be confined strictly to that part of the river improved, and to the floatable material benefited by the improvements. The streams improved under the statute were to be opened to all persons for the passage of vessels, boats, logs, rafts, timber, and lumber, upon payment of the prescribed tolls; and uniform rates were to be charged.

The declaration alleged a compliance by the plaintiff below with the requirements of the statute in its incorporation; in obtaining the consent of the Governor and of the Attorney General of the State to its proposed improvement of Manistee River; in submitting to the Board of Control the maps and plans of the improvements; in obtaining its opinion that their construction, as thus shown, would be a public benefit; that the plaintiff was a proper company to make the improvements; and, also, its consent to the same on behalf of the State, and its designation of the time within which they were to be constructed. The declaration also set forth that the improvements were made pursuant to the plans and within the time required, with such changes and exceptions as were authorized by the Board under the statute, and that when they were completed and accepted, that body fixed the rates of toll for the use of the river as improved, in running logs and timber for the years 1879 to 1881, inclusive, those rates varying from five to fifteen cents per thousand feet, board

measure, according to the distance that the logs were to run through different sections of the improved stream; that during the years mentioned, the defendant below floated down the river, through the portions improved, seventy-eight million seven hundred and eleven thousand feet of logs, board measure, and became liable for the tolls fixed upon them, amounting to $9253, to recover which the present action was brought.

The defendant pleaded the general issue, and gave notice of several special defences. On the trial, the plaintiff established the matters alleged by him in the declaration, but the evidence offered by the defendant only tended to show that the measurement of the logs was excessive, and that the tolls receivable were less by ten per cent than the amount claimed.

The defendant, however, contended, and requested the court to instruct the jury in substance as follows:

First. That the statute of the State, under which the plaintiff was organized and the tolls were fixed, was in conflict with the clause of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law, in authorizing the Board of Control to fix the rates of toll without notice to the parties interested, or affording them any opportunity of contesting the validity or propriety of such tolls, either in the first instance or afterwards.

Second. That the statute in authorizing the improvements of rivers and the collection of tolls for them was in conflict with the clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, in that it impairs the contract contained in the Ordinance of 1787, "for the government of the territory of the United States northwest of the river Ohio," giving to the people of that territory the right to the free use of the navigable waters leading into the St. Lawrence, without any tax, impost, or duty therefor. The fourth article of that ordinance declares that, "The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways and forever free,

as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor." But the court refused to give these instructions or either of them; and the defendant excepted. The jury found a verdict for the plaintiff for $8731.88; upon which judgment was entered. On appeal, the judgment was affirmed by the Supreme Court of the State, 53 Mich. 593; and the case was brought here on writ of error.

Mr. M. J. Smiley for plaintiff in error cited: *Sands* v. *Manistee River Improvement Co.*, 53 Mich. 593; *Benjamin* v. *Manistee River Improvement Co.*, 42 Mich. 628; *Manistee River Improvement Co.* v. *Lamport*, 49 Mich. 442; *Moor* v. *Veazie*, 32 Maine, 343; *S. C.* 52 Am. Dec. 655; *Lorman* v. *Benson*, 8 Mich. 18; *S. C.* 77 Am. Dec. 435; *Morgan* v. *King*, 35 N. Y. 454; *S. C.* 91 Am. Dec. 58; *Thunder Bay Booming Co.* v. *Speechly*, 31 Mich. 336; *La Plaisance Bay Harbor Co.* v. *Monroe*, Walker Ch. (Mich.) 155; *Moore* v. *Sanborne*, 2 Mich. 519; *S. C.* 59 Am. Dec. 209; *San Mateo County* v. *Southern Pacific Railroad*, 13 Fed. Rep. 722; *Burns* v. *Multomah Railroad*, 15 Fed. Rep. 177; *Santa Clara County* v. *Southern Pacific Railroad*, 18 Fed. Rep. 385; *Stuart* v. *Palmer*, 74 N. Y. 183; *Lavin* v. *Industrial Savings Bank*, 18 Blatchford, 1; *Ames* v. *Port Huron Log Co.*, 11 Mich. 139; *S. C.* 83 Am. Dec. 731; *Munn* v. *Illinois*, 94 U. S. 113; *Chicago, &c., Railroad* v. *Iowa*, 94 U. S. 155; *Railroad Commission Cases*, 116 U. S. 307, 331; *People* v. *Brooklyn*, 4. N. Y. 419; *S. C.* 55 Am. Dec. 266; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; *Nelson* v. *Cheboygan Navigation Co.*, 44 Mich. 7; *Stoeckle* v. *Ellees*, 37 Mich. 261.

Mr. T. J. Ramsdell for defendant in error cited: *Escanaba* v. *Chicago*, 107 U. S. 678; *Huse* v. *Glover*, 15 Fed. Rep. 292; *S. C.* on appeal, 119 U. S. 543; *Woodman* v. *Kilbourne Mfg. Co.*, 1 Bissell, 549; *Kelly* v. *Pittsburg*, 104 U. S. 78; *Pollard* v. *Hagan*, 3 How. 212; *Withers* v. *Buckley*, 20 How. 84;

Willson v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turk*, 95 U. S. 459, 462; *Mobile* v. *Kimball*, 102 U. S. 691; *Benjamin* v. *Manistee River Improvement Co.*, 42 Mich. 628; *Nelson* v. *Cheboygan Slack Water Navigation Co.*, 44 Mich. 7, 10; *Manistee River Improvement Co.* v. *Lamport*, 49 Mich. 442; *Wisconsin River Improvement Co.* v. *Manson*, 43 Wis. 255; *Spooner* v. *McConnell*, 1 McLean, 337, 352; *Palmer* v. *Cuyahoga County*, 3 McLean, 226; *Kellogg* v. *Union Co.*, 12 Conn. 7; *Thames Bank* v. *Lovel*, 18 Conn. 500; *S. C.* 46 Am. Dec. 332; *Commissioners of Sinking Fund* v. *Green and Barren River Navigation Co.*, 89 Ky. 73; *McReynolds* v. *Smallhouse*, 8 Bush, 447; *Carondelet Canal Navigation Co.* v. *Parker*, 29 La. Ann. 430; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Vicksburg* v. *Tobin*, 100 U. S. 430; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *San Mateo County* v. *Southern Pacific Railroad*, 13 Fed. Rep. 722; *Santa Clara County* v. *Southern Pacific Railroad*, 18 Fed. Rep. 385; *Sears* v. *Cottrell*, 5 Mich. 251; *Weimer* v. *Bunbury*, 30 Mich. 201; *Munn* v. *Illinois*, 94 U. S. 113; *Peik* v. *Chicago, &c., Railroad*, 94 U. S. 164; *Hagar* v. *Reclamation District*, 111 U. S. 701, 707–712; *Davidson* v. *New Orleans*, 96 U. S. 97; *McMillen* v. *Anderson*, 95 U. S. 37.

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

The plaintiff in error, the defendant below, misapprehends the purport of the provision that no State shall deprive one of property without due process of law, when he considers the exaction of tolls under a statute for the use of an improved waterway as a deprivation of property within its meaning. There is no taking of property from him by such exaction within the prohibition, any more than there is a taking of property from a traveller, in requiring him to pay for his lodgings in a public inn. There is in such a transaction only an exchange of money for its supposed equivalent. The tolls exacted from the defendant are merely compensation for bene-

fits conferred, by which the floating of his logs down the stream was facilitated.

There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property, or of the improvements, and considerations of the return which such values or expenditures should yield. The legislature, acting upon information received, may prescribe, at once, the tolls to be charged; but, ordinarily, it leaves their amount to be fixed by officers or boards appointed for that purpose, who may previously inspect the works, and ascertain the probable amount of business which will be transacted by means of them, and thus be more likely to adjust wisely the rates of toll in conformity with that business. This subject, like a multitude of other matters, can be better regulated by them than by the legislature. In the administration of government, matters of detail are usually placed under the direction of officials. The execution of general directions of the law is left, in a great degree, to their judgment and fidelity. Any other course would be attended with infinite embarrassment.

In authorizing the Board of Control to fix rates of toll for the floating of logs and timber over the improved portions of the Manistee River certain limits are prescribed to its action; but within those limits the matter is left to its judgment. No notice can be given to parties, who may have occasion to use the stream, to attend before the Board and present their views upon the tolls to be charged. Such parties cannot be known in advance. The occasion for using the improved stream may arise at any time in the year; perhaps after the tolls have been established. The whole subject is one of administrative regulation, in which a certain amount of discretionary authority is necessarily confided to officers entrusted with its execution. Should there be any gross injustice in the rate of

tolls fixed, it would not, in our system of government, remain long uncorrected.

The Manistee River is wholly within the limits of Michigan. The State, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the State to another. The internal commerce of a State — that is, the commerce which is wholly confined within its limits — is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the States may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in *County of Mobile* v. *Kimball*, the free navigation of those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. 102 U. S. 691, 699. And to meet the cost of such improvements, the States may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. *Huse* v. *Glover*, 119 U. S. 543, 548. Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the State.

There was no contract in the fourth article of the Ordinance of 1787 respecting the freedom of the navigable waters of the territory northwest of the Ohio River emptying into the St. Lawrence, which bound the people of the territory, or of any portion of it, when subsequently formed into a State and admitted into the Union.

The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The ordinance in terms ordains and declares that

its articles "shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable unless by common consent." And for many years after the adoption of the Constitution, its provisions were treated by various acts of Congress as in force, except as modified by such acts. In some of the acts organizing portions of the territory under separate territorial governments, it is declared that the rights and privileges granted by the ordinance are secured to the inhabitants of those territories. Yet from the very conditions on which the States formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. All the States thus formed were, in the language of the resolutions or acts of Congress, "admitted into the Union on an equal footing with the original States *in all respects whatever*." Michigan, on her admission, became, therefore, entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original States, and could at any time afterwards exercise full control over its navigable waters except as restrained by the Constitution of the United States and laws of Congress passed in pursuance thereof. *Permoli* v. *First Municipality of New Orleans*, 3 How. 589, 600; *Pollard* v. *Hagan*, 3 How. 212; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 159; *Huse* v. *Glover*, 119 U. S. 543, 546.

But, independently of these considerations, there is nothing in the language of the fourth article of the ordinance respecting the navigable waters of the territory emptying into the St. Lawrence which, if binding upon the State, would prevent it from authorizing the improvements made in the navigation of the Manistee River. As we said in *Huse* v. *Glover*, 119 U. S. 543, decided at the last term: "The provision of the clause, that the navigable streams shall be highways without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase

their depth. For outlays caused by such works the State may exact reasonable tolls." 119 U. S. 548. And again: "By the terms tax, impost, and duty, mentioned in the ordinance, is meant a charge for the use of the government, not compensation for improvements." *Ibid.* 549.

We perceive no error in the record, and

The judgment of the Supreme Court of Michigan must be affirmed; and it is so ordered.

RUGGLES *v.* MANISTEE RIVER IMPROVEMENT CO. Error to the Supreme Court of the State of Michigan. MR. JUSTICE FIELD: The same questions are presented as in *Sands* v. *The Manistee River Improvement Co.*; and, in conformity with the decision there rendered, the judgment herein is

Affirmed.

Mr. M. J. Smiley for plaintiff in error.

Mr. T. J. Ramsdell for defendant in error.

HITZ *v.* JENKS.

SAME *v.* SAME.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued October 21, 1887. — Decided November 14, 1887.

Real estate in the District of Columbia, belonging to a married woman before the act of April 10, 1869, c. 23, may be conveyed, by deed voluntarily executed and duly acknowledged by her husband and herself, to secure the payment of a debt of his.

Under §§ 450–452 of the Revised Statutes of the District of Columbia, a certificate of the separate examination and acknowledgment of a married woman, made in the prescribed form, and recorded with the deed executed by her, cannot be controlled or avoided, except for fraud, by extrinsic evidence of the manner in which the magistrate performed his duty.

A receiver of a national bank, appointed by the comptroller of the currency, is not accountable in equity to the owner of real estate for rents

thereof received by him as such receiver, and paid by him into the treasury of the United States, subject to the disposition of the comptroller of the currency, under § 5234 of the Revised Statutes.

Accruing rents, collected and paid into court by a receiver appointed on a bill in equity against the mortgagor and a second mortgagee to enforce a first mortgage, which appears to have been satisfied and discharged, belong to the second mortgagee, so far as the land is insufficient to pay his debt.

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

Mr. Enoch Totten for appellant.

Mr. Walter D. Davidge and *Mr. R. D. Mussey* for appellees.

Mr. Justice Gray delivered the opinion of the court.

The original suit was a bill in equity, filed January 10, 1879, by Keyser, as the receiver of the German American National Bank, against Hitz and wife, Donaldson, Prentiss, Chipley, Halstead, Crane, Tyler and Jenks, to enforce a deed, in the nature of a mortgage, dated January 26, 1876, by which Hitz and wife conveyed land in Washington to Donaldson and Prentiss, in trust to secure the payment of promissory notes for $20,000, made by Chipley, indorsed by Halstead and held by the bank; as well as to set aside, as made in fraud of the bank, the following conveyances of the same land: 1st. A release, dated June 16, 1877, from Donaldson and Prentiss to Mrs. Hitz. 2d. A deed, of the same date, from Hitz and wife to Crane. 3d. A deed, dated June 18, 1877, from Crane to Tyler, in trust to secure the payment of Crane's promissory notes for $20,000, payable to Hitz and by him indorsed to Jenks.

Mrs. Hitz filed a cross-bill against Keyser and her codefendants, alleging that she was induced to execute the conveyance to Crane by fraud and in ignorance of its contents; and praying for a cancellation both of that conveyance and of the deed of trust from Crane to Tyler, and for an account of rents and

profits. By leave of court, she afterwards amended her bill so as to allege that the deed to Crane was fraudulently altered after she executed it.

After a hearing upon pleadings and proofs, it was adjudged at the special term, by a decree made November 28, 1881, and amended December 15, 1881, that these two deeds were valid against Hitz, but void as against his wife; that the former deed of trust had been discharged by payment and release; and that Keyser account for the rents and profits previously received by him, and collect and pay into court all rents subsequently accruing. From that decree Mrs. Hitz, Jenks and Keyser each appealed to the general term, which on December 11, 1883, reversed the decree of the special term, and dismissed both bills, save that the cause was retained to take an account of the rents and profits received or which should have been received by Keyser, and to determine the right to those rents and profits, which were claimed by Mrs. Hitz as her separate property, by Jenks as part of the security afforded by the deed of trust to Tyler, and by Keyser under judgments recovered against Hitz. 2 Mackey, 513. On July 13, 1885, a further decree was entered in general term, denying the right of Mrs. Hitz to any part of those rents and profits. 4 Mackey, 179. From each decree of the general term she alone appealed to this court.

The principal matter to be determined is the validity, as against Mrs. Hitz, of the conveyance from her husband and herself to Crane, and of the deed of trust from Crane to Tyler. The evidence establishes the following facts:

Mr. and Mrs. Hitz were married in 1856, children were born to them, and she inherited the land in question from her father, before the passage of the act of Congress, providing that "in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were feme sole, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise and bequeath

the same, or any interest therein, in the same manner and with like effect as if she were unmarried." Act of April 10, 1869, c. 23, § 1, 16 Stat. 45; Rev. Stat. D. C. §§ 727, 728.

Chipley and Halstead were men of no means, and the real object of the deed of trust from Hitz and wife to Donaldson and Prentiss was to secure certain liabilities of Hitz to the bank, of which he was then president. The object of making the deeds from Hitz and wife to Crane and from Crane to Tyler was to secure the payment of money actually advanced by Jenks to Hitz, and by Hitz applied to the payment of the notes secured by the former deed of trust.

The evidence satisfactorily proves that no fraud was practised upon Mrs. Hitz, and that the deed from herself and her husband to Crane was put in its present form before it was signed by either of them. As these are pure matters of fact, and the evidence relating to them is well summed up in the opinion of the court below, they need not be enlarged upon. 2 Mackey, 521–526.

There can be no doubt that by a deed, voluntarily executed and duly acknowledged by the husband and the wife, the entire title of both might be conveyed to secure the payment of his debt, notwithstanding that the act of 1869, as construed by this court, exempted the land, or any interest therein, from being taken on execution against him. *Hitz* v. *National Metropolitan Bank*, 111 U. S. 722; *Mattoon* v. *McGrew*, 112 U. S. 713.

The more important question is, whether the appellant has shown by competent and sufficient proof that her acknowledgment of the deed to Crane did not fulfil the requirements of the Revised Statutes of the District of Columbia upon the subject, which are as follows:

By § 441, acknowledgments of deeds may be made before any judge of a court of record and of law, or any chancellor of a State, or a judge of a court of the United States, or a justice of the peace, or a notary public, or a commissioner of the circuit court of the district.

By § 450, "when any married woman shall be a party executing a deed for the conveyance of real estate or interest

therein, and shall only be relinquishing her right of dower, or when she shall be a party with her husband to any deed, it shall be the duty of the officer authorized to take acknowledgments, before whom she may appear, to examine her privily and apart from her husband, and to explain to her the deed fully."

By § 451, "if, upon such privy examination and explanation, she shall acknowledge the deed to be her act and deed, and shall declare that she had willingly signed, sealed and delivered the same, and that she wished not to retract it, the officer shall certify such examination, acknowledgment and declaration by a certificate annexed to the deed, and under his hand and seal, to the following effect," that is to say, beginning in the usual form of a certificate of acknowledgment, and adding that "being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, she acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it."

By § 452, "when the privy examination, acknowledgment and declaration of a married woman is taken and certified and delivered to the recorder of deeds for record, in accordance with the provisions of this chapter, the deed shall be as effectual in law as if she had been an unmarried woman," except as to any covenants therein.

These provisions substantially reënact statutes which have been in force ever since 1715 in the District of Columbia, and in the State of Maryland out of which the District was formed. Maryland Stats. 1715, c. 47, § 11; 1752, c. 8; 1766, c. 14, § 6; 1797, c. 103, § 3 — all in Kilty's Laws; Dist. Col. Laws 1868, pp. 21, 28, 38; acts of May 31, 1832, c. 112, 4 Stat. 520; April 20, 1838, c. 57, § 4, 5 Stat. 227.

The conveyance of the estates of married women by deed, with separate examination and acknowledgment, has taken the place of the alienation of such estates by fine in a court of record under the law of England, though differing in some of its effects, owing to the diversity in the nature of the two modes of proceeding.

A fine was in the form of a judgment of a court of record, at first in an actual, and afterwards in a fictitious suit by the conusee against the conusors to recover possession of the land; and derived its very name from its putting *an end* to that suit and to all other controversies concerning the same matter. 2 Bl. Com. 349; Co. Lit. 262 *a*. A party could not therefore impeach it at law, even for infancy (except by writ of error sued out while still under age) or for insanity. Bac. Ab. Fines and Recoveries, Fines C; 5 Cruise Dig. tit. 35, c. 5, §§ 41–54; *Murley* v. *Sherren*, 1 Per. & Dav. 126; *S. C.* 8 Ad. & El. 754. Yet if any fraud or undue practice was used in obtaining the fine, the Court of Chancery would relieve against it, as against any other conveyance. 5 Cruise Dig. tit. 35, c. 14, §§ 68–77; *Bulkley* v. *Wilford*, 2 Cl. & Fin. 102; *Conry* v. *Caulfield*, 2 Ball & Beatty, 255.

On the other hand, the alienation of land by deed of husband and wife with her separate examination and acknowledgment is, in form as well as in fact, a conveyance by the parties, and therefore does not, even if the acknowledgment is certified by a magistrate in the form prescribed by statute, and recorded, bind a wife who, by reason of infancy or insanity, is incapable of conveying. *Sims* v. *Everhardt*, 102 U. S. 300; *Williams* v. *Baker*, 71 Penn. St. 476; *Priest* v. *Cummings*, 16 Wend. 617, 631, and 20 Wend. 338, 349; *Jackson* v. *Schoonmaker*, 4 Johns. 161. In any case of fraud or duress, also, it may be impeached by bill in equity, or, in some States, in an action at law. *Central Bank* v. *Copeland*, 18 Maryland, 305; *Schrader* v. *Decker*, 9 Penn. St. 14; *Louden* v. *Blythe*, 16 Penn. St. 532, and 27 Penn. St. 22; *Hall* v. *Patterson*, 51 Penn. St. 289; *Jackson* v. *Hayner*, 12 Johns. 469; *Fisher* v. *Meister*, 24 Michigan, 447; *Wiley* v. *Prince*, 21 Texas, 637.

The statute of 18 Edw. I. *De Modo Levandi Fines* enacted that if a feme covert should be one of the parties to a fine, then she must first be examined by certain justices, and if she did not assent to the fine it should not be levied. Yet this was always understood to mean that the fine ought not to be received without her examination and free consent; but that if it was received and recorded, neither she nor her heirs could

be permitted to aver that she was not examined and did not consent; "for this," says Lord Coke, "should be against the record of the court, and tending to the weakening of the general assurances of the realm." 2 Inst. 510, 515; Bac. Ab. *ubi supra.*

The object of a statute, like that now before us, requiring the separate examination of the wife to be taken by a judicial officer or notary public, to be certified by him in a particular form, and to be recorded in the registry of deeds, is twofold: not only to protect the wife by making it the duty of such an officer to ascertain and to certify that she has not executed the deed by compulsion of her husband or in ignorance of its contents; but also to facilitate the conveyance of the estates of married women, and to secure and perpetuate evidence, upon which innocent grantees as well as subsequent purchasers may rely, that the requirements of the statute, necessary to give validity to the deed, have been complied with. *Lawrence* v. *Heister*, 3 Har. & Johns. 371, 377.

The duty of examining the wife privily and apart from her husband, of explaining the deed to her fully, and of ascertaining that she executed it of her own free will, without coercion or under influence of his, is a duty imposed by law upon the officer, involving the exercise of judgment and discretion, and thus a judicial or quasi-judicial act. The magistrate is required to ascertain a particular state of facts, and, having ascertained it, to certify it for record, for the benefit of the parties to the deed, and of all others who may thereafter acquire rights under it. And the statute expressly provides that upon the recording of the certificate "the deed shall be as effectual in law as if she had been an unmarried woman."

The reasonable, if not the necessary conclusion is, that, except in case of fraud, the certificate, made and recorded as the statute requires, is the sole and conclusive evidence of the separate examination and acknowledgment of the wife.

It has been decided by this court, in a case arising under a similar statute of Virginia, that if the certificate, as recorded, is silent as to these facts, the want cannot be supplied by parol evidence that the wife was duly examined; and this for the

reason stated by Mr. Justice Trimble, in delivering judgment, as follows: "What the law requires to be done, and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment or privy examination in fact or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a feme covert." *Elliott* v. *Peirsol*, 1 Pet. 328, 340.

That the magistrate's certificate, when made in the form required by the statute, and duly recorded, is conclusive evidence that he has performed his duty, has not been directly adjudged by this court; but the course of its decisions has tended to this conclusion. In *Drury* v. *Foster*, Mr. Justice Nelson, in delivering judgment, observed: "There is authority for saying, that where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the examination of the feme covert, embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that the acts of the officer for this purpose are judicial and conclusive." 2 Wall. 24, 34. And in *Young* v. *Duvall*, the court said that if the officer's certificate "can be contradicted, to the injury of those who in good faith have acted upon it, the proof to that end must be such as will clearly and fully show the certificate to be false or fraudulent. The mischiefs that would ensue from a different rule could not well be overstated. The cases of hardship upon married women that might occur under the operation of such a rule are of less consequence than the general insecurity of titles to real estate, which would inevitably follow from one less rigorous." 109 U. S. 573, 577.

It would be inconsistent with the reasons above stated, as well as with a great weight of authority, to hold that, in the case of a deed actually executed by a married woman of full age and sound mind, a certificate of her separate examination and acknowledgment, in the form prescribed by the statute, and duly recorded with the deed, can afterwards, except for

fraud, be controlled or avoided by extrinsic evidence of the manner in which the examination was conducted by the magistrate. *Comegys* v. *Clarke*, 44 Maryland, 108; *Jamison* v. *Jamison*, 3 Wharton, 457; *Williams* v. *Baker*, 71 Penn. St. 476; *Harkins* v. *Forsyth*, 11 Leigh, 294; *Greene* v. *Godfrey*, 44 Maine, 25; *Baldwin* v. *Snowden*, 11 Ohio St. 203; *Graham* v. *Anderson*, 42 Illinois, 514; *Dolph* v. *Barney*, 5 Oregon, 191; *Johnston* v. *Wallace*, 53 Mississippi, 331; *Hartley* v. *Frosh*, 6 Texas, 208. See also *Bancks* v. *Ollerton*, 10 Exch. 168, 182.

As to such of the cases, cited by the learned counsel for the appellant, as have not been already referred to, it may be remarked that in *Rhea* v. *Rhenner*, 1 Pet. 105, in *Hepburn* v. *Dubois*, 12 Pet. 345, in *Dewey* v. *Campau*, 4 Michigan, 565, and in *O'Ferrall* v. *Simplot*, 4 Iowa, 381, the requisite certificate was either wanting or defective upon its face; and that *Dodge* v. *Hollinshead*, 6 Minnesota, 25, and *Landers* v. *Bolton*, 26 California, 393, were decided under statutes which expressly provided that the certificate should not be conclusive, but might be rebutted by other evidence.

In the case at bar, the recorded certificate of the notary public who took the acknowledgment is in the form given in the statute. The other evidence on the subject is the testimony of the appellant and of the notary. The appellant, being called as a witness in her own behalf, admitted her signature, but did not recollect that she ever executed or acknowledged the deed in question, and denied that it was ever explained to her. The notary, being called as a witness by the appellees, testified that in taking her acknowledgment he asked her if she had read over the deed and understood its contents, and if she willingly signed, sealed and delivered it, without any compulsion on the part of her husband, and wished not to retract it, to all which she answered in the affirmative; that he did not otherwise explain the deed to her, and did not read it himself; and that he did not think it necessary to explain a deed if the party was already acquainted with its contents.

The appellant's signature being admitted, and there being no proof of fraud or duress in taking or procuring her acknowledgment, the extrinsic evidence was, for the reasons and upon

the authorities before stated, incompetent to impeach the notary's certificate as to the manner in which he had performed his duty.

The result is that the appellant shows no ground for reversing the principal decree, and it only remains to consider her claim to rents and profits. This claim consists of two parts:

First. For rents received, with the consent of Hitz, by Keyser as receiver, appointed by the comptroller of the currency, of the national bank, from the time of his appointment as such receiver in October, 1878, to the date of the decree of the court below in special term, December 15, 1881. But it appears that the moneys so received were paid by him into the treasury of the United States, subject to the order of his superior officer, the comptroller of the currency, as required by § 5234 of the Revised Statutes, and were distributed by the comptroller among the creditors of the bank. They were therefore rightly treated by the court below as not to be accounted for in this cause.

Second. For rents received by Keyser under his appointment as receiver by the decree of the court in special term on December 15, 1881, and paid by him into the registry of the court, pursuant to that decree, from its date until its reversal in general term on December 11, 1883. It is argued for the appellant that by the rule affirmed in *Teal* v. *Walker*, 111 U. S. 242, a mortgagee is not entitled to rents and profits until he has been lawfully put in possession of the land; and that Keyser, having been admitted into possession by Hitz only, cannot hold the rents and profits against Mrs. Hitz. The conclusive answer to this argument is that the accruing rents were not received and held by Keyser by virtue of an agreement with Hitz; but the court, through Keyser as its receiver, took possession of these rents in order to preserve them for the party who should ultimately prevail in the suit. When it was afterwards adjudged that the first deed of trust, and the debt thereby secured, which Keyser's original bill sought to enforce, had been released and discharged, and that the second deed of trust was valid as against Mrs. Hitz; and the sum obtained for the land at a sale under the power contained in

Syllabus.

this deed proved insufficient, by more than the whole of the fund in court, to pay the debt of Hitz to Jenks, secured by this deed; it was rightly held that Mrs. Hitz had no right as against Jenks to any part of this fund. This view disposes of the case, independently of the application of part of the fund to the payment of taxes accrued during the pendency of this suit; and even if the rents originally belonged to Mrs. Hitz, and not to her husband as tenant by the curtesy, which is by no means clear. *Hitz* v. *National Metropolitan Bank*, 111 U. S. 722.

Decrees affirmed.

COLORADO COAL AND IRON COMPANY *v.* UNITED STATES.

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

Argued November 2, 1887. — Decided November 21, 1887.

To a bill in equity to cancel a patent of land from the United States to a preëmptor, solely on the ground that there was no actual settlement and improvement on the land, as falsely set out in affidavits in support of the preëmption claim, the defence of a *bona fide* purchaser without notice is perfect.

In a suit by the United States to cancel a patent of public land the burden of producing the proof and establishing the fraud is on the Government, from which it is not relieved although the proposition which it is bound to establish may be of a negative nature.

When a plaintiff's right of action is grounded on a negative allegation, which is an essential element in his case, or which involves a charge of criminal neglect of duty or fraud by an official, the burden is on him to prove that allegation, the legal presumption being in favor of the party charged.

In a proceeding in equity against an innocent purchaser to set aside a patent of public land for fraud in which it is charged that an officer of the United States, who was concerned in its issue, participated, the burden of establishing his title is not cast upon the defendant by raising a suspicion, however strong, of the alleged fraud and wrongdoing of the officer, if the officer could have been examined and was not.

In this case the United States sought to cancel a number of patents to preemptors, the lands having passed into the hands of an innocent purchaser, on the ground that there were no actual settlements and improvements,

but that the alleged preëmptors were fictitious persons, who did not exist, and that these facts were known to the register and receiver, through whose fraudulent act in this respect the patents were obtained. Having established that there were no such settlements and improvements, the plaintiffs introduced the evidence of many witnesses residing in the vicinity that the persons named in the patents had not resided there and were unknown to the witnesses, but did not call the register and receiver, or the solicitor through whom some of the patents were obtained from the Land Office, or the officers who had witnessed and taken acknowledgment of deeds purporting to convey the interest of the patentees to the defendant. *Held*, that the burden was on the Government to produce so much of this further evidence as could be obtained, and that in its absence the United States had not made all the proof of which the nature of the case was susceptible, and which was apparently within their reach.

In order to constitute the exemption of coal lands contemplated by the preemption act under the head of "known mines," there must be ascertained coal deposits upon the land, of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes.

The mere fact that there are surface indications of coal on public land will not of itself prevent the acquisition of title to the land under the preemption laws; nor will the fact alone that after acquisition of such a title the surface indications prove to be veins which are, by a change of circumstances, profitably worked, invalidate such a title.

In equity. The bill was filed in the name of the United States by the attorney general on January 22, 1880, the object and prayer of which were to declare void and cancel sixty-one patents for as many distinct pieces of land, situated at different places in Las Animas County, in the State of Colorado, amounting in the aggregate to $9565\frac{95}{100}$ acres. To the original bill the Southern Colorado Coal and Town Company, a corporation organized under the laws of Colorado, was the sole defendant. The patents in question were issued at different times between October, 1873, and October, 1874, upon preemption claims, under the act of 1841. In each case there appeared to be filed all the necessary and proper affidavits, duly verified before the register or receiver of the land office at Pueblo, showing that the preëmptors had entered and settled in person upon the land on a day named, and had made improvements thereon, the nature of which was set out in detail, and that the lands in question were non-mineral lands,

and subject to preëmption under the acts of Congress relating thereto. Between May, 1873, and December, 1875, warranty deeds in the names of the preëmptors and patentees were made, acknowledged, and recorded, apparently conveying the premises to William S. Jackson, as trustee, who represented a number of individuals who had deposited money in his hands to be used in the purchase of lands in Colorado. On June 1, 1876, by deed duly acknowledged and recorded, but without covenant of warranty, Jackson conveyed and released all these lands to the defendant, the Southern Colorado Coal and Town Company. On January 20, 1880, that corporation was consolidated with other corporations under the name of the Colorado Coal and Iron Company, to which, upon that date, the lands in question were conveyed. Under date of February 1, 1880, the Coal and Iron Company made a mortgage covering the premises in question, with others, to Louis H. Meyer, as trustee, to secure an issue of bonds amounting to $3,500,000. On January 7, 1882, an amendment to the bill was filed, making the Colorado Coal and Iron Company, the consolidated corporation, together with Meyer, the trustee in the mortgage, parties defendant. The purchase price of the lands to the Government was $11,997.45, which was paid at the time to the proper officer, $1813.14 in cash, and the remainder in certificates known as agricultural college scrip, which by law was receivable for that purpose.

It was charged in the bill that these patents were procured by means of a fraudulent conspiracy entered into by and between Irving W. Stanton, register of the land office, Charles A. Cook, receiver for the land district, at Pueblo, in Colorado, Alexander C. Hunt, and others unknown, who, it was alleged, organized and had incorporated the Southern Colorado Coal and Town Company. In furtherance of this conspiracy, and as the means of accomplishing its purpose, it was alleged "that neither of the supposed preëmptors of the land as aforesaid described by their names, as stated in said several proofs of preëmption, or in the said certificates of location, ever settled upon the said lands or improved the same, as represented in said several proofs of preëmption, and that no person or per-

sons whatsoever, as represented in either of said certificates of location, appeared or presented himself before said Stanton or Cook, or either of them, at any time, and made proof of preëmption or agricultural college scrip location, either as preëmptor or as witness for any preëmptor as aforesaid described, as in and by said proofs of preëmption and location certificates, or either of them, as aforesaid, is supposed, but that the same, and each of them, are false and fraudulent, and were designed, made, and executed by said Stanton and Cook and said Hunt, and the said persons to your orator unknown, or some one or more of them, in the manner aforesaid, and for the purpose of fraudulently depriving your orator of its title to the said pieces of land."

It was further alleged that all the said supposed preëmptors were fictitious persons, and their names were fictitious names, and that the supposed names that appeared as witnesses to the said several proofs of preëmption were fictitious names, and that no such person or persons, either as preëmptors or as witnesses, had ever lived or been known in the county of Las Animas, where said pieces and parcels of land were located, and, in fact, that no such persons existed.

It was further alleged in the bill "that the aforesaid pieces and parcels of land are not agricultural land, and are not suitable for agricultural or grazing purposes, and are of no value for any purpose except for the coal deposits therein contained. . . . That the said several pieces and parcels of land contain large and valuable deposits of coal, and that the said deposits of coal were known to the said Stanton and Cook and said Hunt, and to the said person or persons to your orator unknown, who wrote out, signed, and executed, or caused to be written out, signed, and executed, the several proofs of preëmption and non-mineral affidavits at the time the said several proofs of preëmption and non-mineral affidavits were made out, signed, and executed."

It was also charged in the bill that the said Hunt was a stockholder in the Southern Colorado Coal and Town Company, and general manager of its business, and that the incorporators of said company and the trustees thereof, including

William S. Jackson, "knew at the time the aforesaid described land was conveyed to said company by said William S. Jackson, as hereinbefore described, that the several patents to said several pieces and parcels of land had been fraudulently obtained from your orator, and knew that the said several supposed preëmptors and patentees were myths and fictitious persons, and knew that the said Jackson had no right, title, or interest in said land, or any part thereof."

The answer of the Southern Colorado Coal and Town Company, filed November 2, 1881, specifically denied all the allegations of the bill alleging fraud, and denied that the said lands or any portion of them were mineral lands in the sense of not being lands capable of being acquired under the preëmption law, and set up by way of further defence that it was a purchaser of all the said lands in good faith for a valuable consideration without any knowledge or notice whatever of any or either of the pretended fraudulent acts and conspiracies in the bill alleged. Louis H. Meyer, on June 5, 1882, answered to the same effect, and by a stipulation the answer of the Southern Colorado Coal and Town Company was directed to stand as the answer of the Colorado Coal and Iron Company. Replications were duly filed, and the cause was heard on a large amount of proofs, resulting in a decree in favor of the complainant, declaring all the patents in the bill mentioned, and the subsequent conveyances of the land therein described to the defendants, to be fraudulent and void, and decreeing that they should be held for naught and be delivered up to be cancelled. The present appeal was from that decree.

It was held by the Circuit Court that the charge in the bill, that the supposed preëmptors and patentees were fictitious persons, having no existence, was sufficiently proved; that, consequently, there being no grantees, no legal title passed from the United States; and that, as the defendants acquired no legal title by virtue of the supposed conveyances to them, they could not claim protection as *bona fide* purchasers for value without notice of the fraud. 18 Fed. Rep. 273.

Mr. Benjamin H. Bristow (with whom were *Mr. Lyman*

Citations for Appellants.

K. Bass and *Mr. David Willcox* on the brief), for appellants, cited: *Boone* v. *Chiles*, 10 Pet. 177; *Graffam* v. *Burgess*, 117 U. S. 180; *Insurance Co.* v. *Newton*, 22 Wall. 32; *Alexander* v. *Pendleton*, 8 Cranch, 462; *Cole* v. *Gourlay*, 79 N. Y. 527; *White* v. *McGarry*, 2 Flipp. 572; *Chapman* v. *Sims*, 53 Mississippi, 154; *Games* v. *Dunn*, 14 Pet. 322; *Miller* v. *Sherry*, 2 Wall. 237, 250; *Murray* v. *Ballou*, 1 Johns. Ch. 566; *Fletcher* v. *Peck*, 6 Cranch, 87, 133; *Dexter* v. *Harris*, 2 Mason, 531; *Wood* v. *Mason*, 1 Sumner, 506; *United States* v. *Minor*, 114 U. S. 233; *Deffeback* v. *Hawke*, 115 U. S. 392; *Western Pacific Railroad Co.* v. *United States*, 108 U. S. 510; *Westmoreland Coal Co.'s Appeal*, 85 Penn. St. 344; *Bell* v. *Wilson*, L. R. 1 Ch. 303; *Mullan* v. *United States*, 118 U. S. 271; *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S. 687; *Sullivan* v. *Iron Silver Mining Co.*, 109 U. S. 550; *Morton* v. *Nebraska*, 21 Wall. 660; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Maxwell Land Grant Case*, 121 U. S. 379; *United States* v. *Throckmorton*, 98 U. S. 61; *United States* v. *Stone*, 2 Wall. 525; *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *United States* v. *Atherton*, 102 U. S. 372; *Shepley* v. *Cowan*, 91 U. S. 330; *Atlantic Delaine Co.* v. *James*, 94 U. S. 207; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290; *Meader* v. *Norton*, 11 Wall. 442; *Thomas* v. *Wyatt*, 31 Missouri, 188; *S. C.* 77 Am. Dec. 640; *Boyce* v. *Danz*, 29 Mich. 146; *Hatch* v. *Bayley*, 12 Cush. 27; *Calais Steamboat Co.* v. *Scudder*, 2 Black, 372; *Carpenter* v. *Longan*, 16 Wall. 271; *Knox County* v. *Aspinwall*, 21 How. 539; *Coloma* v. *Eaves*, 92 U. S. 484; *Marcy* v. *Oswego*, 92 U. S. 637; *Stearns* v. *Page*, 7 How. 819; *Wagner* v. *Baird*, 7 How. 234; *Burke* v. *Smith*, 16 Wall. 390; *Preston* v. *Preston*, 95 U. S. 200; *Badger* v. *Badger*, 2 Wall. 87; *Kirk* v. *Hamilton*, 102 U. S. 68; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *United States* v. *Smith*, 94 U. S. 214; *McKnight* v. *United States*, 98 U. S. 179; *State* v. *Milk*, 11 Fed. Rep. 389; *Commonwealth* v. *Pejepscot Proprietors*, 10 Mass. 154; *State* v. *Ober*, 34 La. Ann. 359; *United States* v. *Beebee*, 17 Fed. Rep. 36; *Harwood* v. *Railroad Co.*, 17 Wall. 78; *Willard* v. *Taylor*, 8 Wall. 557; *Polk* v. *Wendall*, 9 Cranch,

87; *Utterback* v. *Binns*, 1 McLean, 242; *United States* v. *McGraw*, 12 Fed. Rep. 449, 452; *United States* v. *Marshall Mining Co.*, 17 Fed. Rep. 108; *Miner* v. *Beekman*, 50 N. Y. 337, 345; *Carr* v. *Wallace*, 7 Watts, 394; *Smith* v. *Drake*, 8 C. E. Green (23 N. J. Eq.), 302; *Bomberger* v. *Turner*, 13 Ohio St. 263; *S. C.* 82 Am. Dec. 438; *McLoughlin* v. *Barnum*, 31 Maryland, 425; *Troost* v. *Davis*, 31 Ind. 34; *Bacon* v. *Cottrell*, 13 Minn. 194; *Green* v. *Dixon*, 9 Wis. 532; *Attorney General* v. *Balliol College*, 9 Mod. 407.

Mr. Solicitor General for appellee cited: *Zerbe* v. *Miller*, 16 Penn. St. 488, 495; *Stauffer* v. *Young*, 39 Penn. St. 455; *Garwood* v. *Dennis*, 4 Binney, 314; Stephens Ev. Art. 96; 1 Wharton Ev. § 356; *Moffat* v. *United States*, 112 U. S. 24; *Gaussen* v. *United States*, 97 U. S. 584, 590; *United States* v. *Minor*, 114 U. S. 233, 238; *Sampeyreac* v. *United States*, 7 Pet. 222; *Oliver* v. *Piatt*, 3 How. 333; *Diamond* v. *Lawrence County*, 37 Penn. St. 353; *S. C.* 78 Am. Dec. 429; *Morton* v. *Nebraska*, 21 Wall. 660, 674; *Polk* v. *Wendall*, 9 Cranch, 87; *Minter* v. *Crommelin*, 18 How. 87; *Mullan* v. *United States*, 118 U. S. 271, 277.

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

It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands as falsely set out in the affidavits in support of the preëmption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defence of a *bona fide* purchaser for value without notice is perfect.

In reference to such a case, it was said by this court, in *United States* v. *Minor*, 114 U. S. 233, 243: "Where the patent is the result of nothing but fraud and perjury, it is enough to

hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value." *Meader* v. *Norton*, 11 Wall. 442, 458. It is, indeed, an elementary doctrine of equity that where a grantor has been induced by fraud to part with the legal title to his property, he cannot reclaim it from subsequent innocent purchasers for value. Hence it becomes necessary, to support the decree of the Circuit Court, to maintain as that court declared, that the legal title to the lands in question did not pass from the United States by virtue of the patents, because there were in fact no grantees. And it was that proposition of fact which by the proofs introduced into the cause the United States undertook to establish. The evidence on that point is found in the depositions of fourteen persons examined as witnesses. They were called to prove, and did prove, in the first place, in respect to the several tracts of land in controversy, the facts that they had not been settled upon, and that no improvements had been made upon them by any person. They also testified, in substance, that they were acquainted at the time of the transactions with the lands, and were acquainted with the people then living in Las Animas County, some of them stating that they knew every white man residing at that time therein; that with the exception of one person, named Martine, there were no persons in the county at the time bearing the names specified as preëmption claimants, and no persons bearing the names subscribed as witnesses to their statements; and that they never saw or heard of persons residing in the county having such names. This is the extent of this description of evidence, the weight of which is to be estimated in connection with the fact that the county of Las Animas, although sparsely settled, embraces an area extending about 150 miles from east to west and about 40 miles from north to south. In corroboration of it testimony was introduced, on behalf of the United States, of experts in handwriting, with a view of establishing, by a comparison of the documents, that they were fabricated, which, however, was met by the opposing opinions of other experts called on

the part of the defendants. This evidence we think not only inconclusive, but entitled to no weight, not at all supporting the inference sought to be drawn that the same handwriting is traceable in the signatures of the various names. The conclusion, if warranted at all, must depend upon the statements of the other witnesses, the substance of whose testimony has already been given, and such presumptions of fact or law as legitimately arise thereon.

It is charged in the bill that these title papers were falsely and fraudulently made by the register and receiver combining with Hunt and others unknown in a conspiracy for that purpose, but there is no direct proof of such a conspiracy. It is sought to be inferred from the fact that the preëmption statements were falsely made, and from the evidence tending to show that the persons named were fictitious. There is no proof to connect the register and receiver with such a conspiracy, except the fact that the affidavits purport to have been made before them, and were certified to by them. Hunt's connection with it rests upon the fact that he procured deeds from the supposed patentees, conveying the lands to Jackson in pursuance of a bargain with him. It may well be admitted that if there were no actual persons who made applications as preëmption settlers, none who made and signed the necessary declarations and affidavits, and no persons as witnesses who attested the same, the register and receiver must have known the fact; but the fact of the conspiracy depends upon prior proof that the alleged transactions were mere fictions. The proof necessary to justify that conclusion is supposed to be found in the facts testified to by the witnesses, a summary of which has been given.

It certainly does not follow that no such persons in fact existed, as a necessary conclusion from the testimony of these witnesses that they knew no such persons as named in these papers. The utmost that can be said, as was said by the learned judge of the Circuit Court in delivering judgment in the case, is, that "if none of them were ever in the county, and no improvements were ever made upon the land, then the proofs upon which the patents issued were false, and the infer-

ence that the papers were manufactured without the presence of any persons bearing or assuming the names of the patentees is not more unreasonable than would be the inference that sixty-one actual persons committed perjury themselves, and suborned as many others to perjure themselves as witnesses, in order to acquire the title." This, it is argued, establishes at least that it is more probable that the grantees were fictitious than that they were real persons, and that, in view of the difficulty, if not the impossibility, of proving the negative proposition that no such persons existed, and of the fact that the defendants connect their title and right with a transaction which must have occurred with these grantees if they had an actual existence, the burden of proof is shifted from the United States to the defendants, and that, as the latter introduced no evidence tending to show the fact as they claimed it to be, the case of the complainants must be considered as established by a preponderance of proof.

We have had recent occasion to consider the question of the character and degree of proof necessary in such cases to invalidate titles held by purchasers in good faith for value, and without notice, under patents issued by the United States. In *The Maxwell Land Grant Case*, 121 U. S. 325, 379, 381, it is said : "The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided. . . . We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the

ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal? In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish. It is, indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text writer: "When the negative ceases to be a simple one — when it is qualified by time, place, or circumstance — much of this objection is removed; and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are

in the hands of the party asserting the negative." Best on the Law of Evidence, Am. ed. Boston, 1883, § 270. So also *Ibid.* § 273: "When a presumption is in favor of the party who asserts the negative it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative." Also *Ibid.* § 276: "This appears from the case of *Doe d. Bridger* v. *Whitehead*, 8 A. & E. 571, which was an ejectment by a landlord against a tenant on an alleged forfeiture by breach of a covenant in his lease to insure against fire in some office in or near London, in which it was contended that it lay on the defendant to show that he had insured, that being a fact within his peculiar knowledge. The argument *ab inconvenienti* was strongly urged, viz., that the plaintiff could not bring persons from every insurance office in or near London to show that no such insurance had been effected by the defendant, and *R.* v. *Turner* [5 M. & S. 206], *The Apothecaries' Co.* v. *Bentley* [Ryan & Moody, 159], and some other cases of that class, were cited. But Lord Denman, C. J., in delivering judgment, said: 'I do not dispute the cases on the game laws which have been cited; but there the defendant is in the first instance shown to have done an act which was unlawful unless he was qualified, and then the proof of qualification is thrown upon the defendant. Here the plaintiff relies on something done or permitted by the lessee, and takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within the defendant's knowledge, but that does not vary the rule of law.' And in the same case Littledale, J., said: 'In the cases cited as to game, the defendant had to bring himself within the protection of the statutes; and a like observation applies to *The Apothecaries' Co.* v. *Bentley*. But here, where a landlord brings an action to defeat the estate granted to the lessee, the onus of proof ought to lie on the plaintiff.' And this ruling has been upheld by subsequent cases. *Toleman* v. *Portbury*, L. R. 5 Q. B. 288; *Wedgwood* v. *Hart*, 2 Jurist, N. S. 288; *Price* v. *Worwood*, 4 H. & N. 512."

Mr. Greenleaf states the rule in equivalent terms. He says, 1 Greenleaf on Evidence, § 78: "To this general rule, that the burden of proof is on the party holding the affirmative, there are some *exceptions*, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff *grounds his right of action upon a negative allegation*, and where, of course, this negative is an essential element in his case." And in § 80: "So, where the negative allegation involves a charge of *criminal neglect of duty*, whether official or otherwise; or fraud; or the wrongful violation of actual lawful possession of property; the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged."

In the present case the facts shown are, in our opinion, not sufficient to overcome the presumption of innocence on the part of the register and receiver of the land office. It is quite consistent with these facts that real persons, whether under their own or under assumed names, did actually appear before them and make prëemption claims. There is no testimony whatever tending to establish directly any complicity on their part with the fraud which may have been practised upon them and not through them. It is certain that there were real persons acting in the matter. The purchase price due on the entry of the lands was in fact paid. There is no proof of any actual fabrication of the papers, the genuineness of which is not negatived by any internal evidence. The allegations in the bill, that they were in fact manufactured by the register and receiver and Hunt, or by any one with their connivance, are entirely unsupported by direct evidence.

It is alleged in the bill also that "by the rules and regulations which then and since have governed it in the issue of patents for land located with agricultural college scrip, no patent was issued by your orator except on presentation at its General Land Office, by the person making such location, his agent, or his assign, of the duplicate certificate as aforesaid delivered to the locator for the land for which a patent is

claimed," and "that after the forwarding by the said Stanton and Cook of said supposed proofs of prëemption, said agricultural college scrip, said money, said non-mineral affidavit, and said duplicate certificate, in each of the said pretended preemption claims as aforesaid mentioned, to your orator's General Land Office at Washington, the said Alexander C. Hunt, pretending to act as agent of each of said supposed preemptors, presented to the officers of the General Land Office such other duplicate certificate of location, and requested said officers to cause a patent for each of the said several pieces of land to issue from your orator to the said supposed persons in each case purporting to claim and apply for the same." And it is added that the officers of the General Land Office, confiding in the honesty of the register and receiver, and believing the statements contained in the proofs to be true, did issue its patents therefor. The allegation is that the patents were issued to Hunt. In point of fact, it appears from the evidence that a number of patents were delivered to Britton & Gray, W. P. Dunwoody, and W. W. Cowling, respectively, through whom the duplicate certificates were presented to the General Land Office for that purpose. There is no allegation that these were not real persons, nor are any charges made against them as participants in the fraud. They professed to represent the parties entitled to the patents; they must have known for whom in fact they were acting. There is nothing to show that they were not accessible as witnesses. From the correspondence in the record it appears that Britton & Gray were transacting business in the city of Washington, and that Cowling was also a resident of the District of Columbia. None of these parties were called by the government as witnesses. Whatever may be said as an excuse for the failure to call Hunt and Stanton and Cook, on the ground that they are charged with being the actual conspirators in the fraud, no reason can be assigned for not calling Britton & Gray, Dunwoody and Cowling.

Neither do we think the reason assigned, as an excuse on the part of the government for not calling the register and receiver as witnesses, is valid or satisfactory. One of them, it

was said at the bar, had died. But the other might and ought to have been examined. He was one of its own officers, through whom the government had received the price of the lands sold, and which it has ever since retained. If his official conduct was impugned, nevertheless his misconduct, if proved, was not imputable to the defendants, and they should not be prejudiced by the odium of an accusation against him. The United States had trusted him, and, inspired by that confidence, the defendants also had relied upon his official acts. In this faith they had paid full value for what they had reason to believe was a perfect title. They were not accused of any complicity with, nor had they any knowledge of, the fraud charged. In the absence of direct proof of his guilt the government could not properly treat the defendants as his confederates, nor deprive them of any defence which as a witness he might be able to make for himself. The United States had no higher interest at stake than to establish the truth and justice of the transaction. It was due from it to these parties, whose estate this suit was instituted to defeat, to produce and examine as witnesses those who must have had the best knowledge of the facts, so as not to force the defendants to explanations which, by the very theory of their innocence and ignorance, they were incapable of making. To raise a suspicion, however strong, of the fraud and wrong-doing of its own officers is not enough to justify the government in casting upon the defendants the burden of establishing their title.

In addition, warranty deeds, made to Jackson as trustee, were put in evidence by the government, reciting a consideration in each case, amounting in the aggregate to $52,200, to the payment of which Jackson also testifies. Each of these deeds was executed, acknowledged, and recorded in conformity with law. They were regular on their face, the acknowledgments purporting to have been taken by public officers before whom, it is recited, the grantors severally appeared and acknowledged their execution. These officers, if called and examined as witnesses, would probably have thrown some light upon the transaction, and should have been examined upon the points in issue. It is to be presumed that they could

have testified whether any persons in fact appeared before them at the times and places named in their certificates, and whether, if so, they were identified as being the persons named as grantors in the deeds. None of them were in fact called on the part of the United States, and no reason is assigned for not having done so. It thus appears that the government did not make all the proof of which the nature of the case was susceptible, and which was apparently within its reach.

On the other hand, the defendants, by their evidence, have fully established all the steps by which they became connected with the transaction. The lands were bought and paid for at their full value by William S. Jackson, acting for himself and associates, who united together for the purpose of making purchases of land in that region, upon Jackson's belief and assurance of its ultimate value, expecting it to increase by the building of railroads and general growth of the country. He arranged with Hunt, who was engaged in dealing in lands, and had been Governor of the Territory, to pay for titles to such lands as he might accept. Hunt submitted to him descriptions of lands which he said he could control, from which Jackson made selections. For these Hunt sent to Jackson deeds duly executed, attested, and acknowledged, accompanied by receiver's certificates in regular form, showing that the party named as grantor was entitled to a patent. These he was advised by counsel to accept, and did accept in good faith, as being equivalent to patents. In many instances the patents were issued before the deeds were executed. Jackson had no connection whatever with making the proofs of preëmption, and had no knowledge in reference thereto, except such as was disclosed by the deeds and certificates, in reliance upon which, and without visiting the lands or having them examined, he bought. The deeds to Jackson were duly acknowledged before competent officers by persons certified to be the grantors therein named. The transactions were several, as regards the various tracts of land, and successive, during more than two years, the deeds being delivered within a period extending from May 2, 1873, to May 21, 1875. The circumstance that many of the acknowledgments of the deeds were taken

in Arapahoe County before a notary in Hunt's office, while the grantors purported to be residents of Las Animas County, was not calculated to raise any suspicion of fraud, as Jackson supposed that Hunt was dealing with the preëmptors, and was procuring their deeds to be executed for delivery to him, and it was natural to expect that this would be done at Hunt's own office. In fact, fourteen of the acknowledgments were taken before other officers, and some of them in Las Animas County. That Jackson and his assigns, the Coal and Town Company, and its successor, the Coal and Iron Company, in good faith believed that they had acquired a valid title to these lands, is manifest from their subsequent dealing with them. They not only paid full value for the lands in the condition in which they were, but they made large investments thereon in the way of improvements. At the time of the organization of the consolidated company there were upon the premises described in the bill coke-ovens and machinery in connection therewith, buildings constituting the town of El Moro, and coal-mine improvements, consisting of entries, rooms, gangways, tracks, chutes, repair-shops, houses, and store buildings. Coal was then, between six and seven years after Jackson's purchase, being mined upon one quarter section, and the town of El Moro covered thirty or forty acres, comprising twenty to twenty-five buildings, erected by various individuals, to whom the company had sold lots, in accordance with a regular survey and map of the town site. The entire value of the mine and coke improvements was estimated to be about $250,000. The property was used by the company in connection with works which they had established at South Pueblo for the manufacture of iron and steel, on which there had been an expenditure of from one to two millions of dollars, the coal and coke necessary for carrying on which was obtained from the coal mines on part of the premises in dispute. As against interests of this magnitude and value vested upon a claim of title, the good faith of which on the part of the defendants is absolutely unimpeached, the proof of a fraud which renders their title absolutely void should be stronger than the legal presumptions on which it may rightfully rest.

It is urged in argument by the Solicitor General that this case cannot be distinguished from that of *Moffat* v. *United States*, 112 U. S. 24. The two cases are undoubtedly similar in their general aspects, but, nevertheless, differ in some particulars most material to the decision. It is stated in the report of the case cited that "the testimony taken fully established the truth of the allegations and charges, except as to the knowledge by Moffat and Carr of the alleged frauds." The charges proven, or to be taken as proven, therefore, as set forth in the bill, were, that the title papers in the case were manufactured by a clerk in the office of the receiver, and that the receiver was also the owner of the agricultural college scrip used to pay for the lands located, and that, for the purpose of locating the land with it in the name of Quinlan, the register and receiver had inserted in a blank endorsement his fictitious name and residence, and in that name had located the scrip on the land, there being no such person, nor any settlement and improvement on the land; and that the duplicate certificate on which the patent issued was presented to the General Land Office by the defendant himself, who was thus brought into direct connection with the officers who had committed the fraud, and with the transaction before the issue of the patent. In that case Moffat did not offer his deed in evidence, was not examined as a witness, and attempted no proof either of his own innocence or of the payment of value, but stood without explanation as to who his immediate grantors were, or how he came in contact with them. The receiver was examined as a witness, but wholly failed to meet the charges alleged against him. There was further proof tending to show that the acknowledgments of the deeds to Moffat had been taken without identification of the grantors from whom Moffat received his deeds directly, and in respect to whom he must have had some knowledge. These circumstances, in our opinion, clearly distinguish that case from the present one.

There is, however, another ground on which it is contended by the government that the patents described in the bill are void. It is alleged that the lands in controversy were not subject to settlement and sale under the preëmption laws, being

"known mines" within the description of those laws. The act of September 4, 1841, 5 Stat. 455, c. 16, § 10, provided that no preëmption entry should be made on "lands on which are situated any known salines or mines." By the act of July 1, 1864, 13 Stat. 343, c. 205, § 1, it is enacted: "That where any tracts embracing coal beds or coal fields constituting portions of the public domain, and which as 'mines' are excluded from the preëmption act of 1841, and which under past legislation are not liable to ordinary private entry, it shall and may be lawful for the President to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any lands not thus disposed of shall thereafter be liable to private entry at said minimum."

The language of the preëmption act of 1841 is preserved in § 2258 of the Revised Statutes. The act of 1864 and its supplemental act of March 3, 1865, 13 Stat. 529, c. 107, were substantially reënacted by the act of March 3, 1873, 17 Stat. 607, c. 279, now embodied in § 2347 of the Revised Statutes, and the sections immediately following. The force and meaning of the original legislation remain unchanged. The subsequent provisions relate to the classification and terms and mode of entry and sale of the coal lands excluded from preëmption by the laws on that subject. In reference to coal lands, which are noted on public surveys and plats as such, of course it is not to be disputed that their character is thereby made known so as to withdraw them from entry under the preëmption and homestead acts. Where this is not done it remains, as in the present case, to determine how the character of the lands is to be ascertained, so that they may be classified as those "on which are situated any known salines or mines."

It is argued by the Solicitor General, upon the facts as disclosed by the evidence in this record, that the lands covered by these patents embraced "known mines" of coal, and that, as such lands were expressly excepted out of the preëmption laws, the patents issued therefor were void for want of power on the part of the officer to issue them, as decided in *Polk* v.

Wendall, 9 Cranch, 87; *Minter* v. *Crommelin*, 18 How. 87; *Reichart* v. *Felps*, 6 Wall. 160; *Morton* v. *Nebraska*, 21 Wall. 660. In the last named case, *Morton* v. *Nebraska*, it was said (page 674): "The salines in this case were not hidden as mines often are, but were so encrusted with salt that they resembled 'snow-covered lakes,' and were consequently not subject to preëmption." In *McLaughlin* v. *United States*, 107 U. S. 526, the decree of the Circuit Court cancelling the patent, on the ground that it purported to convey lands as part of a railroad grant, which were excepted therefrom as mineral lands, was affirmed. The court say (page 528): "It is satisfactorily proven, as we think, that cinnabar, the mineral which carries quicksilver, was found there as early as 1863; that a man named Powell resided on the land and mined this cinnabar at that time, and in 1866 established some form of reduction works there; that these were on the ground when application for the patent was made by the defendant McLaughlin, as agent of the Western Pacific Railroad Company, and that these facts were known to him. He is not, therefore, an innocent purchaser." See *Western Pacific Railroad Co.* v. *United States*, 108 U. S. 510.

In the case of *Mullan* v. *United States*, 118 U. S. 271, after referring to the acts of Congress above recited, the court, speaking of the act of July 1, 1864, say (page 277): "This is clearly a legislative declaration that 'known' coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested. Whatever doubt there may be as to the effect of this declaration on past transactions, it is clear that after it was made coal lands were to be treated as mineral lands. That the land now in dispute was 'known' coal land at the time it was selected, no one can doubt. It had been worked as a mine for many years before, and it had upon its surface all the appliances necessary for reaching, taking out, and delivering the coal. That Barnard knew what it was when he asked for its location for his use is absolutely certain, because he was one of the agents of the coal company at the time, and undoubtedly acted in its behalf in all that he

did. If Mullan and Avery were ignorant of the fact when they acquired their respective interests in the property, it was because they wilfully shut their eyes to what was going on around them, and purposely kept themselves in ignorance of notorious facts. But the evidence satisfies us entirely that they were not ignorant."

It will thus be seen that, so far as the decisions of this court have heretofore gone, no lands have been held to be "known mines" unless, at the time the rights of the purchaser accrued, there was upon the ground an actual and opened mine which had been worked or was capable of being worked.

In the case of *Deffeback* v. *Hawke*, 115 U. S. 392, the legislation on the subject was reviewed at length. It was there held that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preëmption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such land, except in the States of Michigan, Wisconsin, Minnesota, Missouri, and Kansas. The court say (page 404): "We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. . . . We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land in which years afterwards rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler, and patented by the government, under the preëmption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term *known* to be valuable at the time of sale to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

It is not sufficient, in our opinion, to constitute "known mines" of coal, within the meaning of the statute, that there should merely be indications of coal beds or coal fields of greater or less extent and of greater or less value, as shown by outcroppings. The act of 1864 evidently contemplates a distinction between coal beds or coal fields excluded from the preëmption act of 1841 as "known mines," and other coal beds or coal fields not coming within that description. We hold, therefore, that to constitute the exemption contemplated by the preëmption act under the head of "known mines," there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual "known mines" capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the preëmption act cannot be successfully assailed. In the present case, the testimony, in our opinion, does not justify us in finding that at the time Jackson acquired his title there were upon any part of the premises in controversy any "known mines" of coal, in the sense of the statute.

For these reasons the decree of the Circuit Court is

Reversed, and the cause remanded with a direction to dismiss the bill; and it is so ordered.

DEWEY *v.* WEST FAIRMONT GAS COAL COMPANY.

WEST FAIRMONT GAS COAL COMPANY *v.* DEWEY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Submitted November 9, 1887. — Decided November 21, 1887.

A New York corporation contracted with a partnership consisting of citizens of West Virginia, to furnish a specified quantity of coal within a fixed time at an agreed rate. After delivery of a portion of the coal, the partnership refused to receive more, whereupon the corporation sued the partners in a state court of West Virginia to recover damages for a breach of the contract. On the motion of the defendants this action was removed from the state court to the Circuit Court of the United States, on the ground that the parties were citizens of different States. The partners then, in conformity with the provisions of a statute of West Virginia which authorizes a creditor, before obtaining judgment, to institute any suit to avoid a conveyance of the estate of his debtor which he might institute after obtaining judgment, and to have the relief in respect to said estate which he would be entitled to after judgment, filed a bill in equity in the Circuit Court of the United States to set aside an assignment of the property of the corporation as fraudulent, and to subject that property in the hands of the assignee to the payment of their debt. It was objected to this bill that the court was without jurisdiction, as the assignee, who was one of the respondents, was a citizen of West Virginia, of which the complainants also were citizens. *Held*, that the objection was not well taken, the equity suit being an exercise of jurisdiction in the Circuit Court ancillary to that which it had already acquired in the action at law, and which it might entertain according to the rule in *Krippendorf* v. *Hyde*, 110 U. S. 276, and *Pacific Railroad Co.* v. *Missouri Pacific Railway Co.*, 111 U. S. 505.

From a careful examination of all the evidence in this case, the court is satisfied with the action of the Circuit Court dismissing the bill, and the cross-bill as dependent upon the bill.

In equity to set aside an assignment by an insolvent debtor as fraudulent, and to subject the assigned property to the payment of the complainants' debt. The respondents filed a cross-bill.

The decree dismissed the bill for want of equity and the cross-bill as dependent upon it. The case is stated in the opinion.

Mr. Daniel Lamb, *Mr. William H. Hearne*, and *Mr. Henry M. Russell*, for Dewey and others cited: *Railway Co.* v. *Railway Co.*, 111 U. S. 506; *Great Falls Mfg. Co.* v. *Henry*, 25 Grattan, 575; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Ragsdale* v. *Hagy*, 9 Grattan, 409; *Jones* v. *Andrews*, 10 Wall. 327; *Jaynes* v. *Brock*, 10 Grattan, 211; *Lindsay* v. *Jackson*, 2 Paige, 581; *Taylor* v. *Okey*, 13 Ves. 180; *Gay* v. *Gay*, 10 Paige, 369; *Kelsey* v. *Hobby*, 16 Pet. 269; *Hudson* v. *Kline*, 9 Grattan, 379; *Heilbutt* v. *Hickson*, L. R. 7 C. P. 438; *Foot* v. *Bentley*, 44 N. Y. 166; *Swett* v. *Shumway*, 102 Mass. 365; *Stoops* v. *Smith*, 100 Mass. 63; *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108; *Sheppard* v. *Pybus*, 3 Man. & Gr. 868; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Hogins* v. *Plympton*, 11 Pick. 97; *Chapin* v. *Dobson*, 78 N. Y. 74; *Gerst* v. *Jones*, 32 Grattan, 518; *White* v. *Miller*, 71 N. Y. 118; *S. C.* 78 N. Y. 393; *Wolcott* v. *Mount*, 9 Vroom (38 N. J. L.), 496; *Randall* v. *Newson*, 2 Q. B. D. 102.

Mr. William P. Hubbard and *Mr. James Morrow, Jr.*, for the West Fairmont Gas Coal Co. cited: 2 Benj. on Sales, 4th Am. ed., page 916, notes and cases cited; *Phillips, &c., Construction Co.* v. *Seymour*, 91 U. S. 646, 652; *Davis* v. *Fish*, 1 G. Greene (2 Iowa), 447; *S. C.* 48 Am. Dec. 387; *Hedden* v. *Roberts*, 134 Mass. 38; *Chanter* v. *Hopkins*, 4 M. & W. 399; *Ollivant* v. *Bayley*, L. R. 5 Q. B. 288; *Mason* v. *Chappell*, 15 Grattan, 572; *Port Carbon Iron Co.* v. *Groves*, 68 Penn. St. 149; *Brown* v. *Edgington*, 2 Man. & Gr. 279; *Hoe* v. *Sanborn*, 21 N. Y. 552; *S. C.* 78 Am. Dec. 163; *Cunningham* v. *Hall*, 4 Allen, 268, 274; *Archdale* v. *More*, 19 Ill. 565; *Whitaker* v. *Eastwick*, 75 Penn. St. 229; *Kirk* v. *Nice*, 2 Watts, 367; *Sands* v. *Taylor*, 5 Johns. 395; *S. C.* 4 Am. Dec. 374; *Kain* v. *Old*, 2 B. & C. 627; *Osborn* v. *Gantz*, 60 N. Y. 540; *Robinson Works* v. *Chandler*, 56 Ind. 575; *Gardiner* v. *Gray*, 4 Campb. 144; *Fisher* v. *Samuda*, 1 Campb. 190; *Couston* v. *Chapman*, L. R. 2 Sc. App. 250; *Hargous* v. *Stone*, 5 N. Y. (1 Seld.) 73, 86; *McCormick* v. *Sarson*, 45 N. Y. 265; *Dounce* v. *Dow*, 64

N. Y. 411; *Reed* v. *Randall*, 29 N. Y. 358; *S. C.* 86 Am. Dec. 305; *Holden* v. *Clancy*, 58 Barb. 590; *Warren Glass Works Co.* v. *Keystone Coal Co.*, 65 Maryland, 547.

Mr. Justice Matthews delivered the opinion of the court.

In October, 1872, a contract was entered into between the firm of Dewey, Vance & Company and the West Fairmont Gas Coal Company, the terms of which are stated in a letter from the former to the president of the coal company, dated October 7, 1872, as follows: "We beg to ratify our verbal agreement of October 4th, by which you are to deliver us until July, in 1873, an average of three cars of coke per day, at six cents per bushel of 41 pounds, we to settle for same by our note of 90 days from the 1st of each month for the previous month's delivery." This was acknowledged as an acceptance of a previous offer in identical terms by a letter from the president of the coal company to Dewey, Vance & Company. Under this contract the coal company were bound to deliver 681 car-loads as ordered, equivalent to 424,944 bushels, which at the contract price would amount to $25,496.64. From the date of the contract to November 30, 1873, the coal company delivered in all 246 car-loads, which had been ordered and were received and paid for according to the terms of the contract, the period during which deliveries were to have taken place having been extended by mutual consent. Dewey, Vance & Company refusing to order or receive any more, the coal company, on January 17, 1877, brought an action at law against them in the Circuit Court of Ohio County, West Virginia, for damages for the breach of the contract. The defendants in that action caused it to be removed from the state Court to the Circuit Court of the United States for the District of West Virginia on June 7, 1877, on the ground that the parties were citizens of different States, the West Fairmont Gas Coal Company, the plaintiff, being a corporation of the State of New York, and the defendants citizens of West Virginia and Ohio. Thereupon, on October 3, 1877, the surviving partners of the firm of Dewey, Vance & Company filed the

present bill in equity against the West Fairmont Gas Coal Company, the plaintiff in the action at law, and the West Fairmont and Marion Consolidated Gas Coal Company, a corporation organized under the laws of West Virginia, alleging that under the contract of October 4, 1872, the sale of coke was by sample, the quality of which was to be equal to that of a certain trial lot previously tested, accompanied by an implied warranty that the coke to be delivered under the contract should also be fit and suitable for the purpose of being used in the furnace of Dewey, Vance & Company for making pig-iron; that in point of fact the coke actually delivered under the contract was not equal to the quality of the sample, and was not fit for the purposes for which it was to be used; that in consequence thereof the complainants had ceased and refused to order or receive any more than that delivered and paid for, and that by reason of the bad quality of the coke actually received and used they had suffered a large amount of damages; that the West Fairmont Gas Coal Company in the meantime had become and was insolvent, and that they had made a fraudulent assignment of their property to their codefendant, the West Fairmont and Marion Consolidated Gas Coal Company. The prayer of the bill was that the amount of damages sustained by the complainant might be ascertained, that the assets of the West Fairmont Gas Coal Company, so fraudulently assigned, be subjected to the payment thereof, and that in the meantime all proceedings in the action at law brought by the West Fairmont Gas Coal Company should be stayed.

The right to maintain such a creditor's bill is based upon the code of West Virginia, c. 133, § 2, which provides that: "A creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment, or transfer of or charge upon the estate of his debtor, which he might institute after obtaining such judgment or decree, and he may, in such suit, have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

To this bill the defendants in the first instance objected, by

way of plea and demurrer, for want of jurisdiction in the court, on the ground that one of the defendants, the West Fairmont and Marion Consolidated Gas Coal Company, was a citizen of the State of West Virginia, of which also a portion of the complainants were citizens. This objection, however, is not well taken. The suit in equity was an exercise of jurisdiction on the part of the Circuit Court ancillary to that which it had already acquired in the action at law, which it might well entertain according to the rule adjudged in *Krippendorf* v. *Hyde*, 110 U. S. 276, and *Pacific Railroad Co.* v. *Missouri Pacific Railway Co.*, 111 U. S. 505.

The defendants having answered, denying the equity of the bill, set up their right to recover damages for the alleged breach of the contract on the part of Dewey, Vance & Company, in refusing to receive the remainder of the coke deliverable under the contract, by way of cross-bill, in which they sought a decree for the amount thereof. Issues having been made upon the bill and cross-bill, the cause was heard upon its merits, when the Circuit Court rendered a decree dismissing the bill for want of equity, and the cross-bill, with costs, to the original defendants as dependent thereon. From this decree an appeal is prosecuted by the original complainants, and also by the defendants, by way of cross-appeal, from so much as dismisses their cross-bill.

From a careful examination of all the evidence in the cause, we are satisfied with the conclusions of the Circuit Court. We find as matter of fact that the sale of coke was not by sample. A trial lot of 34 car-loads, prior to the making of the contract, was furnished and used, the complainants being satisfied with it, but there was no agreement, either express or implied, that all deliveries under the contract should be equal to it in quality. The object of the test evidently was to determine, on the part of the complainants for themselves, whether they were willing to run the risk of using coke to be manufactured by the coal company from the slack of their mines at the price offered. The coke which was subsequently furnished under the contract was used by the complainants and paid for according to the contract without objection, except as to a lot

furnished in December, 1872, which was complained of as being inferior. On investigation it turned out to have been made from material taken from a slack pile outside of the mine which had been for some time exposed, and had become unfit for the purpose. Thereafter no material was used except the fresh slack taken from the inside of the mines, and deliveries continued to be made as ordered until the last which took place in November, 1873. There was no warranty expressed, nor can any be reasonably implied from the circumstances, that the coke under the contract should be suitable for use in the furnace for making pig-iron. On the contrary, it was expressly understood that it would not be suitable for that purpose by itself. The only question to be determined was whether it could be used in combination with Connellsville coke, which was the standard for that purpose, and if so, in what proportions; to determine this was the object of testing the trial lot. The complainants continued to use it, as already stated, from time to time, without objection or complaint, paying for what they received according to the terms of the contract, and not at any time giving notice of any intention to refuse the further performance of the contract, although ceasing to give any orders after November, 1873. On November 28, 1873, the coal company, in a letter from its president to Dewey, Vance & Company, asked for the reason for the order to discontinue shipping, in reply to which, on December 4, 1873, Dewey, Vance & Company wrote: "Yours of the 28th inst. was duly received. We were accumulating stock, and stopped shipments from Fairmont and curtailed from Connellsville; have no definite idea at what time we shall again need." No further communications appear to have taken place between the parties until the beginning of the action at law.

We think the Circuit Court did not err upon the merits in dismissing the complainants' bill, and, as the cross-bill was dependent upon it and sought no relief purely equitable, it was also properly dismissed, with costs to the complainant therein, thereby remitting it to its remedy in the pending action at law.

The decree of the Circuit Court is accordingly affirmed.

UNITED STATES *v.* MORANT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Argued October 25, 26, 1887. — Decided November 21, 1887.

The testimonio granted to Cerilo de Morant, September 22, 1817, was full and particular, and both that and the testimonio to Quina, dated May 1, 1818, made complete titles under the Spanish laws.

In Florida a sheriff's deed given in evidence without production of the judgment or execution, and read without objection, is sufficient evidence of sale by sheriff.

The objection to the claimant's title that no evidence was given of cultivation, as required by the Spanish grant, is not well founded, as the proof is conclusive that the grantees built houses and resided on the granted land shortly after the date of the grants.

Whatever may be the proper construction of the 8th article of the Treaty of 1819 with Spain as to the necessity of a survey prior to the date when the obligation to recognize Spanish grants ceased in order to validate a Spanish grant, the act of June 22, 1860, 12 Stat. 85, under authority of which this suit was commenced, makes the date of the transfer of possession to the United States, viz., July, 1822, the point from which to test the validity of the grants.

The act of June 22, 1860, 12 Stat. 85, was passed to give relief to a large class of grantees of former Spanish governments, whose claims had been rejected by the different boards of commissioners, and by the courts, under the strict construction of the treaties required by prior laws.

This case does not come within the proviso in § 3 of the act of June 22, 1860, excluding claims from the jurisdiction of the commission.

There is no reason why a part owner of lands in Florida under a Spanish grant should not have the benefit of the proceedings authorized by the act of June 22, 1860, 12 Stat. 85.

The failure to annex a sworn copy of the government surveys to a petition for confirmation of title filed under the act of June 22, 1860, 12 Stat. 85, is not a question of jurisdiction, but a matter relating merely to the form of procedure, which should be objected to when the pleadings are *in fieri*, and when the petitioners can apply for leave to amend.

The evidence in this case shows that the grants were genuine, and that the land was surveyed, mapped, and segregated from the public domain in the spring of 1818.

In affirming the decree below this court merely confirms the validity of the grant, but does not give a decision which entitles the party to possession if the government has sold the lands in whole or in part, or if the surveyor general shall ascertain that they cannot be surveyed and located.

Argument for Appellants.

THE case is stated in the opinion of the court.

Mr. Solicitor General for appellants.

I. The jurisdiction in this case is a special one, granted by the act of June 22, 1860, 12 Stat. 85, c. 188. The act only authorizes the court to assume jurisdiction when the parties claiming represent title to the whole of the claim. The evidence shows the title to one undivided fourth of the land to be in John Chabaux.

II. There was no sufficient evidence of the genuineness of the grants, and without this they were not admissible without proof, it not appearing that there was thirty years' possession under them.

III. The grants, if genuine, are invalid, and did not warrant the decree of confirmation. See *United States* v. *Clarke*, 8 Pet. 436, and *Smith* v. *United States*, 10 Pet. 326. These cases settled that where an imperfect grant is indescriptive it does not exist as a valid grant to land until it is actually located by survey, and such survey made after the 24th day of January, 1818, under an indescriptive grant, does not validate a grant and should not be confirmed. They also established that a descriptive grant, which by survey after the 24th of January, 1818, is located on other lands than those described in the grant, should not be confirmed as to such grants. Both of the grants presented in this case purport to have been located by survey on the 6th day of March, 1818. The application for the grant by Cerilo de Morant describes the land as "sixteen hundred arpents of said vacant lands, twelve miles to the NW. of this place (Pensacola), on the SE. side of the land established by Mr. Manuel Goverder." The grant is for "the sixteen hundred acres of land that he asks, . . . and that the surveyor general proceed to the measurement and survey, drawing a figurative plan, which, with the proceedings, will be annexed to this matter." Until the same was made on this grant, by its terms no land was "severed from the domain of the king." All that was fixed by it was the locality in which the future severance was to be made by survey.

No monuments were referred to which defined the boundary. Nor was the length of any side given by which the quantity of land might be located; nor was the figure or form of the survey defined. Hence no particular land was granted, but only an executory agreement made that when survey was had the land so surveyed should be granted. See *Lilley* v. *Paschal*, 2 S. & R. 394, 400; *Starr* v. *Bradford*, 2 Penn. (P. & W.) 384, 395; *Lauman* v. *Thomas*, 4 Binney, 51; *Boyes* v. *Kelly*, 10 S. & R. 214.

IV. Specific performance of the alleged grant should not be decreed, on account of laches of the alleged grantees and their privies. The grants, if made, were prior to the 24th of January, 1818. After their making the legal title to the land was transferred to the United States. On the 8th of May, 1822, the United States by statute provided for their confirmation. 3 Stat. 709, c. 129. On the 3d of March, 1823, the presentations of claims was again urged, with penalty of a bar if not presented before the 1st of December, 1823. 3 Stat. 754, c. 29. On the 8th of February, 1827, a similar act was passed limiting the time for filing to the first of November, 1827. 4 Stat. 202, c. 9.

On the 23d of May, 1828, another act was passed which prescribed by its 12th section that all claims not presented within one year should be forever barred. 4 Stat. 286, c. 80, § 12. From time to time thereafter, until the act of 1860, similar legislation was had, which, with the act of 1860, extended the time until 1865. The government was diligent, urgent on the claimants to present claims, giving ample notice, time, and opportunity. The act of 1860, which applied to these claims, by the second section provided that they should be passed upon according to "justice and equity." No possession is shown by the alleged claimants for over forty years. Flagrant laches have existed with reference to the claims. The act of 1860 infused no new life into the claims to be presented, but only removed the bar of prior limitations. No evidence was given to account for or excuse the negligence of the claimants. Courts of equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated

demands, refuse to interfere in attempts to establish a stale trust except, where, 1st, the trust is clearly established, 2d, the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust.* *Badger* v. *Badger*, 2 Wall. 87.

Mr. Abram Wintersteen for appellees. *Mr. Wayne McVeagh* filed a brief for same; and *Mr. Robert B. Lines* filed a brief for Laurent Millandon.

Mr. Justice Bradley delivered the opinion of the court.

The petition in this case was filed in the District Court of the United States for the Northern District of Florida for the confirmation of a Spanish grant, under the 11th section of the act of June 22d, 1860, entitled "An Act for the final Adjustment of Private Land Claims in the States of Florida, Louisiana and Mississippi, and for other purposes," 12 Stat. 85; and the appeal was taken directly from the decree of the District Court to this court pursuant to the provisions of said section. The petition was filed November 22d, 1869, within the time prescribed by the act of March 2d, 1867, 14 Stat. 544. It is conceded by a stipulation filed of record in the cause that the petitioners are the legal representatives of Cerilo de Morant, Doqumeniel[1] de Morant, and Laurent[1] Millandon, who are deceased. The title of the petitioners is deduced from these deceased parties.

The petition states that on the 8th day of October, 1817, the King of Spain, by Don José Masot, governor of West Florida, granted to Cerilo de Morant, then a subject of Spain, a certain tract of land containing 1600 arpents, situated northwest of Pensacola, in West Florida, about twelve miles and a half, bounded northwardly by lands previously granted to Don Emanuel Gonzales, and by public lands, eastwardly and westwardly by public lands, and southwardly by lands granted to Desiderio Quina; that on the 1st of March, 1818, the said land was surveyed for the grantee by the deputy surveyor for West

[1] The varied spelling of the record is followed by the court.

Florida, and that on the 6th of March, 1818, the said deputy surveyor delivered to the proper authorities his certificate and plan of said survey, a copy of which is annexed to the petition. That thereupon the grantee proceeded to clear, occupy, settle and cultivate the land. A copy of the expediente is annexed to the petition.

It then proceeds to state that another grant was made in the same manner on the 20th day of January, 1818, to Desiderio Quina, of 800 arpents of land, situated about eleven miles northwest of Pensacola, and surveyed for the grantee by the same deputy surveyor. The plats annexed show that the two tracts adjoin each other. The petition further states that Quina, on the 29th of October, 1818, sold and conveyed his grant to Cerilo de Morant; and that the latter subsequently sold and conveyed three undivided fourth parts of both tracts to Laurent Millandon, Louis Doqumenil de Morant and John Chabaux, one undivided fourth to each; and that Laurent Millandon afterwards purchased the interest of Chabaux, and thus became owner of one undivided half of the land.

The petition further states that the heirs of Cerilo de Morant petition as well in behalf of the interests of the heirs of Louis Docmeniel de Morant, and those of Laurent Millandon, as for themselves.

On the trial the petitioners produced in evidence their documentary title in Spanish, with English translations accompanying the same. The title of each tract consists of a testimonio in the usual form in such cases. The testimonio of the tract granted to Cerilo de Morant consists of, first, Morant's petition to the governor, for 1600 arpents of land, indicating the locality, and dated September 22, 1817; secondly, the governor's reference to the surveyor general to ascertain if the lands were vacant, and to the fiscal, or attorney general of the royal treasury, for his advice as to the legality and merits of the application; thirdly, the favorable answers of these functionaries; fourthly, an order of the governor that the applicant take the oath required by the fiscal, and that the surveyor general proceed to the measurement and survey of the land, and to annex a figurative plan to his return; fifthly, a certifi-

cate of the oath taken by the applicant; sixthly, the return of the surveyor, dated March 6, 1818, stating the survey of the tract in detail, with a plat annexed; seventhly, the governor's certificate to the testimonio, declaring that it conforms with the original, and that it is issued at the request of the party at Pensacola, on the 5th of April, 1818. This testimonio is very full and particular. The other, issued to Quina, omits a report from the fiscal, as the petitioner merely stated the quantity of land desired, and left it to the governor to designate its location, who referred it to the surveyor general. The latter located the land adjoining to the tract granted to Morant. A survey was made accordingly, and a testimonio issued to the grantee dated the first day of May, 1818.

Both of these testimonios (including the surveys) made complete titles under the Spanish laws.

The petitioners also produced in evidence certain acts of sale and transfer, to wit:

1. A sale by Quina to Cerilo de Morant for the tract of 800 arpents granted to the former. This act is dated 29th October, 1818.

2. A sale by Cerilo de Morant to John Chabaux, Laurence Millandon, and Louis Doquminel de Morant, junior, of three undivided fourth parts of the tract of 800 arpents granted to Quina. This act of sale is dated November 9th, 1818.

3. A sale by Cerilo de Morant to John Chabaux, Laurence Millandon and Company, of three undivided fourth parts of the tract of 1600 arpents, reserving to himself one undivided fourth part of the same. This act is dated June 14th, 1821.

4. A marshal's deed, dated August 3d, 1835, from James W. Evans, marshal of the Western District of Florida, to Laurence Millandon, for the one undivided fourth part of both said tracts which belonged to John Chabaux. This deed recites a judgment against the executor of John Chabaux recorded in the Superior Court of the Western District of Florida, in May Term, 1825, and an execution sued out in May, 1836, and a sale thereunder by said marshal to said Millandon, in pursuance of which the deed purports to have been made. The judgment and execution were not produced, but

no objection to the admission of the deed was made on this account; and the practice in Florida as to proof of judicial sales by sheriffs seems to be very liberal. (See *Hartley* v. *Terrell*, 9 Fla. 374, where a sheriff's deed was given in evidence without, so far as appears, the production of the judgment or execution.) The fact that the judgment was against the executor was no objection, since real estate was made assets in the hands of executors by the territorial act of 1833, and equally liable with personal property to an execution upon a judgment against the executor. Act of Feb. 17, 1833, §§ 2, 4; Thompson's Digest, 202, 203.

In 1824, these Spanish titles were presented by Cerilo de Morant to the commissioners for ascertaining claims and titles to land within the district of West Florida, and were rejected by them, on the ground, as appears from their report, that no evidence was given of cultivation as required by the grants. Another reason assigned by the commissioners for rejecting grants in the list containing those in question, was that the claims had not emanated from His Catholic Majesty, or his lawful authorities in West Florida, prior to January 24, 1818, or that the order of survey had not been actually executed anterior to that period. See Commissioners' Report in American State Papers, Public Lands, Vol. IV., pp. 198, 199.

These objections are repeated before us, and are, amongst other things, assigned as grounds of error in the judgment of the court below. They may as well be disposed of here.

As to not cultivating the land, it was proved very conclusively on the trial that the grantees actually built houses and resided upon it shortly after the dates of the grants.

As to the dates of the surveys, it is true that they were both made after the 24th day of January, 1818, namely, in the beginning of March in that year, although the grants were made before that period. The objection is based upon the terms of the treaty entered into with Spain, in 1819, by which Florida was ceded to the United States. By the 8th article of this treaty it was stipulated that all grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the ceded territories,

should be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty; but all grants made since the 24th of January, 1818, when the first proposal on the part of His Catholic Majesty for the cession of the Floridas was made, were declared and agreed to be null and void.

The commissioners construed these provisions of the treaty as invalidating grants made prior to the date named, if the surveys were not completed until after that date. This construction was opposed by the claimants who were affected by it, and a different view, perhaps, might well have been taken. But, be that as it may, the act of 1860, under which the present proceedings were instituted, made the date of cession to the United States, or the time of transferring possession, the point from which to test the validity of grants. That act was passed for the relief of parties who claimed lands in Florida, Louisiana, or Missouri, "by virtue of grant, concession, order of survey, permission to settle, or other written evidence of title, emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory in which the lands so claimed were situated." (See the act, 12 Stat. 85, §§ 1, 11.) The act of 1860 was intended to give relief to a large class of grantees of former governments, whose claims had been rejected by the different boards of commissioners, and by the courts, under the strict construction of the treaties, which prior laws had required. The history of the question is given at some length in the opinion of this court in the case of *United States* v. *Lynde*, 11 Wall. 632, and need not be repeated here.

The treaty by which the Floridas were ceded to the United States was not concluded and signed until the 22d day of February, 1819; and the ratifications were not exchanged until two years afterwards. The cession certainly did not take place, therefore, before the date named; and possession

of the territory was not taken until July, 1822; whilst all the acts constituting the titles in question were passed prior to May, 1818. We cannot hesitate to conclude, therefore, that these titles were completed within the time required by the act of 1860.

We will proceed, then, to examine the other errors assigned on behalf of the government.

1. It is contended that the court below had no jurisdiction of the case, (*a*) because the record does not show that the claim did not come within the purview of § 3 of the act of 1860; (*b*) because the alleged claimants do not represent the whole title to the land claimed; (*c*) because no sworn copy of the government surveys was annexed to the petition. The first of these grounds is based on that clause of the 11th section of the act of 1860, which excludes from the jurisdiction of the District Court claims which come within the purview of the 3d section of the act. It requires only a momentary examination of that section to determine that the purview of it here referred to is the *proviso*, which declares, in substance, that in no case shall the commissioners embrace in classes one and two (namely, those which in their opinion ought to be confirmed) any claim previously presented to a board of commissioners, or other public officers acting under authority of Congress, and rejected as being fraudulent, or that had been rejected twice by previous boards. The present case does not come within either of these categories. The other matters assigned as grounds for want of jurisdiction are insufficient. We perceive no reason why a part-owner, or the heirs or representatives of a part-owner, should not have the benefit of the proceeding, even if the present petitioners did not show title to the entire interest in the lands; and the failure to annex a sworn copy of the government surveys to the petition is not a question of jurisdiction, but a matter relating merely to the form of procedure, which should have been objected to when the pleadings were *in fieri*, and the petitioners could have obtained leave to amend. A plat of the two grants, laid down in connection with the sections and subsections of the government surveys, certified as correct by a civil engineer

and surveyor, was put in evidence at the trial without objection, and forms part of the record here. There seems to have been no controversy as to the location of the grants, either before the commissioners in 1824, or on the trial of the present cause.

2. The next assignment of error is, that there was no sufficient evidence that the alleged grants were genuine. This assignment cannot be sustained. The original testimonios seem to have been given in evidence at the trial, since the signatures to the same were identified by the witness Francisco Moreno, who had been attached to the public office in Pensacola under the Spanish government as treasurer of the customs and auditor of accounts, and was familiar with this kind of documents. The English translations are certified by the keeper of public archives of West Florida, in whose office both the Spanish originals and the translations of all claims laid before the commissioners of 1824 were recorded in pursuance of the act of March 3, 1825. 4 Stat. 125. It may be added that the genuineness of these titles was not disputed before the said commissioners, and do not seem to have been disputed in this case in the court below, where these titles are familiar to the courts and members of the bar.

3. The last assignment of errors is, that the grants, if genuine, were void. It is contended that they were void, because they were indescriptive grants which had not been surveyed on the 22d day of January, 1818. We have already shown that, although this was the epoch fixed in the treaty for determining the validity of grants, yet that the act of 1860 made the date of cession of the territory, or of yielding possession thereof, the epoch to be observed under that act; and as this latter epoch was certainly as late as the 22d of February, 1819, when the treaty was concluded and signed, the objection falls to the ground. The land was actually surveyed and mapped, and segregated from the public domain in the spring of 1818. The old cases, therefore, which were formerly decided by this court, and which are referred to by the counsel of the government, have no application to the case before us. Prior statutes, inconsistent with the provisions of the act of 1860, no longer control our decision.

We do not think that any of the alleged errors are well founded.

The decree of the District Court is affirmed.

This decision merely confirms the validity of the grants, but does not entitle the parties to possession. If the government has sold the lands in whole or in part, or if the surveyor general shall ascertain that they cannot be surveyed and located, the petitioners, under § 6 of the act of 1860, will be entitled to scrip for other public lands of equal extent, to those so sold, &c.

Affirmed.

UNITED STATES *v.* ALLEN.

APPEAL FROM THE COURT OF CLAIMS.

Submitted October 26, 1887. — Decided November 7, 1887.

The percentage allowed to officers of the Navy under General Order No. 75 of May 23, 1866, in lieu of all allowances except for mileage or travelling expenses, is to be calculated on the amount statedly received by the officer as statutory pay at the time the order was in force, and is not to be increased by the additional compensation allowed by the act of March 3, 1883, 22 Stat. 473.

United States v. *Philbrick*, 120 U. S. 52, explained.

APPEAL from the Court of Claims. The following were the findings of fact.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

First. Robert W. Allen is an officer of the Navy, to wit, a paymaster thereof; and he has served as such since the 1st day of February, 1868.

Second. In the adjustment of his claim for the benefits of the act of March 3, 1883, the accounting officers of the Treasury deducted from the settlement made in his favor the sum of $1112.75, being the amount paid him, under General Order No. 75, issued by the Secretary of the Navy, May 23, 1866.

Third. Said accounting officers refused in the settlement of

Counsel for Parties.

said claim to allow claimant the further sum of $206.04, which said amount would have accrued to him, if he had been credited, at that time, with his service prior to the date of his commission as paymaster.

Fourth. The following is General Order No. 75, referred to in Finding II:

[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 33⅓ per centum of their pay in lieu of all allowances, except for mileage or travelling expenses under orders; and those provided with such quarters, 20 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.*"

On these facts the court gave judgment against the defendant for $1318.79, from which judgment this appeal was taken.

Mr. Attorney General, *Mr. Assistant Attorney General Howard*, and *Mr. F. P. Dewees* for appellant.

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

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellee is a paymaster in the Navy, having served in that capacity since February 1, 1868. In the adjustment of his claim for the benefits of what is known as the Longevity Act of March 3, 1883, 22 Stat. 473, the accounting officers of the Treasury deducted the sum of $1112.75, the amount paid the claimant under General Order No. 75, issued by the Secretary of the Navy, under date of May 23, 1866, in relation to allowances "for rent of quarters or to pay rent for furniture, or for lights and fuel," &c. The object of the order, as appears upon its face, was to establish a fixed rate of compensation in lieu of the extra allowances prohibited by the act of March 3, 1835, 4 Stat. 753, which last act was repealed by that of April 17, 1866, 14 Stat. 33, 38. That order made an allowance to officers, not provided with quarters on shore stations, of "a sum equal to 33⅓ per centum of their pay in lieu of all allowances, except for mileage and travelling expenses under orders; and those provided with such quarters, 20 per centum of their pay in lieu of said allowances." It also stated: "The act of March 3, 1865, having increased the pay of midshipmen and mates, the allowances hereby authorized will not be extended to them."

The findings of fact further state that "said accounting officers refused, in the settlement of said claim, [under the act of 1883,] to allow claimant the further sum of $206.04, which said amount would have accrued to him if he had been credited, at that time, with his service prior to the date of his commission as paymaster." The court below, following the decision in *United States* v. *Philbrick*, 120 U. S. 52, which sustained the validity of the said general order, held the deduction of $1112.75, to be unauthorized by law; and, without considering the merits of the question made as to the item of $206.04, adjudged — upon the ground that, in its opinion, the decision in Philbrick's case required it to be done — that the appellee should also have been allowed the latter sum in the settlement of his claim under the act of 1883.

It is possible that the findings in Philbrick's case, although

very meagre and obscure, involved the question now presented. But no such point was suggested by counsel, and it was not considered by this court. The only question actually disputed in that case was as to the validity of General Order No. 75; and this court was led to believe that if that order was sustained as a proper exercise of authority by the Secretary of Navy, the affirmance of the judgment below would follow as a matter of course.

We are not at all certain from the pleadings and findings in the present case what is the precise question raised in respect to the item of $206.04. The act of March 3, 1883, provides 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. The question which counsel for the appellee contend is presented by the record is, whether appellee is entitled, in the settlement of his account under the act of 1883, "to the longevity increment of his 33⅓ per cent of salary allowed in lieu of fuel, quarters, &c., under Navy General Order No. 75, of May 23, 1866." It is perfectly clear, they argue, that if the act of 1883 had been in force in 1866, the salary of appellee would have been larger than it actually was by reason of the credit for prior service, which the act of 1883 now directs to be given to them; that is, their salaries being larger, the 33⅓ per cent allowance would have been correspondingly larger, and they should now receive the difference in that item.

We do not concur in this interpretation of the statute. The allowances provided for in the General Order of 1866 were

made pursuant to rules and regulations established for the apportionment from time to time of sums appropriated in gross by Congress for specific objects connected with the naval service. They constituted no part of the pay proper of officers, and were designed to meet certain expenses they would necessarily incur in the discharge of their duties. The Secretary used their regular pay simply as a basis upon which to calculate the percentage allowed for commutation of quarters, &c. That percentage is to be ascertained by reference to the amount statedly received by the officer, as statutory pay, at the time General Order No. 75 was in force, and is not to be increased by the additional compensation allowed by the act of 1883, as the result of giving him the benefits of actual service, as if it "had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service."

These views lead to a reversal, with directions to enter judgment in favor of the claimant, only for the sum of $1112.75.

THE MAGGIE J. SMITH.

WALKER *v.* DUN.

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

Argued November 10, 11, 1887. — Decided November 21, 1887.

The findings of fact in a cause in admiralty under the act of February 16, 1875, 18 Stat. 315, have the same effect as a special verdict in an action at law.

Rule 24 in § 4233 Rev. Stat. applies only when there is some special cause rendering a departure necessary to avoid immediate danger, such as the nearness of shallow water, or a concealed rock, the approach of a third vessel, or something of that kind. [See p. 353 for this rule.]

Where one ship has, by wrong manœuvres, placed another ship in a position of extreme danger, that other ship will not be held to blame, if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind.

Statement of the Case.

The allowance of interest and costs in a cause in admiralty rests in the discretion of the court below, and its action will not be disturbed on appeal.

THE following is the case as stated by the court.

This case comes before us from the Circuit Court of the United States for the District of Maryland. It is a libel against the vessel Maggie J. Smith, for damages caused by her collision with the schooner Enoch Robinson, which resulted in sinking the latter, and in the entire loss of both vessel and cargo. The libellants are the owners of the Enoch Robinson. The petitioners are the owners of the property on board, who have intervened for their interest. The claims of libellants and petitioners exceeded the value of the Maggie J. Smith and her freight, and thereupon the owners of that vessel instituted proceedings for the benefit of the limited liability provisions of the Revised Statutes, §§ 4283–4289, under which the value of the vessel was appraised at $32,000, to which amount their liability was accordingly limited. A stipulation for that amount was thereupon given by sufficient sureties, with the condition that the claimants would perform the final order and decree in the case, or that execution might issue against the goods, lands, and tenements of the stipulators wherever found.

On the trial before the District Court a decree was entered for the claimants, and the libel dismissed. On appeal, the Circuit Court reversed the decree, and adjudged that the libellants and petitioners were entitled to recover certain specified sums, which, in the aggregate, exceeded the $32,000; that the stipulators should pay that amount into the registry of the court, and that the clerk, after deducting the costs of the circuit and district courts, should pay the balance to the libellants and petitioners *pro rata;* that is, in proportion to their respective claims as allowed. From this decree the claimants have appealed to this court. Subsequently the libellants and petitioners applied to the Circuit Court for a further decree, directing the claimants to pay interest on the amount of the stipulation from its date, and the costs of the

district and circuit courts, but the application was refused. From this refusal they have appealed to this court.

Mr. John H. Thomas and *Mr. Robert H. Smith*, for appellants, cited: *The Benefactor*, 103 U. S. 239; *The Palmyra*, 12 Wheat. 1; *The Steamer Webb*, 14 Wall. 406; *United States* v. *Ames*, 99 U. S. 35; *Ex parte Baltimore & Ohio Railroad*, 106 U. S. 5; *Shields* v. *Thomas*, 17 How. 3; *Market Co.* v. *Hoffman*, 101 U. S. 112; *The Connemara*, 103 U. S. 754; *The Mamie*, 105 U. S. 773; *Farmers' Loan & Trust Co.* v. *Waldemar*, 106 U. S. 265, 270; *Whitney* v. *Cook*, 99 U. S. 607; *The S. C. Tryon*, 105 U. S. 267; *The Lucy*, 8 Wall. 307; *United States* v. *Brig Malek Adhel*, 2 How. 210; *The Sapphire*, 18 Wall. 51, 56; *Providence & New York Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *The Nichols*, 7 Wall. 656, 664; *The Dexter*, 23 Wall. 69, 75.

Mr. William W. Macfarland filed a brief for appellants, citing: *The America*, 3 Ben. 421; *The Adriatic*, 107 U. S. 512; *The Elizabeth Jones*, 112 U. S. 514; *The Vortigern*, Swabey, 518; *The Scotland*, 118 U. S. 507.

Mr. John Lathrop and *Mr. Sebastian Brown*, for appellees, cited: *Rich* v. *Lambert*, 12 How. 347; *Ex parte Baltimore & Ohio Railroad*, 106 U. S. 5; *Farmers' Loan & Trust Co.* v. *Waterman*, 106 U. S. 265; *Adams* v. *Crittenden*, 106 U. S. 576; *Hawley* v. *Fairbanks*, 108 U. S. 543; *Tupper* v. *Wise*, 110 U. S. 398; *Gibson* v. *Shufeldt*, 122 U. S. 27; *The Dexter*, 23 Wall. 69; *The Annie Lindsley*, 104 U. S. 185; *The North Star*, 106 U. S. 17; *The Brager*, 14 Law Times (N. S.), 258; *The Fingal*, 13 Law Times (N. S.), 611; *The Radama*, 2 Cliff. 551; *The S. B. Wheeler*, 4 Cliff. 189; *The Agra*, 4 Moore, P. C. (N. S.) 435; *The Spring*, L. R. 1 A. & E. 99; *The Aura*, Holt's Rule of the Road, 255; *The Cleopatra*, Swabey, 135; *The Beryl*, 9 P. D. 137; *New York & Liverpool Steamship Co.* v. *Rumball*, 21 How. 372; *The Nichols*, 7 Wall. 656; *United States* v. *Carey*, 110 U. S. 51; *The Adriatic*, 107 U. S. 512; *McKinlay* v. *Morrish*, 21 How. 343; *The Carroll*, 8

Wall. 302; *The Fairbanks*, 9 Wall. 420; *The City of Paris*, 9 Wall. 634; *The S. C. Tryon*, 105 U. S. 267; *The Bywell Castle*, 4 P. D. 219; *The Elizabeth Jones*, 112 U. S. 514; *The Wanata*, 95 U. S. 600; *The Manitoba*, 122 U. S. 97; *The Favorite*, 12 Fed. Rep. 213; *Walsh* v. *Mayer*, 111 U. S. 31; *The Scotland*, 118 U. S. 507, 519.

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

The Circuit Court having found the facts respecting the collision, our examination will first be directed to a consideration of their sufficiency to sustain the decree. The findings, under the act of February 16, 1875, have the same effect as a special verdict in an action at law. 18 Stat. 315, c. 77; *The Adriatic*, 107 U. S. 512. The bills of exception of the claimants in the record embrace only the refusal of the court below to find certain propositions of law, which can as well be presented to the court upon the present findings.

The findings of fact, with the facts admitted by the pleadings, disclose the following case: On the evening of February 26, 1883, the Maggie J. Smith, a three-masted schooner steamer, under sail only, ran into and sunk the three-masted schooner Enoch Robinson, off the coast of New Jersey. The night was clear and starlight; the wind was about northwest, and blowing a whole-sail breeze, and the sea was smooth. The Smith was on a voyage from New York to Newport News, Virginia; her course was southwest; her first mate, and her engineer, who was acting as second mate, were on deck; one man was at the wheel, and another was stationed forward on the lookout; her regulation lights were set; and she had the wind on her starboard side.

The Enoch Robinson was on a voyage from Baltimore to Providence, Rhode Island, with a cargo of coal. When the Maggie J. Smith was first seen by those on board the Robinson the latter vessel was on her regular course, heading northeast, and had the wind on her port. Her regulation lights were set and burning brightly; her master and second mate

were on deck; a competent seaman was on the lookout forward on the top-gallant forecastle; and one was at the wheel. The court finds that when the vessels were first seen from each other, they were about two miles apart; that they were approaching each other "end on, or nearly so, and on courses involving risks of collision;" that the wheel of the Robinson was put to port almost immediately after the position of the Smith was discovered, and that the Smith starboarded her wheel, and that this starboarding was the direct cause of the collision. The court also finds that when those in charge of the Robinson perceived that the Smith was falling off and that the vessels were approaching in dangerous proximity, they put the wheel of the Robinson hard-a-port, and let go the spanker-sheet; and that a few seconds before the collision the wheel of the Smith was first put to port, and then hard-a-port, but the head sheets were not let go, and before the changes to port materially affected the course of the Smith the two vessels came together, the Smith striking the Robinson a square blow on the port side near the mizzen rigging. And the court finds as a conclusion of law, that the Smith was in fault in not porting her wheel when the Robinson was first seen approaching her end on, or nearly end on, and was in fault for putting her wheel to starboard, and that this was the immediate cause of the collision.

Upon these findings, there could be but one conclusion as to the liability of the Smith under the sixteenth rule of navigation adopted by Congress, which is as follows: "If two sail vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port so that each may pass on the port side of the other." Rev. Stat. § 4233, 2d ed., p. 817.

Three cases in this court are cited by the counsel for the libellants in which this rule has been applied, under circumstances not materially different from those in the present case: *The Nichols*, 7 Wall. 656; *The Dexter*, 23 Wall. 69; and *The Annie Lindsley*, 104 U. S. 185. In the case of *The Nichols*, a schooner and a bark sailing on Lake Erie in nearly opposite directions came into collision by which the schooner was sunk.

Each vessel was seen from the other, when two or three miles apart. The schooner had the wind free and on her starboard side; the bark was close hauled, with the wind on her port side. The vessels approached each other on lines that diverged not more than half a point, and at a combined speed of twelve miles an hour. The schooner starboarded her helm; the bark ported. The owner of the schooner filed a libel against the bark, but the court held that the schooner had violated the rule of navigation in not porting also, and therefore the owner had no claim for damages.

In the case of *The Dexter*, two schooners came into collision on Chesapeake Bay, by which one was totally lost. When within a half-mile of each other, they were approaching from opposite directions, end on, or nearly so. One ported and the other starboarded. It was held that the latter, which was lost, had violated the rule of navigation, and therefore was in fault, and that her owner could not maintain a libel for damages; and the libel filed by him was accordingly dismissed.

In the case of *The Annie Lindsley*, there was a collision on Long Island Sound between a brig and a schooner, which resulted in the sinking of the schooner and the total loss of the vessel and cargo. The two vessels approached each other nearly end on, on courses involving risk of collision; the schooner put her helm to port; the brig put her helm to starboard, thereby violating the sixteenth rule of navigation, and a collision followed. It was held that the brig was liable for the loss.

Some reliance was placed by claimants' counsel on the twenty-fourth rule, which provides that, in construing and obeying the rules of navigation, "due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger." Important as this qualification of the rules is, it has no application to the case at bar, where the vessels saw each other about two miles apart. It applies only where there is some special cause rendering a departure necessary to avoid immediate danger, such as the nearness of shallow water, or a con-

cealed rock, the approach of a third vessel, or something of that kind.

The contention that if the Smith starboarded her helm when the two vessels, though approaching each other end on, or nearly so, were about two miles apart, her fault is not such as to make her responsible for the damages claimed, does not require consideration, for there is nothing in the record to show that when the Smith starboarded her helm the vessels were that distance apart. It is not stated what the distance then was, nor is the speed of the vessels given, from which such distance could be estimated. The contention assumes, without any foundation, that the vessels were then about two miles apart. The libel alleges that the vessels were running red to red three or four minutes before the Smith fell off her course and showed both her lights; and the answer states that the vessels had been in sight of each other some time when the Smith starboarded her helm, and that the vessels were then from a quarter to a half mile apart.

Nor is there anything in the position that, where two vessels are approaching in opposite directions so as to involve risk of collision, and one of them violates a rule of navigation in directing its helm, and the other vessel sees it, she will be in fault if she does not also turn her helm so as to avoid the consequences of such departure from the rule. Whether it would have been more prudent for the Robinson to take a different course in consequence of the dangerous position in which she was placed by the disregard of the statutory rule on the part of the Smith, must depend upon the angle at which the vessels were approaching, their distance apart at the time, and their combined speed — circumstances not disclosed in the record. The rule is well stated by counsel, that "if one vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent the recovery of full damages;" or, as stated by the Court of Appeal of England, in the case of *The Bywell Castle*, 4 P. D. 219, as quoted in the case of *The Elizabeth Jones*, 112 U. S. 514, 526, "Where one ship has, by wrong manœuvres, placed another

ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind."

As to the second appeal from the refusal to allow interest against the claimants upon the amount of the stipulation from the day it was filed in court, and the costs of the circuit and district courts, it is sufficient to say that the allowance of such interest and costs rested in the discretion of the court below, and its action will not be disturbed on appeal.

Decree affirmed.

OELBERMANN *v.* MERRITT.

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

Argued November 3, 1887. — Decided November 21, 1887.

Under § 2930 of the Revised Statutes, the merchant appraiser must be a person familiar with the character and value of the goods; and under § 2901 he must open, examine and appraise the packages designated by the collector and ordered to be sent to the public stores for examination.

In a suit to recover back duties paid under protest, an importer has a right to show that those provisions of the statute have not been complied with.

For that purpose the merchant appraiser is a competent witness.

THIS was an action against the collector of the port of New York, to recover back duties alleged to have been illegally exacted. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. D. H. Chamberlain and *Mr. Eugene H. Lewis* for plaintiffs in error. *Mr. W. B. Hornblower* was with them on the brief.

Mr. Solicitor General for defendant in error.

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law brought in the Circuit Court of the United States for the Southern District of New York by the members of the copartnership firm of E. Oelbermann & Co., against the collector of the port of New York, in November, 1880, to recover the sum of $4925.20, with interest, as an alleged excess of duties exacted by the collector on an importation of 34 cases of silk and cotton velvets into the port of New York from Germany, *via* Rotterdam, in June, 1879.

There were two invoices covered by one entry. One of the invoices was for 10 cases and the other for 24 cases. The collector designated 2 cases from the invoice of 10 cases and 3 cases from the invoice of 24 cases for examination by the appraiser, which 5 cases were sent to the public store. The appraiser, after examination, raised the entered value of the merchandise more than 10 per cent, and reported such advance in value to the collector. The plaintiffs thereupon gave notice to the collector of their dissatisfaction with such appraisement. The collector then selected Levi M. Bates, a merchant of New York City, to be associated as merchant appraiser with A. P. Ketchum, general appraiser, in examining and appraising the merchandise. Such proceedings were had that the general appraiser and the merchant appraiser disagreed, and made separate reports of their appraisement to the collector, who decided between them and adopted the report of the general appraiser as to the value of the merchandise. The entered value of the invoice of the 10 cases was $3477, and the entered value of the invoice of the 24 cases was $9441, being an aggregate entered value of $12,918, upon which, at the time of entry, the plaintiffs paid a duty of 60 per cent *ad valorem*, the proper rate, amounting to $7750.80. The value of the invoice of the 10 cases was advanced by the re-appraisement to $4032, and that of the invoice of the 24 cases to $11,522, making a total advanced value of the goods, after the re-appraisement, of $15,554. Thus the entered value of each invoice was advanced by the re-appraisement more than 10 per cent, and the collector liquidated the

duty on the goods at 60 per cent, upon such advanced valuation, such duties amounting to $9332.40, being an increase in the duty of $1581.60. In addition to such regular duty, he levied an additional duty of 20 per cent, under § 2900 of the Revised Statutes, upon the $15,554, amounting to $3110.80. The plaintiffs paid such two sums of $1581.60 and $3110.80, and filed a protest in writing on the 16th of October, 1879, in due time, against the alleged exaction. They also appealed from the decision of the collector to the Secretary of the Treasury, and brought this suit within the time limited by law. They included in their suit a further sum of $232.80, which had reference to some other matter. At the trial, the court directed the jury to find a verdict for the defendant, which was done; and, after a judgment for the defendant, the plaintiffs sued out a writ of error.

It appeared in evidence at the trial that all the cases covered by the invoice of the 10 cases were, before the official appraisement was made, sent to the appraisers' store; that the merchant appraiser advanced the value of the 10 cases an average of 8.4 per cent, and the value of the 24 cases an average of 8.9 per cent; and that the general appraiser advanced the value of the 10 cases an average of 16 per cent, and the value of the 24 cases an average of 22.1 per cent.

Among the grounds of objection stated in the protest were these, (1) that the merchant appraiser was not a merchant duly qualified to appraise the merchandise in question, as required by law, inasmuch as he was not familiar with the character and value of the goods to be appraised; (2) that the appraisers, and each of them, did not diligently and faithfully examine and inspect such packages of the goods as were designated by the collector on the invoices and were ordered to the public store to be opened, examined and appraised.

Section 2930 of the Revised Statutes provides, that the importer may, after the original appraisement of imported goods, give notice to the collector in writing of his dissatisfaction therewith, and that, on the receipt of such notice, "the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practi-

cable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly." It was under this provision of the statute that the foregoing proceedings took place.

After evidence to the purport before mentioned had been given, the plaintiffs called as a witness Mr. Bates, the merchant appraiser, who testified that he resided and carried on business in the city of New York, and that he served as merchant appraiser in this case, and received his appointment as such from the collector. The witness was then asked in succession, by the plaintiffs' counsel, the following questions:

"Q. Will you state whether, at the time you were selected to act as merchant appraiser, you had any familiarity, and if so, how much familiarity, with silk velvets?"

"Q. Will you state what familiarity you had with silk velvets at the time you were appointed merchant appraiser in this case?"

"Q. At the time you were appointed merchant appraiser were you familiar with the value of silk velvets?"

To each of these questions the counsel for the defendant objected, on the ground that each was incompetent and immaterial and also upon the grounds (1) "that it is not competent now to try the question as to whether the person appointed by the collector was familiar with the goods in question or not; that that is a question which must be determined by the collector;" (2) "that if it were competent for the plaintiffs to try the question at all here, it is not competent for them to prove the incompetency of this appraiser by his own mouth." The court sustained the objection to each question, and the plaintiffs excepted to each ruling.

After the last question above recited had been objected to, and before it was ruled upon, the court said: "I will exclude that in that form, but I do not intend to cut you off from

introducing any competent evidence of the fact that Mr. Bates was not a merchant; that is, an experienced man having some familiarity with these goods; that he was not of the class pointed out in the act of Congress, as an experienced merchant."

The plaintiffs' counsel then asked the witness the following question:

"Q. Will you state to the court and jury what steps you took after you became merchant appraiser to examine the merchandise which was the subject of re-appraisement?"

The defendant's counsel objected to this question "on the ground that it was incompetent and immaterial, and because the witness should not be allowed to impeach his own finding as merchant appraiser." Thereupon the court said: "As you put the question I shall exclude it; at the same time I should not exclude evidence that he made no examination at all or that he did not act at all." To this ruling the plaintiffs excepted.

The following question was then ruled out under the same objection, and the ruling was excepted to by the plaintiffs:

"Q. What did you do in the way of examination of the merchandise which was the subject of that re-appraisement?"

The following question was then put by the plaintiffs' counsel:

"Q. Did you make any examination of any of the merchandise which was the subject of that re-appraisement?"

The witness answered that he did, and that his examination was at the appraisers' headquarters, on the west side of the town.

The following questions in succession were then asked the witness by the plaintiffs' counsel, and to each the same objection was taken by the defendant. Each was ruled out by the court, and to each ruling an exception was taken by the plaintiffs:

"Q. Did your examination of the goods, such as it was, take place in the wareroom at the appraisers' headquarters?"

"Q. Who was present?"

"Q. Were the importers?"

"Q. Or either of them?"

"Q. How many cases of merchandise belonging to this invoice did you find there?"

"Q. How many cases did you open or have opened for examination?"

"Q. How many pieces of velvet did you examine?"

"Q. Was that the only examination you made of those goods?"

"Q. Assuming that you had been examining those goods as a purchaser, and that you did not know who the owners were, and knew nothing of their responsibility, would you have purchased the goods from the examination that you made, if there was nobody behind you to fall back upon if there were any variations in the quality?"

The court then directed a verdict for the defendant, and the plaintiffs excepted to such direction.

Although the advance made in the valuation of each invoice by the merchant appraiser was less than 10 per cent, yet the importers were entitled to have a merchant appraiser with the qualifications prescribed by the statute, with a view to his legitimate influence with the general appraiser to limit his advance not only so that it should not exceed 10 per cent, with reference to the additional duty, but so that it should not exceed such sum as a merchant appraiser with those qualifications should deem just and fair. For the collector is required, by § 2930, to decide between the two appraisers, if they disagree.

It was held by this court, in *Hilton* v. *Merritt*, 110 U. S. 97, that the valuation of merchandise made by the customs officers under the statute for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, and that §§ 2931 and 3011 of the Revised Statutes, which give the right of appeal to the Secretary of the Treasury, when duties are alleged to have been illegally or erroneously exacted, and the right of trial by jury in case of adverse decision by the Secretary of the Treasury, do not relate to alleged errors in the appraisement of goods.

In that case, there was a re-appraisement by a merchant ap-

praiser, associated with one of the general appraisers, of an invoice of kid gloves, and the collector had thereafter adopted the appraisement returned in an amended report of the general appraiser, and, the advance of the invoice value being 16.2 per cent, had imposed an additional duty of 20 per cent, on account of undervaluation in the entry. At the trial, the plaintiffs offered to show the foreign market value of the goods. They also offered in evidence the records of the proceedings before the merchant appraiser and the general appraiser, including the testimony and various documents before those officers and subsequently before the collector, and also the testimony of the collector to show all the facts within his knowledge, or officially acted upon by him, in relation to the invoice in question, and to show what his experience was in valuing kid gloves. This evidence was excluded. The plaintiffs also claimed the right to go to the jury upon the questions (1) whether the collector, acting as appraiser, fully and fairly examined the goods; (2) whether the goods were invoiced at their fair and actual value in the principal markets of France at the time of exportation; (3) whether a fair examination of the goods was made by the general appraiser, associated with the merchant appraiser, when that question was referred to him; (4) whether the facts stated in the protests had been established by the evidence; (5) whether the appraisers followed the evidence before them or disregarded it, and whether the collector disregarded the evidence or was negligent in his appraisal.

This court, in its opinion, stated that the question presented by the plaintiffs' exceptions was, "whether the valuation of merchandise made by the customs officers under the statutes of the United States for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, or is such valuation reviewable in an action at law brought by the importer to recover back duties paid under protest."

On a consideration of all the sections of the Revised Statutes relating to the subject, embracing §§ 2900, 2902, 2906, 2922, 2929, 2930, 2931, 2949, and 3011, the court came to the con-

clusion, that the meaning of those sections was, that the appraisement of the customs officers should be final, but that all other questions relating to the rate and amount of duties might, after the importer has taken the prescribed steps, be reviewed in an action at law brought to recover duties unlawfully exacted; that the valuation made by the customs officers was not open to question in an action at law, so long as the officers acted without fraud and "within the power conferred upon them by the statute;" that the evidence offered by the plaintiffs and ruled out by the court "tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were assuming powers not conferred by the statute;" and that the questions which the plaintiffs proposed to submit to the jury were immaterial and irrelevant. This view of the statutes on the subject, and to which we adhere, does not cover the material questions raised in this case.

Section 2930 of the Revised Statutes provides, that, on the receipt by the collector of the notice of dissatisfaction, he "shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same." The qualification prescribed by this section requires as well that the merchant appraiser associated with one of the general appraisers shall be a discreet and experienced merchant, and a citizen of the United States, and familiar with the character and value of the goods in question, as it does that the two merchant appraisers, who are to act without the general appraiser, shall be discreet and experienced merchants, and citizens of the United States, and familiar with the character and value of the goods in question.

This § 2930 was taken from § 17 of the act of August 30, 1842, c. 270, 5 Stat. 564, and § 3 of the act of March 3, 1851, c. 38, 9 Stat. 630. Section 17 of the act of 1842 provided, that, on the receipt by the collector of the notice of dissatisfaction, he should select "two discreet and experienced merchants, citi-

zens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same." Section 3 of the act of 1851 provided, that "wherever practicable, in cases of appeal from the decision of United States appraisers," under the provisions of § 17 of the act of August 30, 1842, "the collector shall select one discreet and experienced merchant, to be associated with one of the appraisers appointed under the provisions of this act, who together shall appraise the goods in question."

It is quite apparent that the "one discreet and experienced merchant" referred to in § 3 of the act of 1851 is to be a discreet and experienced merchant having the additional qualifications prescribed in § 17 of the act of 1842, that is, that he is to be also a citizen of the United States and familiar with the character and value of the goods in question.

The importer is entitled to have a merchant appraiser who answers these qualifications, and is entitled to raise the question of a want of qualification by a protest and an appeal to the Secretary of the Treasury, and in a suit at law brought thereafter. If the merchant appraiser does not possess these qualifications, he has no power conferred on him by the statute to act as a merchant appraiser. The questions excluded by the court at the trial of this case, so far as they bore upon the question as to whether Mr. Bates was familiar with the goods in question or not, were competent; and the ruling of the court, which was to the effect that that question was to be determined solely by the collector, was erroneous. The questions excluded by the court, as to whether Mr. Bates had any familiarity, and if so, how much, with silk velvets, and as to whether he was familiar with the value of silk velvets, were questions in the exact language of § 2930.

The remark of the court, that it did not intend to cut the plaintiffs off from any "competent evidence of the fact that Mr. Bates was not a merchant, that is, an experienced man, having some familiarity with these goods," and "that he was not of the class pointed out in the act of Congress, as an experienced merchant," must be regarded as emphasizing the word "competent," in view of the objection taken, that, if it

were competent for the plaintiffs to try at all the question as to whether Mr. Bates was familiar with the goods in question, it was not competent for them to prove his incapacity by his own mouth, and as sustaining that objection, and as holding that Mr. Bates was not a competent witness upon the subject of his familiarity with the character and value of silk velvets.

That the plaintiffs had a right, on the trial, to inquire whether the provisions of § 2930 had been complied with in this respect, has been determined by the decisions of this court in like cases. In *Greely* v. *Thompson*, 10 How. 225, the Circuit Court had instructed the jury, that the valuation made by two merchant appraisers, under the act of 1842, was invalid because one of the merchants who made the appraisement was wrongfully substituted for another who had been appointed, and who was removed by the collector for having stated it to be his opinion that the plaintiffs should have time to obtain evidence from England as to the true market value of the goods. The judgment of the Circuit Court was affirmed by this court, on the ground, among others, that the removal of one of the merchant appraisers, and the appointment in his place of another, under the circumstances stated, was illegal. This was an examination into the competency of the appointment of the substituted merchant appraiser, of the same character with the inquiry into the competency of the merchant appraiser in the present case.

In *Converse* v. *Burgess*, 18 How. 413, which arose under the act of 1842, the plaintiffs offered to prove that the merchant appraisers did not examine or see any of the original packages of the merchandise, which was sugar, but only saw samples which had been previously taken from one in ten of the packages described in the invoice, and that such samples would not, when exposed to the air, afford a fair criterion by which to judge of the importation, and claimed the right to go behind the return of the merchant appraisers, on the ground that they had not examined the sugar. Section 21 of the act of August 30, 1842, c. 270, 5 Stat. 565, now embodied in § 2901 of the Revised Statutes, provided that the collector

should designate on the invoice at least one package of every invoice, and one package at least of every ten packages imported, to be opened, examined, and appraised in the public stores. The defendant objected to the admission of the evidence, in the absence of fraud on the part of the appraisers, and claimed that their decision was in the nature of an award, and final under the statute, and not open to review under the protest. The protest alleged that the goods "were not fairly and faithfully examined by the appraisers." The Circuit Court ruled that the evidence was admissible, and that the plaintiffs might go to the jury on the question whether the examination made by the merchant appraisers was in substance and effect equivalent to an examination of one package in ten of the importation, and that, if it was not, the appraisement was void. The plaintiffs had a verdict and a judgment, and, on a writ of error by the collector, the judgment was affirmed by this court. The court observes, in its opinion, that the decision of the merchant appraisers is final "provided it is made in pursuance of law;" and, referring to the acts of Congress on the subject, the court adds: "These acts of Congress provide for the appointment, regulate the duties, and impose the limitations on the authority of the appraisers, and determine the conditions on which the validity of their assessment depends. All their powers are derived from these acts, and it is their duty to observe the restrictions and to obey the directions they contain. In the present instance, there was a neglect of the positive mandate 'to open, examine and appraise one package of every invoice, and one package at least of every ten packages of goods, wares and merchandise;' and the jury have found that the inquiry they made was not, in substance nor in effect, an equivalent for such an examination. We are, therefore, of the opinion that the importer was not precluded by their return from disputing the sufficiency or accuracy of their assessment."

If such non-observance of the positive mandate of the statute in regard to the examination of so many of the original packages as the statute specified, as a condition on which the validity of the assessment depended, vitiated the

appraisement, the non-observance of the statute in regard to the qualifications of the merchant appraiser must be regarded as equally one of the conditions on which the validity of the assessment depends, and the plaintiff must have an equal right in either case to make proof, at the trial, of such non-observance, if he has complied with the other statutory requirements necessary for the bringing of his suit. We do not lay down any absolute or comparative standard of familiarity with the character and value of the goods which must be applied to carry out the requirements of the statute. There must be, in every case, a substantial compliance with the statute. This does not necessarily require the highest degree of such familiarity. There must be, in good faith, in every case, the appointment of a person having the qualifications prescribed by the statute.

In regard to the question whether Mr. Bates was a competent witness to prove that he was not familiar with the character and value of silk velvets, we are of opinion that his evidence on that subject was admissible. As the question of his familiarity with the article and with its value necessarily depended upon the nature, and to some degree, at least, upon the extent, of his experience in connection with the article, no one could know what that experience was so well as himself. If he is to be excluded as a witness on the subject, when offered by either side, the court and the jury and the parties would be deprived of the best testimony within reach. There is no ground of public policy which forbids that the merchant appraiser should be a witness to the extent above indicated. The brief of the solicitor general does not urge that the witness was not a competent witness to that extent.

The question is somewhat analogous to that in the case of an arbitrator. It has been held that an arbitrator can be a witness as to the time when, and the circumstances in which he made an award, with a view to show that, by the terms of the submission, he was not authorized to make the award, *Woodbury* v. *Northy*, 3 Greenleaf, 81; as to the fact that the arbitrators did not examine or act upon a certain matter, *Roop* v. *Brubacker*, 1 Rawle, 304; as to facts which occurred

at or during the arbitration, and which tend to show the award to be void for legal cause, *Strong* v. *Strong*, 9 Cushing, 560, 576; and as to whether a certain claim was included in the award, *Hale* v. *Huse*, 10 Gray, 99. See also *Spurck* v. *Crook*, 19 Ill. 415. The same principle has been applied in the case of a tribunal called a jury, appointed to assess damages and apportion benefits in the widening of a street, *Canal Bank* v. *Mayor*, 9 Wend. 244; and in the case of commissioners appointed to condemn land for railroad purposes, *Marquette Railroad Co.* v. *Probate Judge*, 53 Mich. 217. In *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, it was held that an arbitrator may be a witness as to what passed before him and as to what matters were presented to him for consideration. (See 2 Greenleaf on Evidence, § 78 and notes.)

We are also of opinion that the court erred in excluding the evidence of Mr. Bates, which was offered to show that he did not observe the requirements of § 2901 of the Revised Statutes, and did not open, examine, and appraise the packages designated by the collector, and ordered to be sent to the public store for examination. The court observed that it would not exclude evidence that Mr. Bates made no examination at all, and thereupon the witness, in reply to a question whether he made any examination of any of the merchandise, answered that he did. But this ruling did not give to the plaintiffs that to which they were entitled. The subsequent questions which were excluded, as to how many cases he opened or had opened for examination, and as to the character of the examination he made, the object of which questions was to ascertain whether it was such an examination as the statute prescribed, were intended to show a non-compliance with the statute as to examination, within the terms of the protest. This the plaintiffs had a right to show. In *Greely* v. *Thompson* (before cited), the Circuit Court had instructed the jury that if both of the appraisers did not make some personal examination of the goods, their report or decision was not made in conformity to law, and did not justify the penalty; and the propriety of this instruction was approved by this court. In *Converse* v. *Bur-*

Counsel for Plaintiffs in Error.

gess (before cited), it was held, as we have seen, that the appraisement was vitiated by proof of a failure to open, examine, and appraise the packages designated by the collector, or to do what was an equivalent for such an examination.

We are also of opinion, for the reasons before stated, that Mr. Bates was a competent witness to prove the extent and character of the examination which he made of the goods in question. He may have been the only witness who could testify as to such examination, and certainly there was no witness who could know more on the subject.

We do not consider it necessary or proper to express an opinion upon any of the other questions raised by the counsel for the plaintiffs in error.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with a direction to award a new trial.

MUSTIN *v.* CADWALADER.

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

Submitted November 3, 1887. — Decided November 21, 1887.

Under § 2930 of the Revised Statutes, the merchant appraiser must be a person familiar with the character and value of the goods.

In a suit to recover back duties paid under protest, an importer has a right to show that that provision of the statute has not been complied with. *Oelbermann* v. *Merritt* (*ante*, p. 356), affirmed.

This was an action against the collector of the port of Philadelphia, to recover back duties alleged to have been illegally exacted. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. Henry Edwin Tremain, *Mr. Mason W. Tyler*, *Mr. Alexander P. Ketchum*, and *Mr. Frank P. Prichard*, for plaintiffs in error.

Mr. Solicitor General for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law brought in the Court of Common Pleas for the County of Philadelphia, in the State of Pennsylvania, by the members of the copartnership firm of Thomas J. Mustin & Co., against the collector of the port of Philadelphia, and removed into the Circuit Court of the United States for the Eastern District of Pennsylvania, to recover the sum of $346.09, alleged to have been illegally exacted by the collector as duty on worsted yarn imported by the plaintiffs from Bremen, and entered at the custom house July 1, 1886. There was a protest, an appeal to the Secretary of the Treasury, and a decision by him, before the suit was brought. The statute in force at the time, applicable to the goods in question, was Schedule K of § 2502 of the Revised Statutes, as enacted by the act of March 3, 1883, c. 121, 22 Stat. 509, which imposes as duty on worsted yarns valued at above 40 cents per pound and not exceeding 60 cents per pound, 18 cents per pound, and in addition 35 per cent *ad valorem;* and on the same article valued at above 60 cents per pound and not exceeding 80 cents per pound, 24 cents per pound, and in addition 35 per cent *ad valorem.* The goods in question were entered as having cost not more than 60 cents per pound and as being dutiable at 18 cents per pound and 35 per cent *ad valorem*, making the dutiable value $922, and the amount of duty, $611.42, corresponding with the invoice. The appraiser advanced the valuation from $922 to $1041, the increase changing the rate of duty from 18 cents per pound to 24 cents per pound, and resulting in a total duty of $749.31, instead of $611.42, and in an additional duty of 20 per cent under § 2901 of the Revised Statutes, on the $1041, or $208.20, making a total duty of $957.51, or $346.09 more than the amount stated by the plaintiffs on the entry as the proper duty. After the invoice had been advanced in value by the appraiser, the importers demanded a re-appraisement, which took place before the general appraiser and a

merchant appraiser, the latter being William F. Read. The claims of the plaintiffs on the trial were in accordance with the claims made in the protest.

At the trial, it appeared that, at the opening of the proceedings for the appraisement by the general appraiser and the merchant appraiser, the broker of the plaintiffs appeared before them and presented to them a written protest against the appointment of Mr. Read as merchant appraiser, which stated "that the said William F. Read is not an importer of or dealer in the particular quality or kind of yarn in dispute, and that he is not acquainted with the foreign market values of the same, and that, therefore, his appointment is not in conformity with the customs regulations on this subject." The protest cited article 466 of the general regulations under the customs laws, issued by the Treasury Department in 1884, and in force at the time of the plaintiffs' importation, and which required that the merchant appraiser should be a "discreet and experienced merchant, a citizen of the United States, familiar with the character and value of the goods in question," and referred to § 2930 of the Revised Statutes. The plaintiffs offered this paper in evidence, and it was objected to by the defendant as immaterial, and also on the further ground that, as there had been a merchant appraisement, the same was final and conclusive as to the value of the goods, and that it could only be attacked upon the ground of fraud. The plaintiffs also offered to show that Mr. Read was not familiar with the character and value of the goods. This evidence was objected to by the defendant as immaterial and irrelevant. All of the evidence thus offered was ruled out by the court, on the ground that the act of Congress had confided exclusively to the collector the selection of the merchant appraiser, and that the importer had no right to object to such selection; that the provisions of the statute were simply directory to the collector; that evidence tending to show that the person selected had not the requisite familiar knowledge of the subject matter of the importation to enable him to discharge his duties satisfactorily could not be regarded as sufficient ground for assailing the action of the collector; and that his

action in selecting a particular person to be merchant appraiser was not subject to revision in any court where the importer sought to recover what he claimed to be an erroneous imposition of duties. The plaintiffs excepted to these rulings. There was a verdict and a judgment for the defendant, to review which the plaintiffs have sued out a writ of error.

The question involved in the exclusion of the evidence offered, is the same question as that passed upon in the case of *Oelbermann* v. *Merritt*, decided herewith. For the reasons stated in the opinion in that case, it must be held that the evidence was erroneously excluded.

Other questions were raised by the plaintiffs at the trial, and are discussed in the briefs of their counsel in this court, but we do not think it necessary or proper to pass upon any question other than the one above considered.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with a direction to award a new trial.

IN RE HENRY.

ORIGINAL.

Submitted November 10, 1887. — Decided November 21, 1887.

Each letter or packet put in or taken out from the post-office of the United States in violation of the provisions of Rev. Stat. § 5480 constitutes a separate and distinct violation of the act.

Three separate offences (but not more) against the provisions of Rev. Stat. § 5480, when committed within the same six calendar months, may be joined, and when so joined there is to be a single sentence for all; but this does not prevent other indictments, for other and distinct offences under the same statute committed within the same six calendar months.

THIS was a motion for a rule to show cause why a writ of habeas corpus should not issue. The motion for leave to move for the rule was filed on the 11th of October, 1887. On the 17th of October leave was granted, and also leave to file a

brief in support of it. On the 10th of November this motion was filed. The case is stated in the opinion of the court.

Mr. Isaac M. Bryan for the motion.

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

This is a motion for a rule to show cause why a writ of habeas corpus should not issue as prayed for. The case made by the petition is this:

Section 5480 of the Revised Statutes is as follows: "If any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the Post-Office Establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information, or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post-Office Establishment enters as an instrument into such fraudulent scheme and device."

Henry, the petitioner, was indicted in the District Court of the United States for the Western District of South Carolina, on the 11th of September, 1886, for a violation of this statute. The indictment charged three separate and distinct offences, all alleged to have been committed within the same six calendar months. Under this indictment he was tried, convicted, and sentenced to imprisonment in the South Carolina penitentiary at Columbia for the term of twelve months.

Afterwards, at the same term of the court, but on a different day, he was indicted for three other and different offences under the same statute, committed within the same six calendar months. To this indictment he pleaded his conviction upon the first indictment in bar. This plea was overruled, and upon a trial he was convicted and sentenced to imprisonment in the Albany penitentiary, New York, for the term of fifteen months, upon the termination of his sentence under the first indictment.

He has served out his term under the first sentence, and is now confined in the penitentiary at Albany under the second. From this imprisonment he seeks to be discharged on *habeas corpus*, because, as he alleges, the court had no jurisdiction to inflict a punishment for more than one conviction of offences under this statute, committed within the same six calendar months.

We have carefully considered the argument submitted by counsel in behalf of the petitioner, but are unable to agree with him in opinion that there can be but one punishment for all the offences committed by a person under this statute within any one period of six calendar months. As was well said by the district judge on the trial of the indictment, "the act forbids, not the general use of the post-office for the purposes of carrying out a fraudulent scheme or device, but the putting in the post-office of a letter or packet, or the taking out of a letter or packet from the post-office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act." It is not, as in the case of *In re Snow*, 120 U. S. 274, a continuous offence, but it consists of a single isolated act, and is repeated as often as the act is repeated.

It is indeed provided that three distinct offences, committed within the same six months, may be joined in the same indictment; but this is no more than allowing the joinder of three offences for the purposes of a trial. In its general effect this provision is not materially different from that of § 1024 of the Revised Statutes, which allows the joinder in one indictment of charges against a person "for two or more acts or transac-

tions of the same class of crimes or offences," and the consolidation of two or more indictments found in such cases. Under the present statute three separate offences, committed in the same six months, may be joined, but not more, and when joined there is to be a single sentence for all. That is the whole scope and meaning of the provision, and there is nothing whatever in it to indicate an intention to make a single continuous offence, and punishable only as such, out of what, without it, would have been several distinct offences, each complete in itself.

The motion for a rule is denied and the petition dismissed.

COX *v.* WESTERN LAND AND CATTLE COMPANY.

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

Submitted November 16, 1887. — Decided November 21, 1887.

It appearing that the amount in controversy does not exceed five thousand dollars, the writ of error is dismissed.

THIS was a motion to dismiss. The case is stated in the opinion.

Mr. Alexander McCoy for the motion.

Mr. R. A. Childs opposing.

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

This motion is granted on the ground that the record shows that the value of the matter in dispute does not exceed five thousand dollars. The suit was brought originally to recover 135 head of Colorado steers, alleged to be worth $6000. At the time of the judgment only 79 head were in dispute. As to the rest, a settlement had been made during the pendency of the suit. The court has found as a fact that the 79 head

were sold in open market the day after they were taken possession of under the writ in this case, and that the net proceeds of the sale only amounted to $4526.15. There is nothing to show that they were really any less valuable at the time of the sale than when they were taken. Upon the facts as found the recovery could not have exceeded five thousand dollars if there had been a judgment in favor of Cox, the plaintiff in error.

Dismissed.

LAMASTER *v.* KEELER.

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

Argued November 18, 1887. — Decided December 5, 1887.

The provisions of Rev. Stat. § 914 relating to the practice, pleadings, and forms and modes of proceeding in common law causes in Circuit and District Courts of the United States do not apply to remedies upon judgments; but those remedies, being governed by the provisions of § 916, are confined to such remedies as were provided by the laws of the State in force when § 916 was passed or reënacted, or by subsequent laws of the State adopted by the Federal Court in the manner provided for in that section.

A confirmation by the court of a sale under execution will not cure an infirmity growing out of the nullity of the judgment under which it was had.

EJECTMENT. Judgment for the plaintiff. Defendant sued out this writ of error. The case, as stated by the court, is as follows.

This case comes before us from the Circuit Court for the District of Nebraska. It is an action of ejectment to recover a parcel of land in the city of Lincoln, State of Nebraska. The plaintiff below, the defendant in error here, traces title to the premises from a purchaser at a sale under an execution issued upon a judgment, extended by the clerk of the court so as to include certain sureties, and among them the defendant

Statement of the Case.

below. The contention of the defendant is, that the extension of the judgment so as to include him was unauthorized and void, and that the execution and sale thereunder of his property was, therefore, without any force or validity.

The facts of the case, so far as it is necessary to state them for the disposition of the contention of the defendant below, are briefly these: On the 12th of November, 1875, Charles W. Seymour and William Wardell, as plaintiffs, recovered a judgment in the Circuit Court of the United States for the District of Nebraska, against one William P. Young, as defendant, for $6500 and costs. The defendant in that case, Young, being desirous of staying execution upon this judgment, obtained a bond, as the undertaking is termed, signed by five parties, of whom Lamaster, the plaintiff in error, was one, in which, after reciting the judgment recovered, they acknowledged themselves "security for the defendant for the payment of the judgment, interest, and costs, from the time of rendering said judgment, until paid, to be paid nine months from the rendering the same." Attached to this instrument was an affidavit of justification of all the parties signing it except Lamaster. Originally, his name was signed to the affidavit, but he had it cut off before the instrument was presented to the clerk. It is unnecessary to state the circumstances under which this was done or the effect of it (if any it had) upon his liability, as the case will be determined on other points.

The bond, so called, was approved by the clerk of the court, on the 2d of December, 1875, and filed; and thereupon he made in one of the books of record of the court, called "Judgment Index of the Court," the following entry: "Defendants, Lamaster, M. F., *et al.*, surety; Plaintiffs, Seymour and Wardell, appearance. Docket 6, No. 138; date of judgment, Nov. 12, 1875; amount of judgment, $6500."

This entry was made by the clerk under the impression that the statute of Nebraska of February 23, 1875, entitled "An act to provide for stay of executions and orders of sale," was the law governing the stay of executions upon judgments in the Circuit Court of the United States. The third section of the statute provides for a stay of execution for a period of nine

months, upon judgments for the recovery of money only (with certain exceptions not material in this case), on condition that the defendant shall, "within twenty days from the rendition of judgment, procure two or more sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest, and cost from the time of rendering judgment until paid."

The other sections which bear upon the questions involved are the following:

"Sec. 4. Officers approving stay bonds shall require the affidavits of the signers of such bonds, that they own real estate not exempt from execution, and aside from incumbrances, to the value of twice the amount of the judgment."

"Sec. 6. The sureties for the stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper judgment docket as in the case of other judgments."

"Sec. 9. At the expiration of the stay, the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein." (See Laws of Nebraska of 1875, pp. 49–51.)

Upon the assumed sufficiency of the bond of the sureties, and of the above entry in the Judgment Index under the statute of Nebraska, the clerk, on the 14th of April, 1881, issued an *alias* execution to the marshal of the district, commanding him as follows:

"That of the goods and chattels, and for want thereof, then of the lands and tenements of William P. Young, debtor, and John I. Irwin, Jane Y. Irwin, W. T. Donovan, Milton F. Lamaster, and Nathan F. Moffit, sureties, in your district, you cause to be made the sum of four thousand seven hundred forty-four and $\frac{31}{100}$ dollars, being the balance due April 2d, A.D. 1881, on the judgment of the Circuit Court of the United States for the District of Nebraska, at the November term thereof, in the year 1875, by which Charles W. Seymour and

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William W. Wardell recovered against the said William P. Young, with interest thereon from the second day of April, A.D. 1881, until paid, together with the further sum of ——, costs of increase on said judgment, and also the costs that may accrue on this writ. And have you the said moneys before the clerk of the said Circuit Court, at the city of Omaha, in said district, within sixty days, to be paid to the persons entitled to receive the same."

Under this execution, the premises in controversy, being a lot in the city of Lincoln, was, on the 17th of May, 1881, sold to one Thomas Ewing for the sum of $5600. A motion to set aside the sale having been denied, and the sale confirmed, the marshal's deed of the premises was made to the purchaser, and he conveyed them to the plaintiff.

The petition, the designation given to the first pleading, in the system of procedure in civil cases in force in Nebraska, sets forth the title of the plaintiff under the execution and sale mentioned, the detention of the premises by the defendant, and the receipt by him of the rents and profits to the amount of $3000, and prays judgment for the possession of the premises and for the rents and profits. The defendant pleaded that the conveyance from Ewing, the purchaser at the execution sale, to the plaintiff, was colorable and collusive, for the purpose of enabling the latter to commence and maintain an action for the recovery of the property in the Circuit Court of the United States. And in answer to the petition the defendant denied the validity of the bond, the extension of the judgment against him, and the proceedings thereunder; and also set up the pendency in the state court of a suit for the determination of his title to the premises.

Two trials of the case were had, which is permissible in actions of ejectment under the laws of Nebraska. On the first, the verdict of the jury was for the defendant; on the second, they found that the conveyance by the purchaser at the marshal's sale to Ewing, the plaintiff herein, was "merely colorable and collusive, and was made for the purpose of creating a case cognizable in the Federal Court, and the plaintiff was not the real party in interest, but that the action was being

prosecuted for the use and benefit of Ewing, and that Keeler is only a nominal and colorable party."

This verdict being set aside by the court, a third trial was had, which resulted in a general verdict for the plaintiff, under the instructions of the court. The question raised on the trial and decided by the court, upon the instruction refused and those given, related to the validity of the proceedings taken by the clerk upon the bond of the sureties, to authorize execution against their property, and the sale of the premises.

The defendant requested the court to instruct the jury that the statute of Nebraska respecting the stay of executions and orders of sale, approved February 23, 1875, "was not operative to authorize the execution against Lamaster's property;" but the court refused the instruction and charged the jury as follows: "That the filing of defendant's bond with the clerk of the court, and its approval by him, and his approval of the sureties thereto, including the defendant, the record of the same, the entry of memoranda thereof in the judgment index, called in the statute 'extending the judgment,' justified the issue by the clerk of the court of an execution upon the judgment of Seymour and Wardell against Young and others, directed to the marshal, commanding him to make the balance due upon the judgment out of the property of the principal and sureties, including that of the defendant Lamaster, and the sale by the marshal of the defendant's property under and by virtue of the execution, was authorized by law." And again, "that when the bond was taken by the clerk, as shown in evidence, and when the proceedings were taken thereon leading to the sale by the marshal of the property in question, the statute of this State, passed on the 23d of February, 1875, and entitled 'An act to provide for stay of executions and orders of sale,' was in force in the court, and was a law therein, the same as in the District Courts of the State."

And the court further instructed the jury to find a general verdict for the plaintiff.

To the refusal of the court to give the instruction requested, and to the instructions given, the defendant at the time excepted.

Argument for Defendant in Error.

The jury found a verdict for the plaintiff; and to review the judgment entered thereon the defendant has brought the case here on a writ of error.

On the 30th of December, 1876, and not before, the Circuit Court of the United States for the District of Nebraska made the following order:

"Ordered, that the laws of the State of Nebraska, now in force, regulating the issuing of executions and of the proceedings to be had thereon and thereunder, be, and the same are hereby, adopted as the rule of procedure to enforce the collection of judgments in the United States Circuit and District Court for said State."

Mr. John F. Dillon and *Mr. George W. Doane* for plaintiff in error.

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

I. The provisions of the statute of Nebraska were all complied with, except in one particular, noticed hereafter; that is to say, First, within twenty days from the rendition of the judgment, on the 25th of November, 1875, a stay bond was filed, and on the 2d of December, 1875, approved by the clerk; Second, this bond was signed by five sureties, four of whom showed by their respective affidavits that they were sufficient freeholders, whose real estate was not exempt from execution, and of the value of twice the amount of the judgment; Third, this bond was recorded in a book kept for that purpose, that is to say, Stay Bond Record A of the court; Fourth, the clerk entered and indexed the same in the proper judgment docket as in the case of other judgments; Fifth, after the expiration of the nine months, that is to say, on the 14th of April, 1881, the clerk issued a joint execution against the property of the judgment debtor, Young, and the parties obliged by the bond, describing them respectively therein as debtor and sureties.

The question presented at this point of the case is, whether these proceedings subjected the premises which were the property of Lamaster, to the lien of the judgment and to sale under

an execution issued thereon. The question was raised on the trial and saved.

Section 914 of the Revised Statutes (taken from the act of June 1, 1872), adopted as part of the jurisdiction of the Federal Court in Nebraska, the statute of that State, by virtue of which the proceedings here complained of were had. The words "modes of proceeding" in that section of the Revised Statutes were not new in 1872. They are found in all that class of acts. Section 2 of the act of 1789, for instance, which was the first of the series, provided "that until further provision shall be made . . . the forms of writs and executions, except their style, and *modes of process* . . . in the Circuit and District Courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the Supreme Courts of the same."

In 1792 an act was passed, the second section of which ran as follows: "The forms of writs, executions and other process, except their style, and the forms and *modes of proceeding* in suits, in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled 'An act to regulate processes in the courts of the United States.'" In *Wayman* v. *Southard*, 10 Wheat. 1, these statutes came before this court for construction, upon a certificate of division of opinion between the judges of the Circuit Court for Kentucky. A motion had been filed in that court to quash the marshal's return to an execution, issued on a judgment recovered therein, and also a bond taken upon the execution. The report does not state the facts very distinctly, but it appears that the marshal pursued the direction of a then recent statute of Kentucky, which provided for an appraisement of the property, and its sale at not less than three-fourths of its appraised value, and granting to the defendant time for the payment of the judgment. Chief Justice Marshall delivered an elaborate opinion, in which, after dealing with some matters not involved in the present inquiry, he considered with great care, whether the words "and modes of process," covered the proceedings of the marshal upon an execution. He reached the conclusion that the

words "'modes of proceeding in suits,' embrace the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment shall be satisfied. It may then, and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of the 'proceedings' in a suit." In *United States* v. *Halstead*, 10 Wheat. 51, the same points were ruled.

In 1828, another act was passed, the language of which was as follows: "The forms of mesne process, except the style, and the forms and *modes of proceeding* in suits, in courts of the United States, held in those States admitted into the Union since the twenty-ninth day of September, in the year seventeen hundred and eighty-nine, in those of common law, shall be the same in each of the States, respectively, as are now used in the highest court, of original and general jurisdiction of the same." 4 Stat. 278.

In *Beers* v. *Houghton*, 9 Pet. 329, 361, and *Ross* v. *Duvall*, 13 Pet. 45, it is said, that this act was passed shortly after the decision in the case of *Wayman* v. *Southard*, *supra*, and was intended as a legislative sanction for the opinion in those cases, that the words "*modes of proceeding*" included all of the proceedings of the marshal upon an execution in his hands, down to the satisfaction of the judgment. See *Williams* v. *Benedict*, 8 How. 107; *Bank of Tennessee* v. *Horn*, 17 How. 157; *Georgia* v. *Atlantic and Gulf Railroad*, 3 Woods, 434; *Smith* v. *Cockrill*, 6 Wall. 756; *Moncure* v. *Zunts*, 11 Wall. 416; *United States* v. *Knight*, 3 Sumner, 358, 373.

But it is insisted that § 914 of the Revised Statutes does not authorize a summary judgment as against the surety on a stay bond, given by a judgment debtor in order to secure time for payment. There is a class of cases closely analogous to this, in which such remedies are sustained. *Hiriart* v. *Ballou*, 9 Pet. 156; *Smith* v. *Gaines*, 93 U. S. 341; *Amis* v. *Smith*, 16 Pet. 303; *Beall* v. *New Mexico*, 16 Wall. 535; *Moore* v. *Huntington*, 17 Wall. 417.

But the plaintiff in error insists that the law applicable to this case is not § 914, but § 916 Rev. Stat. The contention is

understood to be as follows: (1) The general words of § 914, "practice, pleadings, forms and modes of proceeding," are to be applied to what is not within the particular words of § 916, "the party recovering a judgment shall be entitled to similar remedies on the same by execution or otherwise." That is to say, all of the modes of proceeding in a suit are governed by the former section, until judgment has been recovered; and thereafter the proceedings are governed by the latter section. (2) It follows that the stay law of the State was not incorporated into the jurisprudence of the Federal Court, because § 916 was enacted in 1873 and the stay law was enacted in 1875; and no general rule of the Circuit Court had adopted the state statute when the proceedings here in question were had.

The premise of this contention is unsound, as appears from several considerations.

The first of these considerations arises upon the language of § 916, particularly as compared with the terms of § 914. We have already seen that the terms of § 914, as construed by this court in *Wayman* v. *Southard*, *supra*, and other cases, are broad enough to include process of execution and all the proceedings of the officer thereunder. The terms of the section are: "Practice, pleadings, forms and *modes of proceeding*." These words, "*modes of proceeding*," standing alone, include what was done under this execution. Now let us proceed to consider the language of § 916. In order to support the contention of the plaintiff in error, its terms must be such as qualify those of the former section. Several words deserve notice.

In the first place, it is expressly stated, concerning the object of the remedies, that they are "to reach the property of the judgment debtor." They do not secure any other benefit or advantage to either party. Consequently, when a bond is given by the debtor, with sureties, to stay an execution against his property, by the terms of which they become bound as he is bound, execution against their property is not within the terms or purpose of the provision. The execution against the sureties is not issued to reach his property.

Argument for Defendant in Error.

Next, the parties in whose behalf the section is enacted are also to be noted. They are the plaintiffs in judgment, and not the defendants. The debtor is not the party in whose behalf the new remedies are provided. His interests are not within the words of the statute.

The nature of the new remedies supports the same view. The language is "by execution or otherwise." Proceedings which arrest the officer in issuing the writ and obeying its commands are not a remedy by execution. The words "or otherwise" apply to remedies of the same character as an execution, the object of which is to reach the property of the debtor and apply it to the satisfaction of the judgment; of which character are creditors' bills, proceedings supplementary to execution, garnishment of parties owing or holding the property of the judgment debtor, and other proceedings of like character, which within the last twenty-five years have been contrived in favor of plaintiffs. The terms of the section are abundantly satisfied by these new remedies, and ought not to be enlarged so as to trench upon and limit the significance of the words "modes of proceeding," in § 914.

2. The construction of the statutes, contended for by the defendant in error, is supported not only by a consideration of the precise terms of § 916, but by a consideration also of the prior legislation. The process acts of 1789 and 1792 contain no provision relating particularly to executions, or any other mode of final process. All such writs and proceedings were covered by the general words, "mode of process" and "mode of proceeding." Next came the special statute of 1824 relating to domain using the term "mode of proceeding," and then the act of 1828, already alluded to.

In 1872 an act was passed "to further the administration of justice" (17 Stat. 196). It contained no provision relating to final process. Its general terms, "modes of proceeding," were sufficient to provide therefor. This provision superseded and in effect repealed the provision above cited of the act of 1828. Not only were its terms ample to provide for what was covered by the third section of the former statute, but it directly conflicted therewith. The proviso of the said third section

vested in the courts the power at their discretion, by rule, to alter final process, so as to conform the same to changes which had been adopted by the state legislatures for the state courts. This power was taken from the courts by the act of 1872, and it was made compulsory upon them to follow the state practice. Therefore it repealed the former act.

Now what was done by the revisers? Out of § 5 of the act of 1872, they made § 914 of the revision. They framed §§ 915, 916, which are substantially the same as § 6 of the act of 1872. That section related only to attachment cases, or cases in which other process of a similar nature is issued. The act of 1872 left the matter of execution, except in attachment and like cases, to be governed by § 5. In 1873 the revisers divided this into two parts. The first part of § 6 they made § 915 of the Revised Statutes. The last part they made into § 916, but they changed the phraseology. In place of the words "in such cause," they inserted the words "in case of any common law cause." This brings us face to face with the question, whether the revisers intended that the operation of the fifth section of the act of 1872 should be modified and limited by the slight change made in reënacting the last clause of the sixth section of the same act; or did they mean to leave the terms of § 914 with all the force which they had under the settled judicial construction of its terms, and down to the time when they remodelled the statute, and to confine the terms of § 914 to such new remedies as had been devised by the state legislatures for the relief of judgment plaintiffs? The answer cannot be doubtful. We are bound to say, that under the operation of § 914, the state statutes are incorporated into and made a part of the Federal jurisprudence in the State, as well with reference to executions and the proceedings thereon as such other matters, as pleadings, amendments, times and orders of trial, and other like proceedings.

II. But this question is not an open one. The parties were concluded upon it when the decision of the court confirming the sale was made. The question above discussed was presented to the court, was ruled upon by it, its order of confirmation was appealable, and all this amounts to an estoppel of record.

Such an order of confirmation is not open to collateral attack. See *McKeighan* v. *Hopkins*, 14 Neb. 361; *Phillips* v. *Dawley*, 1 Neb. 320; *Crowell* v. *Johnson*, 2 Neb. 146; *State Bank* v. *Green*, 8 Neb. 297; *Berkley* v. *Lamb*, 8 Neb. 392; *Day* v. *Thompson*, 11 Neb. 123; *Neligh* v. *Keene*, 16 Neb. 407; *Orchard* v. *Hughes*, 1 Wall. 73; *Blossom* v. *Railroad Co.*, 1 Wall. 655; *Butterfield* v. *Usher*, 91 U. S. 246; *Findley* v. *Bowers*, 9 Neb. 72; *Gilbert* v. *Brown*, 9 Neb. 90; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Mather* v. *Hood*, 8 Johns. 44, 50; *Griswold* v. *Stewart*, 4 Cowen, 457; *Dyckman* v. *The Mayor, &c., of the City of New York*, 5 N. Y. (1 Selden) 435.

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

The contention of the plaintiff below, the defendant in error here, that the act of Nebraska of February 23, 1875, governed proceedings for the stay of money judgments in the Federal courts of the Nebraska District equally as for the stay of such judgments in the courts of that State, and in like manner determined the liability of sureties upon bonds given for such stay, is founded upon the language of § 914 of the Revised Statutes, which is as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This section is a reënactment of § 5 of the act of June 1, 1872, "to further the administration of justice" (17 Stat. 196, c. 255), and was intended to assimilate the pleadings and the procedure in common law cases in the Federal courts to the pleadings and procedure used in such cases in the courts of record of the State within which the Federal courts are held. Much inconvenience had been previously felt by the profession from the dissimilarity in pleadings, forms, and modes of pro-

cedure of the Federal courts from those in the courts of the State, consequent upon the general adherence of the former to the common law forms of actions, pleadings, and modes of procedure; whilst the distinctions in such forms of action and the system of pleading and the modes of procedure peculiar to them had been in many States abrogated by statute. The new codes of procedure did not require an accurate knowledge of the intricacies of common law pleading; and to obviate the embarrassment following the use of different systems in the two courts the section mentioned of the act of 1872 was adopted. As said by this court in the case of *Nudd* v. *Burrows*, 91 U. S. 426, 441, its purpose "was to bring about uniformity in the law of procedure in the Federal and state courts of the same locality. It had its origin in the code enactments of many of the States. While in the Federal tribunals the common law pleadings, forms, and practice were adhered to, in the state courts of the same district the simpler forms of the local code prevailed. This involved the necessity, on the part of the bar, of studying two distinct systems of remedial law, and of practising according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes."

The general language of the section, in the absence of qualifying provisions, would comprehend all proceedings in a cause from its commencement to its conclusion, embracing the enforcement of the judgment therein. The court which has jurisdiction of a cause has jurisdiction over the various proceedings which may be taken therein, from its initiation to the satisfaction of the judgment rendered. Any practice, pleading, form, or mode of proceeding which may be applicable in any stage of a cause in a state court would therefore, under the section in question, in the absence of other clauses, be also applicable in a like stage of a similar cause in a Federal court. The section would embrace proceedings after judgment equally with those preceding its rendition.

The first process act of Congress, passed September 29, 1789, (1 Stat. 93, c. 21,) provided "that until further provision shall be made . . . the forms of writs and executions, except their style and *modes of process*, . . . in the circuit and district courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the supreme courts of the same."

The second process act, passed May 8, 1792, (1 Stat. 275, c. 36,) provided "that the forms of writs, executions, and other process, except their style, and the *forms and modes of proceeding* in suits, in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled 'An act to regulate processes in the courts of the United States,'" — the first process act mentioned above.

In *Wayman* v. *Southard*, 10 Wheat. 1, these statutes were considered and construed by this court. And in giving a meaning to the language "forms and modes of proceeding in suits," the court, speaking by Chief Justice Marshall, said, that it "embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment shall be satisfied. It may then and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of 'the proceedings' in the suit." 10 Wheat. 32.

There would, therefore, be good reason for the contention of the plaintiff below, that the general words of § 914 of the Revised Statutes, "forms and modes of proceeding," apply to proceedings for the enforcement of judgments, as well as to proceedings before the judgments were rendered, but for the provisions of § 916, which is § 6 of the same act of June 1, 1872, from which § 914 was taken. Section 916 is as follows:

"The party recovering a judgment in any common law cause, in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such

court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

This section shows that in pursuing the remedies for the enforcement of a judgment in a common law cause, recovered in a Federal court, the "forms and modes of proceeding" provided for the enforcement of a like judgment in a state court are not to be followed, unless they were prescribed by a law of the State, at the time the provisions of the section took effect; or, if subsequently prescribed by such law, until they have been adopted by a general rule of the court. In providing for remedies upon judgments, the section not only excludes the application of the provisions of § 914 to such remedies, but also indicates the extent to which remedies upon judgments furnished by state laws may be used in the Federal courts. Congress, which alone can determine the remedies which may be pursued for the enforcement of judgments in the Federal courts, as well as the procedure to be adopted in the progress of a suit, has declared its will with respect to both. The procedure in civil causes, other than those in equity and admiralty, from their commencement to final judgment, must conform, as near as may be, to the procedure *existing at the time* in like causes in the courts of record of the State in which the Federal courts are held. It must, therefore, follow subsequent changes in the procedure in like causes in the state courts. But to enforce judgments in common law causes, only such remedies can be pursued "as *are now provided* in like causes by the laws of the State" — that is, when the act of Congress on the subject, the above section, was passed or reënacted — or, if provided by subsequent laws of the State, such as have been adopted by the Federal courts.

It matters not that the remedies designated in § 916 are stated to be, to reach by execution or otherwise the property of the judgment debtor; and that proceedings under the stay law

of Nebraska are only to secure, where a stay is obtained, the personal liability of the sureties for the amount of the judgment — in the absence of a designation of any other remedies, the section is a declaration that, until adopted by a rule of the court, no other remedies prescribed by state laws shall be permitted in the Federal courts. The extent to which the authority of the Federal courts may go, in the enforcement of judgments, by resort to remedies provided by state laws in similar cases, is thus defined and limited.

Section 916, as mentioned, is taken from the act of Congress of June 1, 1872, and is reënacted in the Revised Statutes, which took effect as of December 1, 1873. The act of Nebraska of February 23, 1875, had not been adopted by any rule of the Federal court when the judgment of *Seymour* v. *Young* was rendered in the Circuit Court of the United States, November 12, 1875, or when that judgment was extended by the clerk of that court, December 2, 1875, so as to embrace the sureties on the bond given to stay execution. That act was not adopted as a rule of procedure of that court until December 30, 1876.

It follows from this construction of the two sections 914 and 916, that the act of Nebraska did not govern proceedings for the stay of execution upon that judgment, or determine the liability of the sureties on the bond or undertaking given for such stay; and that the act of the clerk extending that judgment against the sureties was without authority and void. The sale, under the execution of the property of Lamaster, one of the sureties, and the deed of the marshal to the purchaser at such sale, therefore conferred no title.

The confirmation of the sale by the order of the court, did not cure the invalidity of the execution upon which it was made. The extension of the judgment against Young, so as to embrace the sureties, being a void proceeding, no subsequent action upon the sale could give it validity. A confirmation of a sale may cure mere irregularities not affecting its fairness, but not an infirmity growing out of the nullity of the judgment under which it was had.

The judgment below must therefore be reversed, and the cause remanded for a new trial; and it is so ordered.

WHITE *v.* BARBER.

SAME *v.* SAME.

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

Argued November 17, 1887. — Decided December 5, 1887.

A *bona fide* contract for the actual sale of grain, deliverable within a specified future month, the only option in which is an option in the seller to deliver it at any time within such month, is not a gambling contract, within the meaning of § 130 of chapter 38 of the Revised Statutes of Illinois. (Hurd's ed. of 1883, p. 394; do. of 1885, p. 405.)

W. claimed to recover from B., by a suit in equity, money which he had put into the hands of B., as a broker, to be used by him in transactions which W. alleged were wagering contracts, because they were sales of wheat in regard to which both W. and B. did not intend there should be any delivery of the wheat: *Held*, that what W. did in connection with the transactions was inconsistent with such claim; that B. had no such understanding; that the sales of wheat were lawful; and that W. was not entitled to recover the money which B. had paid out.

B. having paid out the money in settlement of the sales according to the rules of the board of trade of Chicago, was not a "winner" of the money from W., within the meaning of § 132 of chapter 38 of the Revised Statutes of Illinois. (Hurd's ed. of 1883, p. 394; do. of 1885, p. 405.)

Moreover, as W. set up as the ground of recovery that the transactions were gambling transactions, as between him and B., he could not recover back the money.

THE case, as stated by the court, was as follows:

The first one of these cases is an action at law brought on the 10th of May, 1883, by James B. White against George M. Barber, in the Superior Court of Cook County, Illinois. The declaration demanded the sum of $15,000, and declared on the common counts. The defendant pleaded *non assumpsit*. In June, 1883, the cause was removed by the defendant into the Circuit Court of the United States for the Northern District of Illinois. At the trial, in February, 1884, there was a verdict for the defendant, followed by a judgment for him, to review which the plaintiff has brought a writ of error.

Statement of the Case.

There was a bill of exceptions, the whole of which is in substance as follows:

The plaintiff introduced the following evidence. James B. White, the plaintiff, "testified, that now, and during the time in question, he resided at Fort Wayne, Indiana, engaged in the business of dealing in general merchandise; that, in 1879 and prior thereto, one A. S. Maltman, of Chicago, acted as his agent in purchasing and forwarding merchandise of various kinds; that, about September, 1879, desiring to do some trading on the board of trade, Chicago, I asked Maltman to recommend some good responsible broker on the board of trade, through whom I could do business; that Maltman recommended the defendant, who then, and during the time in question, was a broker residing in Chicago and doing business on the board of trade; that thereupon I commenced trading on the board, sending my orders at first to Maltman, who communicated them to the defendant; that, about December, 1879, I came to Chicago, made the acquaintance of defendant, and thereafter did business directly with him; that I continued to do business with defendant during the years 1879, 1880, 1881, and 1882, buying and selling on the board, through the defendant, as broker, corn, wheat, oats, pork, and other commodities, and that, about April 19th, 1882, I had a settlement with defendant, in which all previous dealings were adjusted; that up to this time the transactions which I had made through defendant on the board amounted to $105,000, in 1879; $1,718,000, in 1880; $640,000, in 1881, and $672,000, in 1882; that, in November or December, 1879, and at other times prior to the settlement in April, 1882, I had conversations with the defendant in which I told defendant that I was a merchant in Fort Wayne, and did not want it known that I was engaged in speculating on the board of trade in Chicago, as it might affect my credit, and that the account could be kept in the name of A. S. Maltman; that I considered it a hazardous business, but was willing to gamble provided I could have a fair show; that I wanted my deals placed with responsible parties, so that I could get my money when I made it; that I didn't want any of the property, but meant

simply to do a gambling business; that defendant told me (plaintiff) that he knew what I wanted; that Maltman had explained my situation and business; that he would deal only with responsible parties, and the deals should be settled so as to get the profits or losses; that defendant told me (plaintiff) that not one bushel in a million that was bought and sold on the board was legitimate business; that a few of the large houses did some legitimate business, but most of it was simply trading in differences; that he (defendant) did nothing but business of the latter kind; that he dealt mostly for himself; that he did a good deal of 'scalping,' deals made and closed the same day, on the turn of the market; that he did not let his deals run over night; that, up to April, 1882, I (plaintiff) never delivered or received any of the property so sold or bought, nor was anything ever said by defendant to me about receiving or delivering the property or making arrangements to do so; that, from time to time, defendant rendered statements to me (plaintiff) showing the deals made, the price per bushel, or, in case of pork, the price per 100 lbs., at which the commodity was bought and sold, the difference in dollars and cents, the commissions charged, and the total debit or credit passed to my account; that all the deals made were in form contracts for future delivery, in which the seller had the option of delivering at any time during some future month; that, up to April, 1882, all trades made by defendant for me (plaintiff) had been settled or closed by counter-trades prior to the month in which delivery could be made; up to April 19, 1882, no commodities had been delivered to or received on these trades, nor had any suggestion or requirement on the part of Mr. Barber to deliver been made; that defendant never reported to me the names of the parties with whom trades were made on my account, and that I never knew or inquired who such parties were; that, after the settlement in April, I commenced selling wheat for July delivery, and, by the last of May, had sold, through defendant, 100,000 bushels for that delivery, which are the trades in question in this case; that there was a corner in July wheat, and the price was forced up ten or twelve cents; that, on the last of July, I

came to Chicago, had an interview with defendant in the morning, in which he (defendant) proposed to make a tender of No. 2 red winter wheat, the kind sold being No. 2 spring wheat; that No. 2 red winter is intrinsically more valuable than No. 2 spring, but that, on the last of July, the former stood at 98 cents per bushel and the latter at $1.35 to $1.37; that I (plaintiff) knew of the tender, and I did not object; that I met defendant later in the day, and was informed by him that he had borrowed warehouse receipts for ten thousand bushels No. 2 red winter wheat, and had made a tender of the same to the several parties to whom he had sold the wheat, and that such tender was in every case declined, and that said tender was made under the following rules of the board of trade, viz.: 'On contracts for grain for future delivery the tender of the higher grade of the same kind of grain as the one contracted for shall be deemed sufficient, provided the higher grade of grain tendered shall not be of a color or quality that will depreciate the value of the other, if mixed.'

"Prior to December, 1879, I bought, through defendant, 100,000 bushels of corn for December delivery. I came to Chicago and defendant told me the deal had gone against me $4500, and he said I had to close it that day. The loss was that amount, and I paid it that day. No corn was delivered on either side. In January, 1880, I sold, through Barber, 20,000 bushels of wheat. My profit was $400. I did not take the profit, but sold more, and the deal went against me $2000, and I paid it up. I then commenced buying, and made $600 on March wheat bought in January. I commenced selling wheat in March, 1880, and made a good deal of money for a few months; recovered losses in April and commenced selling May wheat. The May options took a sudden start up, and I lost $8000, and I paid it. It was expressly stated by me to Barber that I wanted no property. He knew that. He said, 'Certainly, I know that,' and that the deals should be settled on the margins — on the profits. Up to April, 1882, nothing had been delivered by me or received by me, nor had there been any suggestion or requirement on defendant's part to deliver made; on the other hand, it was never expected to

handle the property, but merely to trade in the different deals. Up to the close of the July deal, 1882, no demand had been made on me by Barber for the delivery of wheat or corn, or any other commodity.

"That I received the following statement of account from defendant about the day of its date (which was read in evidence):

"'CHICAGO, *Oct. 30th*, '82.

"'A. S. Maltman (J. B. W.) in acc't with G. M. Barber,

1882.			Cr.
July	1.	By balance	$12,000 00
	3.	" draft	3,000 00
Sept.	11.	" profit as per statement rend. . .	931 25
	12.	" " " " " " . .	2,018 75
	27.	" " " " " " . .	318 75
Oct.	26.	" " " " " " . .	300 00

"'DEBIT.

July	31.	To loss as per statement rend.	$2,668 75	
Aug.	11.	" " " " " " .	100 00	
Sept.	12.	" draft	3,000 00	
Oct.	27.	" loss as per statement rend.	400 00	
	30.	" draft	987 50	
		To balance	11,412 50	
			$18,568 75	$18,568 75
Oct.	30.	By balance, being diff. between price .		$11,412 50

"'I have 100 M July spring wh't sold for you and the settling price of same as fixed by board of trade (1.35), including coms., ¼c.'

"That the item of $12,000 balance in said account consisted of money advanced and paid to the defendant; that the item 'July 3d, by draft $3000,' consisted of $3000 money paid the defendant by means of a draft. Plaintiff testified further that on April 2d, 1883, I served the following notice upon the defendant, by delivering to him a copy thereof; the defendant

read the notice, admitted he had the money in his hands, but declined to pay it over.

"The notice was offered in evidence, and is as follows:

"'To G. M. Barber, Esq.:

"'In a statement made by you, dated October 30th, 1882, of deals made on my account on the board of trade, Chicago, you acknowledge a balance in your hands of $11,412.50 in my favor, being, so the statement says, the difference between price you sold 100 M July wheat for me and the selling price of same as fixed by the board of trade, $1.35, including your commission of ¼ cent; now you are hereby notified that I claim all contracts for sale of said wheat to be illegal and void, and forbid you to pay over any part of said money or balance to any one, and I further demand the immediate payment thereof to myself.

"'Dated Chicago, April 2d, 1883. JAMES B. WHITE.'

"On cross-examination plaintiff testified, that, during all the time he traded through defendant, Maltman continued to some extent to act as his agent in the business with defendant; that he received some profits debited to him in the statement offered in evidence; that defendant complied with his orders, so far as he knows; that he did not think defendant had any thing to do with the corner in wheat; that he (plaintiff) had nothing to do with the appointment of a committee by the board to fix a selling price for July wheat; that he knew what was going on, and talked with A. M. Wright and other members of the board of trade about the deal, but did not enter into any agreement or arrangement with the other brokers similarly situated to the defendant in regard to legal proceedings to prevent the consummation of the corner; did not employ counsel on behalf of defendant, or authorize any steps to be taken in his name; that he (plaintiff) was an outsider and was not recognized in that matter; that he did not agree to pay attorney's fees, but expected he would have to do so, and did after the litigation was over; that he knew a bill was filed; that the matter was contested and decided by

the Supreme Court in favor of the cornerers. The litigation was after a committee appointed by the board had fixed the selling price at $1.35.

"In the progress of the case the plaintiff testified further, among other things: I left it for Mr. Barber to put the contracts in form when I wished him to buy or sell. I understood that he would go on the board of trade and either buy or sell, and I understood that he did go on the board of trade and buy and sell according to my orders. There was no disobedience of my orders, so far as I know. I have no complaint to make on the score of non-observance of my orders. I knew that while we thought the corner in July wheat was about to culminate, buying wheat at Milwaukee or elsewhere to fill orders was talked about — a great many talked of it — but it was considered that parties who attempted that got beaten, because they simply dropped the grade on them. It is possible I may have talked with Maltman about the possibility of buying wheat in Milwaukee to fill my orders, but I never dreamed of it. I said some were doing it; some did do it. It was generally talked that some people had done it, and as to the propriety of doing it; it was only three cents, I think, to bring it from Milwaukee here, and twelve, fifteen, or twenty cents, somewhere along there, lower a bushel, and they could fill their contracts here with it and not lose so much as they would in the extortion of the corner. I might have said, 'Well, it could be done,' 'I wish I could do it,' or something of that kind. I knew Barber, being a member of the board of trade and making contracts on the board for me, would be obliged to observe the rules of the board. I understood there was a rule that one must keep his margin good. I told him to buy, and told him to sell, and told him to sell out, and when to cover and when to close trades, and he observed my orders. If there was any corner it was not my fault, as I was selling, and it was not from Barber's fault, so far as I know. After he made the tender of red winter wheat on the 31st of July, 1882, I approved of what he did. I went to see Mr. A. M. Wright, who was one of the parties proposing to file a bill to question the propriety or binding force of a finding of a

committee of the board of trade fixing the settling price for July wheat. I saw published a communication in the paper, an interview with the reporter, in regard to this corner, or at least he published a communication and I went to see him and consulted with him about it. The complaint was that the price of July wheat was put too high on the 31st of July. Barber had spoken about the contracts being under the board of trade rules. After the culmination of the corner I got a copy of the rules — printed copy. He showed me the rules under which the committee was appointed. I think the rule is on page 51 of Rules of 1882, § 3. Mr. Wright believed it was a legal tender; so did I. I believed that 'red' would be a good tender. I went to see counsel; it was John E. Burke. He was a lawyer who had charge of what he called contested cases. There were some thirty-two members of the board in contested cases, and Mr. Barber joined in with them. I footed the lawyer's bill; that was all I did. I told Mr. Burke that I was one of the fellows that got bled in this affair, and I did not want to stand it if he could help it. He was seemingly as much out of humor about it as I was, as far as the situation was concerned — the unfairness of it. When it came to pay for the expense of those legal proceedings, the bills were presented to Mr. Barber and Mr. Maltman, and I told them to pay them, and I would pay them back; and I did. I went with Mr. Wright to Mr. Burke. Mr. Barber was away from home at the time. I told Mr. Burke the situation I was in, and he said, 'Well, when your broker comes here, have him come up and see me.' It was understood that Mr. Barber was my broker or commission merchant, and, when he returned, he went and joined in with the others, to contest this thing. I knew how the matter progressed after that. It was contested in the courts in some formal way, to get into the Supreme Court. There was a *pro forma* decision in the court here, and the case was taken to the Supreme Court and was there determined in favor of the cornerers. That was after the committee of the board of trade appointed under these rules had been appointed. The case went to the Supreme Court. We simply had to have patience to wait until they

determined it. They determined it about a year ago last January — that is, in January, 1883 — before I had served notice on him. In most cases where I bought or sold I closed before the end of the month in some way — either sold out or covered it. If I bought wheat of a man for the month of July he had the whole month of July in which to tender to me. During the whole of the month of July I had an option at what time I would deliver. The buyer has to close his trade the first of the month, and the seller has to the last of the month, or, if he pleases, he can close between times.

"George M. Barber, defendant, who, being first duly sworn, testified as follows: That, after the notice was served upon him, by plaintiff, in April, 1883, he paid over to the various parties to whom he had owed the wheat in question, the sum of $11,412.50, less the amount of his commissions, which were $250; and, on cross-examination, that he made such payment because charges had been preferred against him, and he had to pay or be suspended from the board.

"Plaintiff here rested his case, and the defendant, to maintain the issues on his part, introduced the following:

"George M. Barber, defendant, who, being recalled, testified that he was a commission merchant and member of the board of trade; that he was employed by Maltman to trade for plaintiff on the board of trade — to make trades there; that, in executing the orders of plaintiff, he dealt with other members of the board; that he did not seek commission business, but dealt mostly on his own account; that once, when White was hanging on to a deal which had gone against him, witness told him that witness never hung on to a deal, but, in his own trades, generally calculated, when he went home at night, to have an equal amount bought and sold, so that he would not be affected by the fluctuations of the market, but did not say to Mr. White that White's business would be conducted in that way. Witness had to be governed by White's orders, which were to do so and so; did not recollect plaintiff saying that he wanted to gamble on the board; that the manner of making trades on the board is as follows: If the order was to sell, he would go on the board

and offer to sell so much wheat at such a price, and some other broker would accept the offer, or some other broker might offer to buy, and he (defendant) would accept the offer, and thereupon both parties made a memorandum of the trade on a card, without comparison; that such memorandum was usually as follows, (referring to a card,) this being one of the trades in question: '10 M, July, H. G. Gaylord, 1.25⅛, J. B. W.;' that this was the only writing made in the hurry of business on the board; that '10 M' meant 10,000 bushels; 'July' meant for delivery in July, at the seller's option; that No. 2 spring wheat was understood; that 'H. G. Gaylord' was the name of the broker to whom the sale was made; that '1.25⅛' denoted the price, and the initials 'J. B. W.' indicated that the sale was on account of plaintiff; that their trades were afterwards, on the same day, entered on the books of the respective parties, and their clerks went round and compared and checked them off; that this was the case with the sales of 100,000 bushels for delivery at seller's option during July, 1882 (the deals under consideration); that he had no different agreement with any of the persons with whom he dealt for plaintiff; that the grain was to be delivered or received; that 'puts' and 'calls,' or mere options to buy or sell, were not recognized on the board; that it is customary where a commodity is sold to and bought of the same broker, upon different orders, for the brokers to settle their trades by paying the difference, as the case may be. (And a rule of the board of trade allowing such transfers was read in evidence.) That he never told plaintiff that trading on the board was illegitimate, but may have told him many other of the trades were settled up, or offset, without delivery. The volume of transactions was too large to make delivery practicable in all cases. As to the conversation between witness and White, November 30, 1879, witness stated he believed it was the first time he met White, for whom there were then to mature contracts to buy 100,000 bushels corn, and witness told White that the chances were strong that the corn would be delivered, and he must either furnish the money to pay for it or order him to sell it, so that he would have a place to put it, when delivered,

or could make arrangements to transfer it; that, in the contracts for Mr. White, witness had received and delivered property; had received as high as 60,000 bushels in a day; that, at the request of plaintiff, he did not settle the deals for July, but made default as to the 100,000 bushels. Mr. Maltman, for Mr. White, gave me the draft of $5000, June 12, 1882. I was required to give my word that I would not buy in the wheat unless by his orders, but would allow him to default, and Maltman told me that White said he would settle — let the committee fix the price and he would settle that way, if possible, if he did not decide to buy in the wheat. White sent witness a telegram from Fort Wayne, Aug. 5th, 1882, as follows: 'Don't cancel the July trades. My attorneys here believe the tender we made is good and can be enforced. J. B. White.' (Telegram read in evidence.) There were about thirty other brokers who made default; that a committee was appointed in accordance with the rules of the board, who fixed the settling price at $1.35; that thereupon the brokers filed bills in court, to enjoin the board from suspending them for not settling at the price fixed by the committee; that he returned to the city about September 10th, 1882, after being absent a month or more, and was informed by Maltman that the plaintiff had made arrangements for him to join in the injunction proceedings; that the next day he went to the office of J. E. Burke, the attorney for the defaulting brokers, and signed and swore to a bill for the purpose above stated; that said bill was filed; that afterwards the Supreme Court rendered a decision adverse to the prayer of the bill, and the bill was dismissed; that plaintiff was informed of the result, and paid the attorney's fees and damages in the case; that plaintiff did not suggest the making of any further contest; that at the time plaintiff made the demand upon him, April 2d, 1883, the money in question was under his control, except $6700, which had been deposited in the bank as margins, on account of some of the deals; that he frequently received and delivered grain; had received as high as 60,000 bushels in a day; that he could not recall any trade in which he bought for Mr. White where he received any commodity, but had no doubt

at all in all his tradings he did receive a good deal, but could not recall any particular instance. There was a certainty that delivery would be made, unless, after the trades were made, I made offsets. I always do get more or less; do not expect it will all be delivered. I expect I can offset trades with a good part of it. When the 100,000 bushels in question were sold, witness expected it would be delivered; that he would buy here in the market, the largest grain market in the world.

"Thomas W. Burns, being duly sworn, testified for the defendant, that, in 1882, he was a member of the firm of Ulrich, Busch & Co., and a broker on the board of trade; that, on May 17, 1882, he bought of defendant, for his firm '5, July, wheat, at 1.24⅜,' No. 2 spring wheat (5000 bushels); that the contract was made in the regular way; that there was no secret understanding or agreement that it was not to be executed, or that it was to be settled; that the wheat was to be delivered at any time in July, at the seller's option.

"Abel H. Bliss, being duly sworn, testified for defendant, that he was a member of the board of trade, and was doing business as a commission merchant in 1882; that in May he bought 10,000 bushels July wheat (No. 2 spring, deliverable at seller's option at any time during July), of defendant, which he never received; the wheat was to be delivered in July, at the seller's option; that there was no agreement that the wheat was not to be delivered, or that it was to be settled; that he certainly expected to get the wheat.

"It was admitted that the other brokers to whom defendant had sold the wheat in question would testify in a similar way, as to the trades with them, respectively.

"Alexander S. Maltman, being sworn, testified for defendant, that he was of the firm of A. S. Maltman & Co., and was engaged in the commission business in Chicago; that he acted as agent for plaintiff, in his transactions with defendant; that he never told defendant that the transactions were to be of a gambling or fictitious character; that his instructions from plaintiff were for the most part contained in telegrams and letters, and these he gave or showed to defendant; that the transactions were quite continuous; that, in July, 1882, he

had several conversations with plaintiff as to Barber defaulting; that, when the price was up in the thirties, plaintiff was unwilling to advance more margins unless defendant would agree to default, and that he procured such an agreement from the defendant at the request of plaintiff; that, after default had been made, plaintiff said he was willing to leave it with the committee to be appointed by the board; that he went with plaintiff to the office of Burke, the attorney; that plaintiff went there to get out an injunction to prevent the board of trade from suspending defendant; that he paid out for plaintiff on account of the said suit $283.50, which plaintiff had repaid him.

"George F. Morcom, who, being duly sworn, testified for defendant, that he was of the firm of A. S. Maltman & Co.; that he heard plaintiff say that the tender of No. 2 red winter wheat was good; that, according to their own rules, they were bound to accept it; that plaintiff said that he desired Mr. Barber to default on the deals and let the matter go to a committee and let them fix the price, and said that he would see that Mr. Barber was protected.

"Deville C. Bannister, being duly sworn, testified for defendant, that, during the time in question, he was book-keeper for defendant; that plaintiff, at the time the injunctions were being obtained, went to Mr. Burke's office to see about the matter, and said he wished he would take the matter into his own hands; that Mr. Barber did not pay over the money until it was necessary to do so in order to save himself from being suspended from the board.

"The bill in chancery above referred to, being a bill filed in the Superior Court of Cook County, by George M. Barber, in the interest of or for the benefit of the plaintiff, on the 11th of September, 1882, making the Board of Trade of the City of Chicago party defendant, was, together with a copy of the injunction issued in pursuance of the writ, read in evidence. It set forth certain sections of the charter of the board of trade, and referred to a copy of the rules of said board in force January 1st, 1882, making such copy a part of the bill as an exhibit, and referred also to sales of No. 2 spring wheat, made

by defendant for delivery in July, 1882, and alleged that there was an unlawful combination to prevent the complainant and others situated like him from fulfilling their contracts, &c., and set forth a certain rule of the board of trade providing, among other things, for the appointment of a committee to determine disputes as to the price of property, in case of supposed excessive claims for damages being made under contracts, on default, &c., and showed that application for the appointment of such committee was made with reference to the defaults made upon contracts for delivery of No. 2 spring wheat in July, 1882, and showed that the committee determined the price for settlement at $1.35 per bushel; and the decision of the committee was drawn in question by the bill upon various grounds, not drawing in question the validity of the contracts, but questioning whether the board of trade had power to compel members to abide the decision of such committee, and also questioning the regularity of the appointment of the committee, and charging that, in the conduct of the hearing had before the committee, and in the finding of the committee, the spirit of the rules of the board of trade was violated by putting it in the power of persons who had been concerned in cornering the market to get excessive damages, &c. The bill pointed out certain rules of the board of trade under which, in case a member failed to comply promptly with the terms of any business contract or obligation, or failed to satisfy, adjust, and settle the contract, or failed to comply with or fulfil any award of the committee of arbitration, or committee of appeals, made in conformity with the rules, regulations, and by-laws of the association, he should, upon admission or proof of the delinquency before the board of directors, be subject to be suspended from all privileges of the association, &c.; and an injunction to prevent suspension or expulsion, and especially to restrain and enjoin the board from accepting, treating, or recognizing the decision of the committee aforesaid as in force, or as having any effect, was prayed for by the bill. Such injunction was ordered, and was issued September 11, 1882, and was served on the board. There was also introduced a certified transcript of the order of said superior court, made on the 11th of October, 1882, dis-

solving the injunction, and assessing damages on account of the issuing of the same, but showing, that, by stipulation, the cause was to abide the final result of the case of *Abner N. Wright et al.* v. *The Board of Trade of the City of Chicago*, in the appellate court or in the Supreme Court, and that, in case of the reversal of the decree in that case, then the decree in the Barber case should be set aside on his motion, and the injunction in his favor was continued. This decree was to be regarded as final in case the decree in the Wright case should be affirmed, except that, in such case, the injunction was to be dissolved, on defendant's motion. The transcript further showed, that, on the 16th of April, 1883, the said superior court, in the said chancery suit of Barber, vacated the order to continue the injunction, and the bill thereupon stood dismissed under the previous order of the court, this being because the Supreme Court had, in the case of Wright, affirmed the decree of the superior court dismissing his bill. It appeared that, after the decision of the Wright case, inquiry was made of the plaintiff as to whether he wished anything further done in reference to the prosecution of the chancery suit in the name of Barber, and he replied, 'Further appearance not necessary.'

"It further appearing, from the testimony, that the plaintiff paid the damages which were assessed against Barber on account of the issuing of the injunction, the testimony of the witness Barber tended to show, that, at the time of the delivery by defendant to the plaintiff of the statement aforesaid, dated October 30th, 1882, the balance of $11,412.50 therein mentioned, that amount being the difference between the price at which the one hundred thousand bushels of wheat were sold for July delivery, and $1.35 per bushel, the settling price so fixed by the committee — that is, the difference over and above the commissions of $\frac{1}{4}$ of a cent per bushel charged by the defendant — was to remain with the defendant, to await the action of the court upon the aforesaid bill in equity, seeking to impeach the decision of the committe fixing the settling price, and that, after that matter had been litigated in the courts, through the suit so brought in favor of Wright, which was made a test case, complaints were made before the board of

directors of the board of trade, against the defendant, on account of default on his part in performing or settling the contracts for the sale of the said one hundred thousand bushels of wheat, notice of one or more of which complaints were given by defendant to plaintiff, and the defendant appeared before the directors to make defence, but did not succeed in making any defence, and, being about to be suspended unless he settled, did thereupon settle by paying according to the decision of the committee declaring $1.35 per bushel to be the settling price, so that the moneys paid out by defendant, together with his commission, exhausted the said sum of $11,412.50; and this was prior to the commencement of this suit, but after the notice of April 2d, 1883, above set forth; the testimony tended to show that this money was left in defendant's hands by Mr. White, when the aforesaid statement of account stating said balance, &c., was given by defendant to the plaintiff, and was so left for the protection of the defendant, as to the contracts, with reference to the litigation arising as to whether the decision of the committee should be allowed to be binding in regard to the settling price."

On the foregoing evidence, the plaintiff claimed to recover the before named sum of $11,412.50, as money placed by him in the hands of the defendant for the purpose of dealing in gambling contracts at the Chicago Board of Trade, and which contracts, it was asserted, were made illegal by a statute of Illinois.

The court charged the jury, among other things, as follows: "The question of fact for you to determine under the proof is, whether these dealings made by the plaintiff on the board of trade, through the defendant, as his broker, were gambling contracts, within the meaning of the law. The statute of the State of Illinois upon the subject I will now read you. Section 130 of c. 38" (Rev. Stat. of Illinois, by Hurd, ed. of 1883, p. 394; ed. of 1885, p. 405,) "reads as follows: 'Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price

of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than $10 nor more than $1000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.' The plaintiff contends that the contracts in question, made by the defendant for him and in his behalf, were gambling contracts, within the meaning of this law. The question then arises, What kind of contracts are prohibited by this statute? You will notice the language is, 'Whoever contracts to have or give to himself or another the option to sell or buy, at a future time'—an option to sell or buy at a future time. The courts have construed to some extent the meaning of this statute, and I will read from a case decided by the Supreme Court of this State the construction which is there given upon it: 'The evidence in this record is by no means conclusive that the contracts for grain, made by defendants for plaintiff, were unlawful. They were made in the regular course of business, and, for anything that appears in this record, they could have been enforced in the courts. It is true, they were time contracts—that is, the seller had all of the month in which to deliver the grain; but the testimony of Wolcott is, they were *bona fide* contracts for the actual purchase of the grain. The only option the seller had was as to the time of delivery. The obligation was, to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month. Time contracts, made in good faith, for the future delivery of grain or any other commodity, are not prohibited by the common law nor any statute of this State, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of trade. Our present statute was not in force when these dealings were had; consequently, the rights of the parties are not affected by it. What the law prohibits, and what is deemed detrimental to the public interests, is, speculations in differences in market values, called, perhaps, in the peculiar

language of the dealers, "puts" and "calls," which simply means a privilege to deliver or receive the grain, or not, at the seller's or buyer's option. It is against such fictitious gambling transactions, we apprehend, the penalties of the law are levelled.'" The above extract is taken from the opinion of the Supreme Court of Illinois in *Wolcott* v. *Heath*, 78 Ill. 433. The Circuit Court then proceeded in its charge as follows: "Now, the question is, in the light of the testimony in this case, whether the contracts in question in this case were contracts to buy or sell at a future day, or whether they were simply absolute sales, in which the seller had the entire month, the month specified, in which to perform his contract. This court has found it necessary, on several occasions, to construe this statute, and has held, with the case which I have just read, that the statute is levelled against what are called puts and calls, that is, the right or the privilege which a party may have to buy or sell of you at a future day, not an absolute agreement now to sell, but where one man pays another $5 or $10 for the privilege of delivering to him 1000, 5000, or 10,000 bushels of grain at a future time, or pays him a similar amount for the privilege of buying or accepting from him grain at a future time — a contract which cannot be enforced in terms, because it is wholly at the option of the party holding the option whether he will call for the grain or not. This is what is termed a gambling contract, or a put or call, or an option to buy or sell at a future time, within the meaning of the Illinois statute."

The bill of exceptions further says: "And the court further explained to the jury that the 'option to buy or sell,' prohibited by § 130, c. 38, of the Revised Statutes, means a privilege which the buyer or seller may or may not exercise at his option, and that a contract by which the seller absolutely agrees to deliver a certain commodity to the buyer within a specified time, when the only option is as to the delivery within a certain time, such as within the whole of some month named, is not a gambling contract, within the meaning of this statute."

There were other instructions to the jury, the entire charge

covering nearly seven printed pages of the record. The bill of exceptions states that the plaintiff excepted to all of the instructions given, and especially to those hereinbefore set forth.

The second case above named is a suit in equity, brought on July 24, 1883, in the Circuit Court of Cook County, Illinois, by the Bank of British North America, a corporation of Great Britain, against James B. White and George M. Barber. The bill alleges that the bank has on deposit, in its office at Chicago, Illinois, $6700, standing to the credit of Barber, the same having been deposited by him as security for certain trades or deals in wheat with members of the board of trade of Chicago, the money having been turned over to the plaintiff by the Merchants' Bank of Canada, to whose business at Chicago the plaintiff succeeded; that White claims that said money belongs to him, and claims that Barber, in depositing it, acted merely as the agent of him, White; that, on April 2, 1883, White made a demand upon the plaintiff for the money, and forbade it to pay the money, or any part thereof, to any person except upon the order of him, White; that White had commenced an action against the plaintiff to recover the money; and that Barber had demanded of the plaintiff that it should pay the money to him. The bill prays that the defendants may interplead and settle the controversy, and that the plaintiff may be allowed to pay the money into court. Both of the defendants appeared in the suit. White put in an answer setting up that the $6700 was part of a larger sum of money placed by him in the hands of Barber to be used by Barber as margins in gambling contracts which Barber was to make for him on the board of trade in Chicago; that Barber, in pursuance of such employment, and in April, May, and June, 1882, made certain gambling contracts with members of the board of trade, which contracts were ostensibly for the sale of certain quantities of wheat by Barber to such members, to be delivered at any time in July, 1882, at the option of the pretended purchaser, but such pretended contracts were a mere form and cover, and the real intention of all the parties was to settle them by a payment of the difference between the price

for which the wheat was sold and the market price of the same when delivery thereof should be called; that Barber took $6700 of the money of White, so placed in his hands, and deposited the same with the Merchants' Bank of Canada, as security for certain of such pretended contracts, being the same $6700 turned over to the plaintiff by the Merchants' Bank; and that, while the money was still in the possession of the plaintiff, and on April 2, 1883, White notified both the plaintiff and Barber not to pay the same to any one but White.

Barber also answered the bill, and in his answer made the following allegations: He was not the agent of White in depositing the $6700. As a commission merchant at Chicago, he made certain sales and purchases of grain and pork, for future delivery, at the instance and request of White, being, as between himself and those with whom he made the contracts, responsible for the performance of them on his part. A large number of such transactions occurred in May, June, July, August, September, and October, 1882. Barber was doing business on the Board of Trade of Chicago, of which he was a member, and White was living at Fort Wayne, in Indiana. The contracts were made with reference to the rules and regulations of the board of trade, and to the usages of business on that board; and, by those rules, the persons with whom Barber made such contracts were authorized to demand margins and deposits, as security for the performance of the contracts by Barber, and in various instances such demands were made, and it became necessary for Barber to make deposits for margins or security with reference to the contracts. Those rules provided, that, on time contracts, purchasers should have the right to require of sellers, as security, ten per cent margins, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above that price; also, that sellers should have the right to require as security from buyers, ten per cent margins on the contract price of the property sold, and, in addition, any difference that might exist or occur between the estimated value of said property and the

price of sale. The rules also provided, that securities or margins should be deposited either with the treasurer of the board of trade, or with some bank authorized to receive the deposits. The rules also prescribed the form of certificate to be used by the bank, which form was adopted by the Merchants' Bank of Canada and by the plaintiff. In accordance with those rules, the certificates showing the deposits were issued in duplicate in each case, one being marked "original" and the other "duplicate," and both being marked "not negotiable or transferable." The certificates were not made with express reference to any particular contract, and the deposits were subject to be treated as security for the fulfilment of any contracts made between the parties to the respective certificates, during the time the deposit remained unpaid. During May, 1882, Barber, at the instance and request of White, made contracts for the sale and delivery by Barber to divers persons, members of such board of trade, of large quantities of No. 2 spring wheat, for delivery at seller's option during July, 1882, at certain prices specified in the various contracts, ranging from $\$1.22\frac{1}{2}$ per bushel to $\$1.25\frac{1}{8}$ per bushel, which wheat was to be delivered in lots of 5000 bushels. White did not put Barber in funds to buy wheat for delivery according to the contracts. While Barber remained liable upon the contracts, he was, from time to time, called upon to deposit margins on account of the contracts, to secure their performance, and did, in accordance with the rules of the board of trade, and in compliance with his duties under the contracts, make deposits of money and procure certificates therefor from the Merchants' Bank of Canada. The answer then gives the particulars of twelve different certificates for such deposits on various contracts, amounting in the aggregate to $6700. The contracts for the delivery during July, 1882, of No. 2 spring wheat were not performed by White. The moneys deposited as margins were furnished by Barber in large part from his own means, for the purpose of keeping the contracts open, as was desired by White. Barber also, in order to avoid loss by White and to protect the interests of White, made, before the close of July, 1882, a tender of No. 2 red winter wheat under the contracts, which wheat

was of greater intrinsic value, as Barber believed, than No. 2 spring wheat; but the tender was rejected by the purchasers, on the ground that the wheat tendered was not of the kind and grade contracted to be delivered, nor such as, under the rules of the board of trade, was necessary to be delivered. The parties with whom the contracts had been made, and who had the right to call for delivery, made large claims for damages against Barber, and insisted that the tender was irregular and insufficient; and White desired Barber to object to the payment of such claims, and to reduce the same, if he could. With this object in view, Barber, at the instance of White, filed a bill in chancery, in the Superior Court of Cook County, on September 11, 1882, against the board of trade, seeking by the bill to impeach the regularity and fairness of an award or decision of a committee which had been appointed, under the rules of the board of trade, to determine the settlement price under contracts such as those which were so made by Barber, and which committee had determined that such settlement price should be $1.35 per bushel. The bill also sought to restrain the board of trade from enforcing such award or disciplining Barber on account of non-compliance therewith. An injunction was temporarily granted on the bill. The award made Barber liable to pay, as damages, to the parties with whom he had made the contracts, the difference between the contract price and the settlement price of $1.35 per bushel. The Superior Court of Cook County adjudged, in the suit, that Barber was not entitled to any relief on account of any of the matters stated in the bill, and the injunction was dissolved on April 16, 1883. The bill was drawn up by counsel employed by White, White knowing that if the injunction should be dissolved Barber would be required to settle on the basis of the award of the committee. With reference to that basis, White drew from Barber, on October 30, 1882, $987.50, as an excess of money, including profits, due to him from Barber after reserving enough to pay damages at that rate. Prior to the bringing of the suit in chancery, it was the right of the parties with whom Barber had entered into the contracts, to have the

moneys which had been deposited as margin or security under the contracts, paid over to them on the order of the president of the board of trade, they holding, respectively, duplicates of the certificates; and Barber, on making default as to the delivery, became amenable to discipline under the rules of the board of trade, for not complying with the terms of the contracts. One of those rules provided, that, when any member of the association failed to comply promptly with the terms of any business contract or obligation, and failed to equitably and satisfactorily adjust and settle the same, he should, upon admission or proof of such delinquency before the board of directors, be by them suspended from all privileges of the association until all his outstanding obligations to members of the board of trade should be adjusted and settled. The parties who were entitled to delivery of the wheat under the contracts for delivery in July, 1882, were, by those rules, entitled to settlement with Barber at the average market price of the commodity on July 31, 1882, the day of the maturity of the contracts, and the damage or loss due to such purchasers by reason of the required settlement became thereupon immediately due and payable by Barber to such purchasers; but the payment was delayed because of difference of opinion as to the amount of damages, and in order to enable White to obtain, if possible, a reduction of them; and this was the object of the suit in chancery against the board of trade. It was also, under those rules, the right of such purchasers, after a failure for three business days succeeding the maturity of the contracts, to cause to be submitted to a select committee of three members of the board any dispute between Barber and such purchasers, with reference to any deposit of moneys applicable to the contracts; and the decision of a majority of the committee, reported to the president of the board, would have determined in what manner and to whom the deposit should be paid; and thereupon the president would have been authorized by the rules, to make an order for the payment of the deposit in accordance with the decision of the committee, which order would have been a sufficient warrant to the bank by which the certificates were issued, to pay the money in

accordance with the order; but action before the board, as against Barber, was postponed because of the injunction, and the certificates of deposit for margin and security, so issued, having reference to such wheat contracts, were held over in view of the injunction. After its dissolution, the payment of the margins or security moneys represented by the certificates was subject to be enforced under the rules of the board of trade, and Barber was in danger of being suspended from the privileges of the board because of the non-settlement of the contracts. White had due notice of all the foregoing facts, but failed to protect Barber or to give him any guarantee for his protection. The liability to suspension from membership of the board of trade was one of great consequence to Barber in a monetary point of view, as well as with reference to his standing and reputation as a merchant, for such suspension would have operated as practically a forfeiture of his membership, so long as the contracts remained unsettled. The fee for membership was fixed by the rules of the board at $10,000, and any permanent suspension of Barber from the membership of the board would have caused a loss to him of even more than $10,000, because it would have interfered with his livelihood and business. He could not, consistently with his rights or duties as a member of the board, defer an adjustment or settlement of the contracts any longer than was necessary to determine what he would, under the rules of the board, be required to do in respect to such settlement. In order to accommodate White as far as possible, Barber delayed making settlement until after complaint was made against him before the board in pursuance of its rules; and he allowed the complaint to proceed to a hearing, at which he attempted to make defence as to one of the contracts, setting up, among other matters, such tender of No. 2 red winter wheat; but the board ruled against him and was about to direct his suspension from membership unless he made settlement. Thereupon, on the 24th of April, 1883, he settled such of the contracts as were then outstanding, making such settlement in accordance with the rules of the board, and, on his making it, the deposits for margins and security, pertaining to

the contracts, were liberated, and, on the return to the bank of the original margin certificates, so issued by the Merchants' Bank of Canada, the certificates being endorsed to the bank, it gave to Barber credit for the moneys on his account as a depositor in the bank. White caused Barber to make the contracts and to become bound for their performance, and made it necessary for Barber to put up margins and security, and thus placed it out of the power of Barber to control such margins and security in any other way than according to the rules of the board of trade, and also so involved Barber, in causing him to become amenable to discipline by or suspension from the board of trade, that White could not legally or equitably revoke the authority of Barber to make settlement of the contracts or pay over the moneys when it became necessary to settle the contracts. The contracts were legal, and the provisions of the rules of the board of trade, applicable thereto, were binding upon Barber, and were necessary and proper to be considered with reference to his duties and rights, as between himself and the other contracting parties, and as between himself and White. Barber avers that it was his right to pay damages or differences on default under the contracts, when such damages became due according to the rules of the board of trade; that such right enured to him by direct authority from White, when the contracts were made at the instance of White and the moneys were paid or advanced to Barber; and that thereafter there was no time when White had any right or authority to revoke the power to pay over the moneys, when, in the course of trade, or in accordance with the rules of the board of trade, it became necessary to pay them over, in making settlement of the contracts on which White defaulted, and which it became necessary for Barber to adjust, because he had become a party thereto at the instance of White; that the contracts in question were but a small part of the dealings which were had by White through Barber, as his commission merchant, with various members of the board of trade; that, in many of those dealings, which were carried on contemporaneously with the dealings in question, there was profit to White, and White

received from Barber, on account thereof, large sums of money, representing such profits; and that it would be inequitable for White to claim that he should be relieved at the expense of Barber from the effects of the contracts for the delivery of No. 2 spring wheat in July, 1882, which remained open at the close of that month because of the non-fulfillment thereof on the part of White, while White had received profits from other contracts of a similar character, made for him by Barber, which White chose to have settled and closed, when the same resulted in profits which were to be paid to White by Barber.

Replications were put into these two answers, and, in January, 1884, the suit was removed by Barber into the Circuit Court of the United States for the Northern District of Illinois. Afterwards, it was stipulated that the money might remain in the hands of the bank until the final disposition of the cause, subject to like order by the court as if the money were paid into the registry of the court, and an order was made dismissing the bank from the litigation, as well in the suit at law commenced against it by White, as in the interpleader suit.

By a further stipulation, made in May, 1884, the testimony taken in the suit at law before mentioned, of White against Barber, to recover the $11,412.50, at the trial which took place in February, 1884, was used and introduced by the party taking the same, as his testimony on the trial of the suit in equity. Such testimony consisted of the detailed examination of the witnesses examined on the trial of the suit at law, and of documentary testimony, the substance of which examinations and documentary testimony is given in the bill of exceptions in the suit at law, and is hereinbefore recited. To this were added, in the suit in equity, the further depositions of White and Barber, taken therein in May, 1884. In these supplementary depositions, each party goes over with greater particularity the matters previously testified to by him, as set forth in the bill of exceptions; but nothing is substantially added throwing light upon the merits of the dispute. By the same stipulation there was put in, as part of the testimony on behalf

of Barber, a copy of the proceedings and judgment in the suit at law above mentioned, brought by White against Barber, to recover the $11,412.50.

In May, 1884, a final decree was made in the suit in equity, adjudging that Barber was entitled to the $6700, and ordering that it be paid to him. From that decree White has appealed to this court.

Mr. L. M. Ninde for plaintiff in error cited in both cases: *Tenney* v. *Foote*, 95 Ill. 99; *Pickering* v. *Cease*, 79 Ill. 328; *Beveridge* v. *Hewitt*, 8 Bradw. App. Ill. 467; *Lyon* v. *Calbertson*, 83 Ill. 33; *Calderwood* v. *McRea*, 11 Bradw. App. Ill. 543; *North* v. *Phillips*, 89 Penn. St. 250; *Barnard* v. *Backhaus*, 52 Wis. 593; *Cobb* v. *Prell*, 15 Fed. Rep. 774; *S. C.* 5 McCrary, 80; *Grizewood* v. *Blane*, 11 C. B. 526, 538; *Brun's Appeal*, 55 Penn. St. 294, 298; *Kirkpatrick* v. *Bonsall*, 72 Penn. St. 155; *Lyons Nat. Bank* v. *Oskaloosa Packing Co.*, 66 Iowa, 41; *Gregory* v. *Wattowa*, 58 Iowa, 711; *Murry* v. *Ocheltree*, 59 Iowa, 435; *Pearce* v. *Foote*, 113 Ill. 228; *Flagg* v. *Baldwin*, 38 N. J. Eq. (11 Stewart) 219; *Love* v. *Harvey*, 114 Mass. 80.

Mr. Thomas Dent in the case at law cited: *United States* v. *Central Pacific Railroad*, 118 U. S. 235; *Lehman* v. *Strasberger*, 2 Woods, 554; *Gregory* v. *Wendell*, 40 Mich. 432; *Williar* v. *Irwin*, 11 Bissell, 57; *Irwin* v. *Williar*, 110 U. S. 499, 508; *Clarke* v. *Foss*, 7 Bissell, 540; *Kent* v. *Miltenberger*, 13 Missouri App. 533; *Pennock* v. *Dialogue*, 2 Pet. 1, 16; *Express Company* v. *Kountze*, 8 Wall. 342; *Holliday* v. *Rheem*, 18 Penn. St. 465; *S. C.* 57 Am. Dec. 628; *Deal* v. *Bogue*, 20 Penn. St. 228; *S. C.* 57 Am. Dec. 702; *Walbrun* v. *Babbitt*, 16 Wall. 577; *Decatur Bank* v. *St. Louis Bank*, 21 Wall. 294; *Shutte* v. *Thompson*, 15 Wall. 151; *Warren* v. *Hewitt*, 45 Geo. 501; *Wyman* v. *Fiske*, 3 Allen, 238; *S. C.* 80 Am. Dec. 66; *Thacker* v. *Hardy*, 4 Q. B. D. 685; *Read* v. *Anderson*, 10 Q. B. D. 100; *Denton* v. *Jackson*, 106 Ill. 433; *Wright* v. *Board of Trade*, 15 Chicago Legal News, 239; *Thorne* v. *Prentiss*, 83 Ill. 99; *Nickalls* v. *Merry*, L. R. 7 H. L. 530, 539; *Patterson* v. *Clark*, 126 Mass. 531; *Yates* v. *Foot*, 12 Johns. 1; *Ruckman*

v. *Pitcher*, 1 Comst. 392, 402; *Love* v. *Harvey*, 114 Mass. 80; *Wolcott* v. *Heath*, 78 Ill. 433; and, in the Equity cause, in addition, *Ex parte Rogers*, 15 Ch. Div. 207; *Kirkpatrick* v. *Adams*, 20 Fed. Rep. 287; *Bangs* v. *Hornick*, 30 Fed. Rep. 97; *Roundtree* v. *Smith*, 108 U. S. 269; *Gilbert* v. *Gauger*, 8 Bissell, 214; *Jackson* v. *Foote*, 12 Fed. Rep. 37; *Higgins* v. *McCrea*, 116 U. S. 671.

Mr. Justice Blatchford delivered the opinion of the court.

The only question involved in the suit at law is as to the correctness of the charge to the jury in the particulars specially excepted to. The proper construction of the statute of Illinois, § 130 of c. 38 of the Revised Statutes, was determined by the Supreme Court of Illinois, in *Wolcott* v. *Heath*, 78 Ill. 433, in the passage from the opinion in that case quoted by the Circuit Court in its charge to the jury. According to that construction, the contracts for the sale of No. 2 spring wheat, deliverable in July, 1882, made by Barber, were not void as gambling contracts, if they were *bona fide* contracts for the actual sale of grain, and if the only option the seller had was as to the time of delivery, the obligation assumed by Barber being to deliver the grain at all events, with the option only to deliver it at any time before the close of business on the last day of July, 1882. That the contracts made by Barber were of that character, and were not such gambling contracts as the statute denounces, must be held to have been found by the jury under the portions of the charge specially excepted to, and under other portions of the charge contained in the record. The plaintiff did not pray for any instructions to be given to the jury, nor did he present to the court any propositions of law which he maintained the court should lay before the jury as guides to a proper solution of the questions in controversy. The general exception to the whole of the charge cannot be regarded, as it is a violation of Rule 4 of this court.

In its charge to the jury, the Circuit Court explained fully to them the theory of White, that the dealings on account of

which Barber paid out the moneys in question were, as between White and Barber, gambling or wager contracts and, therefore, illegal. It presented fairly to them a statement of the testimony on both sides of that question, as set forth in the bill of exceptions. It also submitted to them the question whether, in view of the testimony, the contracts in question were contracts to buy or sell at a future day, or whether they were absolute sales, in which the seller had the entire month of July, 1882, in which to perform his contracts; and it instructed them that if they should find that the dealings by the defendant for the plaintiff were options to buy or sell at a future day, their verdict should be for the plaintiff, but that if, on the contrary, they should find that such dealings were contracts by which the grain was to be absolutely delivered during the month of July, 1882, the only option being the time when, during the month, the delivery should be made, their verdict should be for the defendant. This charge was very favorable to the plaintiff, for it necessarily involved an affirmation of the propositions, that the plaintiff had a right to revoke his action in advising the tender of the No. 2 red winter wheat in fulfillment of the contracts, and had a right to revoke his express or implied assent to the appointment of the committee, under the rules of the board of trade, to determine what was a fair settling price for the wheat on the 31st of July, 1882, and had a right to recall his connection with the chancery suit brought by Barber against the board of trade, in which the validity of the contracts was recognized, and had a right to ignore the fact that he had placed Barber in the position in which, at the time of the giving of the notice of April 2, 1883, by White to Barber, Barber was not at liberty to refuse payment of the damages arising out of the non-fulfillment of the contracts, but was in danger of being expelled from the board of trade, if he persisted in such refusal.

The jury must have found, on the testimony, that the contracts made by Barber for the plaintiff at the board of trade were valid contracts, and that Barber was liable on them to either deliver the grain or pay the damages in case he failed

to deliver, because the court charged the jury, that, if the proof satisfied them that, by the contracts, Barber was liable to either deliver the grain or pay the damages, then the contracts were not gambling contracts, and they should find for the defendant.

We find no error in the record in the suit at law, and the judgment is affirmed.

In the suit in equity, the contention on the part of White is, that the contracts and transactions between Barber and himself were wagering contracts and, therefore, void, and that the $6700 was subject to the demand of White, if such contracts were void. It is urged on the part of White, that the wheat was sold by Barber for him without any intention on the part of either of them that there should be any delivery thereof, but with the intention that the transactions should be settled by the payment of the differences between the prices at which the wheat was sold and its prices at the times stipulated for its delivery. White testifies that such was his understanding, communicated to Barber before Barber made the contracts of sale. Barber testifies that he has no recollection of anything of the kind. The evidence as to what White did in connection with the transactions is inconsistent with White's version, and it clearly appears that Barber had no such understanding.

The defence set up in the answer of Barber is proved to every substantial intent, and the facts therein set forth constitute a valid bar to the suit of White. The evidence shows that White in advance required that Barber should trade with parties whom he knew to be responsible; that, in each case, he gave special directions to Barber to buy or to sell, as the case might be, and left it to Barber to put the contract in form, these directions being generally given by telegrams from White at Fort Wayne to Barber at Chicago; that it was understood between them that Barber should buy or sell at the Chicago Board of Trade; that Barber, in all cases, obeyed the orders of White; that White controlled the trades which Barber made; that, unless the margin was exhausted, Barber was not to close out White's trades until White directed him to do so; that it was understood that Barber was to observe

the rules of the board of trade; that White knew that Barber, as a member of such board, making such contracts on the board for White, would be obliged to observe those rules; that White directed Barber when to cover and when to close trades, and that Barber observed his orders; that White acted on his own judgment in making the sales of wheat for delivery in July, 1882; that, when the contracts for those sales had matured, White approved of the tender being made of No. 2 red winter wheat; that, subsequently, on August 5, 1882, White telegraphed to Barber from Fort Wayne, directing him not to cancel the July trades, and saying that White's attorneys at Fort Wayne believed that such tender was good and could be enforced; and that, on the 15th of August, 1882, White, in a letter to Barber, stated that his attorney at Fort Wayne had examined the subject of the July deals, in connection with the rules of the board of trade, and had concluded that the delivery which Barber had tendered was good and was "binding on the buyer, and that we can collect the difference in court." It also appears that Barber was unwilling to default on the contracts lest it should injure his reputation on the board of trade, and that he defaulted on them because White insisted that he should do so. White knew of the rule of the board of trade under which a committee could be appointed to determine what was a fair price for property to be delivered, and was willing to leave it to such committee. After the committee had fixed the price at $1.35 per bushel, White was advised of this action and determined that legal proceedings should be taken to set aside the award of the committee. It was in pursuance of the wish of White that the chancery suit was brought by Barber against the board of trade, to enjoin all action under such award. In that suit, an injunction was obtained to restrain such action, which injunction remained in force until the determination by the Supreme Court of Illinois of a suit brought by one Wright against the Board of Trade, 15 Chicago Legal News, 239, it having been stipulated that the suit of Barber against the board of trade should abide the final result of the Wright suit. The latter suit was decided in favor of the board of

trade. After all this had occurred, White determined to repudiate his obligations to Barber, and, on the 2d of April, 1883, he served on Barber the written notice, claiming that the contracts for the sale of the wheat were illegal and void, and forbidding Barber to pay over any part of the $11,412.50 to any one but White, and demanding the immediate payment of it to him. On the 20th of April, 1883, Barber, having been notified of complaints made against him before the board of trade, under its rules, which provided for the hearing of complaints and for suspension or expulsion in case of non-compliance with contracts, notified White, in writing, of these facts, and asked White if he could protect him (Barber) in any way. Not receiving such protection, Barber, on the 24th of April, 1883, paid out the moneys necessary to satisfy the damages on the contracts, and thereby relieved himself from being suspended from membership in the board of trade. He had no alternative but to pay the money or lose his business, and also lose a sum of money, in the value of his membership in the board of trade, equal to if not greater than the amount in controversy in this suit. He had acted strictly according to the instructions he had received from White. White had left the money in his hands for the express purpose of paying such damages as the committee of the board of trade should find to be due. Barber retained the money in order to allow White to obtain some benefit if he could from the suit in chancery brought by Barber. By that suit and by the suit of Wright all legal means were exhausted, leaving the rights of the purchasers under the contracts of sale to be enforced according to the rules of the board of trade under which they were made. The payment of the money by Barber in satisfaction of those damages was, under the circumstances, demanded by every principle of law and of equity, and no right was left in White to claim the $6700.

White had no right to forbid the payment of the money by Barber, or to recall it from its destination. The money is to be regarded as having been, for all practical purposes, irrevocably set apart by both White and Barber for the payment of such damages, prior to the giving of the notice by

White to Barber on the 2d of April, 1883. White had caused Barber to make the contracts and to become bound for their performance, and had made it necessary that Barber should put up the margins and security, and had thus placed it out of the power of Barber to control the margins and security in any other way than according to the rules of the board of trade, in subordination to which White as well as Barber had acted throughout. It was obedience to the orders of White which had made Barber subject to suspension or expulsion by the board of trade. The $6700 had been put up by Barber as margins, under the rules of the board of trade, prior to the giving of the notice of April 2, 1883, and thus had been before that time devoted by White as well as Barber to the purpose of paying the damages under the rules of the board of trade.

For the reasons thus stated, we are of opinion that the claim of White, sought to be enforced in this suit in equity, cannot be allowed.

A claim is made on the part of White, that he can recover this money under the provisions of § 132 of c. 38 of the Revised Statutes of Illinois. Rev. Stat. by Hurd, ed. of 1883, p. 394; ed. of 1885, p. 405. That section provides that "any person who shall at any time . . . by any wager or bet upon any . . . unknown or contingent event whatever, lose to any person so . . . betting, any sum of money . . . amounting in the whole to the sum of $10, and shall pay . . . the same or any part thereof, the person so losing and paying . . . the same, shall be at liberty to sue for and recover the money . . . so lost and paid . . . or any part thereof, . . . by action of debt, . . . from the winner thereof, with costs, in any court of competent jurisdiction." It is a sufficient answer to this claim to say that Barber was not the "winner" of any money from White.

There is a further view applicable to this case, arising out of the decision of this court in *Higgins* v. *McCrea*, 116 U. S. 671. In that case, Higgins, the broker of McCrea, sued him to recover moneys which Higgins had paid for the purchase, at the Chicago board of trade, of pork and lard, on the

instruction of McCrea, in May, 1883, deliverable in August, 1883, on such day as the seller might elect. In his answer, McCrea set up that he had engaged with the plaintiff in gambling transactions, and that the contracts which the plaintiff had made were not contracts for the actual delivery of any merchandise, but were pretended purchases and mere options, and that it was the understanding of all the parties to the transactions that no merchandise should be delivered on the contracts, but that the same should be settled upon the differences between the contract prices and the market prices. On this basis, McCrea claimed, by way of counterclaim, to recover judgment against the plaintiff for the sum of nearly $20,000, which he alleged he had paid to the plaintiff to carry on such gambling transactions and to purchase option contracts. The plaintiff denied the version thus given by the defendant of the transactions. The Circuit Court had instructed the jury that the defendant was entitled to recover upon his counterclaim, and he had a judgment accordingly. This court held that the case of the defendant, as stated by himself in his answer and counterclaim, was, that the money was advanced by him to carry on a gambling transaction, that with his concurrence the money so advanced was used in such gambling transaction, and that, by the statute of Illinois, where the contracts were made, they were treated as gambling contracts and were void; that the counterclaim thus stated was supported by the testimony of the defendant, given on the trial; that there was no statute of Illinois to authorize the recovery of money paid on such contracts; and that no recovery could be had by the defendant. This court said, in its opinion: "We do not see on what ground a party, who says in his pleading that the money which he seeks to recover was paid out for the accomplishment of a purpose made an offence by the law, and who testifies and insists to the end of his suit that the contract on which he advanced his money was illegal, criminal, and void, can recover it back in a court whose duty it is to give effect to the law which the party admits he intended to violate."

The decree of the Circuit Court is affirmed.

JEWELL *v.* KNIGHT.

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

Argued November 3, 4, 1887. — Decided December 5, 1887.

Questions certified to this court upon a division of opinion of two judges in the Circuit Court must be distinct points of law, clearly stated, so that they can be definitely answered, without regard to other issues of law or of fact; and not questions of fact, or of mixed law and fact, involving inferences of fact from particular facts stated in the certificate; nor yet the whole case, even if divided into several points.

Whether a sale and delivery of a debtor's stock of goods, by way of preference of a *bona fide* creditor, is fraudulent against other creditors, involves a question of fact, depending upon all the circumstances, and cannot be referred to this court by certificate of division of opinion.

BILL IN EQUITY by general creditors of John Knight against him, his wife, Stoughton A. Fletcher and Francis M. Churchman. After a hearing upon pleadings and proofs before the Circuit Judge and the District Judge, the bill was dismissed, and they signed the following certificate of division of opinion:

"The defendant John Knight was a merchant engaged in the railway-supply business at Indianapolis. He had been engaged in such business for several years prior to May 3, 1879. The defendants Fletcher & Churchman were his bankers, and the defendant Eliza J. Knight is his wife.

"The complainants are Eastern manufacturers or merchants, residing at Hartford, Connecticut, and Pittsburgh, and have sold goods to Knight for which they have never been paid.

"In December, 1878, Knight borrowed from his wife $10,000, which she raised by mortgaging her separate real estate. He gave her a note at the time of the loan, evidencing the indebtedness. There is no evidence impeaching the *bona fides* of this transaction between Knight and his wife. The money so raised was used by Knight in his business.

"Knight was also indebted to Fletcher & Churchman, in the sum of $10,000, which indebtedness was evidenced by various promissory notes, of which a note for $4000 matured March

6, 1879, and other notes for $6000 matured at different dates up to April 18, 1879.

"Afterwards, on March 1, 1879, a note due one day after date was given by Knight to Fletcher & Churchman as collateral security for the other notes. The object of giving this note was to put it in the power of Fletcher & Churchman to sue and obtain judgment at any time they desired.

"Besides these, Knight owed mercantile debts to manufacturers and dealers living in other cities to a considerable amount, to wit, about $12,000. He was also indebted to George P. Bissell, trustee, for borrowed money to the amount of $45,867.85, which was secured by a mortgage upon real estate, and default had been made in payment of interest on this mortgage debt, but of this debt Knight was personally bound for the payment of $28,770.90 only. Knight and Churchman then supposed that Knight was personally liable for the whole debt.

"Foreclosure proceedings had been commenced by Bissell in January, 1879, and Knight, about that time, had some negotiations with Bissell, the object of which was to induce him to agree to take the mortgaged property in full satisfaction of the mortgage debt, and exonerate Knight's personal estate. Bissell refused, and pressed his suit with the purpose, as he informed Knight, of taking personal judgment against Knight, collecting what he could by levy and sale of his personal property, and enforcing his mortgage lien for the balance.

"Fletcher & Churchman were apprised of Bissell's suit, and of his purpose to take personal judgment against Knight and levy upon his personal property, and they were also apprised of Knight's efforts to settle with Bissell, and informed Knight that if those efforts were fruitless they would protect themselves, and requested Knight to execute for them a cognovit upon which they could take judgment at any time they saw fit. Mrs. Knight insisted that she should be put on an equal footing with Fletcher & Churchman, and it was finally agreed that the cognovit should include her debt also, and it was so made and executed on March 17, 1879, and delivered into Churchman's custody to take judgment when he saw fit. By

this arrangement it was in the power of Fletcher & Churchman and Mrs. Knight at any time to take judgment; it was left wholly to them to determine when judgment should be taken, though Knight begged them to postpone as long as they could, saying he still had hopes of settling with Bissell. Fletcher & Churchman did not agree to delay, but it was understood between them and Knight that unless it became necessary for their protection against Bissell or any other person (there being, however, no expectation of suit by any other person, nor that there would be any necessity for the use of the cognovit if Bissell could be persuaded to take the property covered by his mortgage in satisfaction of his demand), they would not take judgment until Knight could see Bissell again; and accordingly they did wait until May 1, 1879, before they took any steps to put their claim in judgment. Knight did not see or communicate with Bissell until April 28, 1879, when, as Knight had expected, Bissell came out to Indianapolis. Knight then saw him, and again requested Bissell to take the mortgaged property for the debt, but Bissell refused to do so, and Knight made no further effort to induce him to make that arrangement. Meanwhile, from the date of the cognovit to May 1, a period of six weeks, Knight held himself out as a solvent merchant worthy of credit, and, with the knowledge of the other defendants, went on with his business as usual, buying and selling goods.

"His standing as a business man was good, and he could buy goods on credit for any reasonable amount during that time, and did buy to replenish his stock as he had been in the habit of doing; during which time his purchases amounted to $4113.94, and his sales amounted to $5249.64.

"Knight had been dealing with the complainants, Spang, Chalfant & Co., during a period of four years, and with the complainants, Pliny Jewell & Sons, for eighteen months prior to May 1, 1879. The goods for which he owed Jewell & Sons were purchased as follows: February 19, 1879, $379.36; April 22, 1879, $45.57; for which February purchase, on April 14, 1879, he gave them his acceptance, payable July 2, 1879. The goods for which he owed Spang, Chalfant & Co. were pur-

chased as follows: December 17, 1878, $75.94; April 7, 1879, $849.80, on 90 days' credit. No part of either debt was paid.

"On or about May 1, 1879, Churchman, of Fletcher & Churchman, heard that Bissell was pressing his suit to judgment, and he therefore requested Ayres, the attorney named in the cognovit, to proceed at once to take judgment, and judgment was entered upon the cognovit in the Superior Court of Marion County May 1, 1879, for $20,352.22, the amount due Fletcher & Churchman and Mrs. Knight. Execution was promptly issued and came to the hands of the sheriff May 1, 1879. No levy was made, though the lien of the execution attached to the personal property of Knight when the writ came to the sheriff's hands, provided that such a writ, issued upon a judgment so obtained, could create a lien.

"On May 3, 1879, Knight suggested to Fletcher & Churchman and Mrs. Knight that more money could be realized out of his stock of goods by selling them out from the store in the usual way than by sale on execution. He gave it as his opinion that the stock was worth $20,000. Ayres, who was Mrs. Knight's counsel, was thereupon consulted about the sale of the goods to Fletcher & Churchman and Mrs. Knight, and advised it. Thereupon an agreement was made between Knight and Fletcher & Churchman and Mrs. Knight that Knight should turn over the goods to them in satisfaction of their judgment against him and of his debts to them. The stock on hand was really not worth $20,000, but was $5000 or $6000 short of that, as shown by subsequent invoice and sales after the arrangement was made. Fletcher & Churchman and Mrs. Knight took possession of the stock of goods on May 3, 1879, and put Knight in to sell out the stock as their agent in the ordinary course of business. There was no agreement as to his salary, though he took out of the proceeds of sales ten to fifteen dollars per week for his services.

"The business was carried on by Fletcher & Churchman and Mrs. Knight in this way until August 12, 1879, when Fletcher & Churchman became dissatisfied and the partnership was dissolved. The goods and proceeds of sales were divided between Fletcher & Churchman and Mrs. Knight equally, and

Fletcher & Churchman's share of the goods was removed from the store. The goods on hand amounted to $9449.88. The money realized from sales amounted to $5156.52. Mrs. Knight's half of these amounts was applied in payment of the indebtedness of Knight to her, and Fletcher & Churchman's share on the indebtedness of Knight to them. But as the amount received by Fletcher & Churchman fell short of paying his debt to them in the sum of $2805, they demanded of Knight that he should give them a new note for this sum, on the ground that he had overstated the amount of goods at the time they purchased them. Knight thereupon gave them a note for this balance.

"The complainants, Jewell & Sons, recovered judgment against John Knight in the Superior Court of Marion County on March 23, 1881, for $440.20 and costs; and the complainants, Spang, Chalfant & Co., recovered judgment against Knight in the Circuit Court of the United States for the District of Indiana for $1032 on May 3, 1881. Execution was issued on the judgment in favor of P. Jewell & Sons on April 21, 1881; and on April 22, 1881, it was returned *nulla bona*. Execution was issued on the judgment in favor of Spang, Chalfant & Co. on May 4, 1881, and returned on the same day *nulla bona*. And nothing has since been paid upon either of these judgments.

"After this transfer of the goods by Knight to Fletcher & Churchman and Mrs. Knight, Knight had no property subject to execution, and was insolvent. The plaintiffs sold goods to Knight as stated, believing him solvent and in ignorance of the execution of said cognovit.

"That upon the hearing of the said cause before the Honorable Thomas Drummond, Judge of the Circuit Court of the United States for the District of Indiana, and the Honorable William A. Woods, District Judge of the United States for said district, sitting with said circuit judge, the above facts were found, and thereupon it became a question —

"1st. Whether or not the delay from March 17 to May 1, 1879, in taking judgment upon the warrant of attorney, had the effect to render the purchase which was thereafter made

Counsel for Parties.

by the defendants Fletcher & Churchman and Mrs. Knight of the stock of goods of said John Knight voidable by the plaintiffs?

"Second. The *bona fides* of the original indebtedness of Knight to Fletcher & Churchman and Mrs. Knight not being questioned, whether or not, to render said sale void as to the complainants or other creditors, it must not also appear that the same was made by said John Knight with the fraudulent intent to cheat, hinder and delay said creditors, and that said Fletcher & Churchman and Mrs. Knight had knowledge of that fact at the time they made the purchase.

"Third. Whether or not, if such sale is voidable by the plaintiffs, it can be avoided by them for the payment of the entire indebtedness of said John Knight to them, or only for the payment of so much of said indebtedness as was contracted after the execution of said warrant of attorney.

"Fourth. Whether or not under the circumstances the sale by Knight to the other defendants was fraudulent as to the complainants' claims for goods sold during the time the cognovit was held — March 17 to May 1, 1879.

"Fifth. Whether under the circumstances the sale by Knight to the other defendants was fraudulent as to the complainants' claims for goods sold prior to March 17, 1879.

"Upon each and all of the above questions the opinions of said judges are and were opposed; and that the points upon which they so disagree may be ruled upon by the Supreme Court, in pursuance of the statutes in such case made and provided, the said judges have caused the above points upon which they have disagreed and are so opposed to be stated under their direction, with the facts so found upon which the disagreement occurred, and that the same be certified and be made part of the record in this cause, which is done accordingly."

Mr. Benjamin Harrison and *Mr. Horace Speed* for appellants.

Mr. Joseph E. McDonald and *Mr. Ferdinand Winter* for appellees. *Mr. John M. Butler* was with them on the brief.

Mr. Justice Gray delivered the opinion of the court.

The claim of each plaintiff being for less than $5000, the amount in dispute, as was admitted at the bar, is insufficient of itself to give this court jurisdiction. *Stewart* v. *Dunham*, 115 U. S. 61; *Gibson* v. *Shufeldt*, 122 U. S. 27.

The jurisdiction of this case therefore depends upon the statutes which provide that when, on the trial or hearing of any civil suit or proceeding before the Circuit Court held by the Circuit Judge and the District Judge, or by either of them and a Justice of this court, any question occurs upon which the opinions of the judges are opposed, the opinion of the presiding judge shall prevail and be considered as the opinion of the court for the time being; "the point upon which they so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record;" and the final judgment or decree "may be reviewed, and affirmed or reversed or modified, by the Supreme Court, on writ of error or appeal." Rev. Stat. §§ 650, 652, 693.

Under these statutes, and the earlier ones authorizing questions upon which two judges of the Circuit Court were divided in opinion to be certified to this court, it has been established by repeated decisions that each question so certified must be a distinct point or proposition of law, clearly stated, so that it can be definitely answered, without regard to other issues of law or of fact in the case.

The points certified must be questions of law only, and not questions of fact, or of mixed law and fact — "not such as involve or imply conclusions or judgment by the court upon the weight or effect of testimony or facts adduced in the cause." *Dennistoun* v. *Stewart*, 18 How. 565, 568; *Wilson* v. *Barnum*, 8 How. 258; *Silliman* v. *Hudson River Bridge Co.*, 1 Black, 582; *Daniels* v. *Railroad Co.*, 3 Wall. 250; *Brobst* v. *Brobst*, 4 Wall. 2; *Weeth* v. *New England Mortgage Co.*, 106 U. S. 605; *California Paving Co.* v. *Molitor*, 113 U. S. 609; *Waterville* v. *Van Slyke*, 116 U. S. 699; *Williamsport Bank* v. *Knapp*, 119 U. S. 357. The question of fraud or no

fraud is one necessarily compounded of fact and of law, and the fact must be distinctly found before this court can decide the law upon a certificate of division of opinion. *Ogilvie* v. *Knox Ins. Co.*, 18 How. 577, 581; *United States* v. *City Bank*, 19 How. 385; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Watson* v. *Taylor*, 21 Wall. 378.

The whole case, even when its decision turns upon matter of law only, cannot be sent up by certificate of division. *Saunders* v. *Gould*, 4 Pet. 392; *United States* v. *Bailey*, 9 Pet. 267; *Harris* v. *Elliott*, 10 Pet. 25; *White* v. *Turk*, 12 Pet. 238; *United States* v. *Briggs*, 5 How. 208; *Sadler* v. *Hoover*, 7 How. 646; *United States* v. *Northway*, 120 U. S. 327; *State Bank* v. *St. Louis Co.*, 122 U. S. 21. Nor can a splitting up of the whole case into the form of several questions enable the court to take jurisdiction. *White* v. *Turk*, above cited; *Nesmith* v. *Sheldon*, 6 How. 41; *Luther* v. *Borden*, 7 How. 1, 47; *Webster* v. *Cooper*, 10 How. 54.

In *Webster* v. *Cooper*, decided at December term, 1850, it appearing by the record that the whole case had been divided into points and sent up to this court, and that several of the latter points could not have arisen until the previous ones had been first decided, this court declined to take jurisdiction, and Chief Justice Taney said: "This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals. Indeed, it would impose upon it the duty of deciding in the first instance, not only the questions of law which properly belonged to the case, but also questions merely hypothetical and speculative, which might or might not arise as previous questions were ruled the one way or the other." 10 How. 55.

As the Chief Justice there observed, in some earlier instances, questions irregularly certified had been acted upon and decided. But the later decisions already referred to show that this court has since been careful not to exceed its lawful jurisdiction in this class of cases; and that under the existing statutes, as under those which preceded them, whenever the

jurisdiction of this court depends upon a certificate of division of opinion, and the questions certified are not such as this court is authorized to answer, the case must be dismissed.

In the present case, general creditors of Knight seek to set aside, as fraudulent against them, a warrant of attorney to confess judgment, executed by Knight to secure the payment of money lent to him in good faith by his wife and his bankers, and a subsequent sale of his stock of goods to satisfy those debts.

The statement (embodied in the certificate and occupying three closely printed pages in the record) of what the judges below call "the facts found" is in truth a narrative in detail of various circumstances as to the debtor's pecuniary condition, his dealings with the parties to this suit and with other persons, and the extent of the preferred creditors' knowledge of his condition and dealings. It is not a statement of ultimate facts, leaving nothing but a conclusion of law to be drawn; but it is a statement of particular facts, in the nature of matters of evidence, upon which no decision can be made without inferring a fact which is not found.

The main issue in the case, upon which its decision must turn, and which the certificate attempts in various forms to refer to the determination of this court, is whether the sale of goods was fraudulent as against the plaintiffs. That is not a pure question of law, but a question either of fact or of mixed law and fact.

In the absence of any bankrupt or insolvent law, a debtor may lawfully give a preference to one of his creditors, if he does not thereby intend to defraud the others; and a sale and delivery of goods in satisfaction of an honest debt cannot be avoided by other creditors, unless made and received with intent in fact to defraud them. This is well settled by the decisions of this court, as well as by those of the highest court of the State of Indiana, where these transactions took place. *Buckingham* v. *McLean*, 13 How. 151, 167; *Warner* v. *Norton*, 20 How. 448; *Robinson* v. *Elliott*, 22 Wall. 513, 520; *Medsker* v. *Bonebrake*, 108 U. S. 66; *Stewart* v. *Dunham*, 115 U. S. 61; *Jones* v. *Simpson*, 116 U. S. 609; *People's Savings*

Bank v. *Bates*, 120 U. S. 556; *Huiskamp* v. *Moline Wagon Co.*, 121 U. S. 310, 319; *Pence* v. *Croan*, 51 Indiana, 336; *Leasure* v. *Coburn*, 57 Indiana, 274; *Willis* v. *Thompson*, 93 Indiana, 62. The fact that one of the creditors preferred was the debtor's wife does not affect the question. *Magniac* v. *Thompson*, 7 Pet. 348; *Bean* v. *Patterson*, 122 U. S. 496.

Many of the cases cited in the learned arguments at the bar were of voluntary conveyances, or arose under a bankrupt act, or presented the question whether there was sufficient evidence of fraudulent intent to be submitted to a jury, or were decided by a court authorized to pass upon the facts as well as the law, and therefore have no direct or important bearing upon this case.

Not one of the questions certified presents a distinct point of law; and each of them, either in express terms or by necessary implication, involves in its decision a consideration of all the circumstances of the case. The first question, whether the six weeks' delay in taking judgment upon the warrant of attorney made the subsequent sale voidable by the plaintiffs, as well as the second question, whether evidence of the debtor's fraudulent intent and of the preferred creditors' knowledge of that intent was requisite to render "said sale" void as against the plaintiffs, could not be determined except upon a view of all the attendant circumstances. The third question, whether "such sale," if fraudulent, would be voidable in favor of the whole or of part only of the plaintiffs' debts, could not arise until the sale had been decided to be fraudulent. The fourth and fifth questions frankly submit in two subdivisions the general question, whether "under the circumstances" the sale was fraudulent as against the plaintiffs.

As was recently said by this court, speaking of questions certified in similar form, "They are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone;" and "It is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the circuit judges of the difficulties they have found in doing so." *Waterville* v. *Van Slyke*, 116 U. S. 699, 704.

Upon this record, therefore, this court cannot decide, either that the decree of the Circuit Court should be affirmed, or that it should be reversed or modified, but must order the

Appeal to be dismissed.

SMITH *v.* CRAFT.

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

Argued November 4, 1887, — Decided December 5, 1887.

Whether an agreement to prefer a *bona fide* creditor is so fraudulent against other creditors, as to avoid a subsequent preference of the former, involves a question of fact, depending upon all the circumstances, and cannot be referred to this court by certificate of division of opinion.

A bill of sale of a stock of goods in a shop, by way of preference of a *bona fide* creditor, is not rendered conclusively fraudulent, as matter of law, against other creditors, by containing a stipulation that the purchaser shall employ the debtor at a reasonable salary to wind up the business.

Jewell v. *Knight*, *ante*, 426, followed.

BILL IN EQUITY by general creditors of Craft against him, Fletcher and Churchman. After a hearing upon pleadings and proofs before the Circuit Judge and the District Judge, the bill was dismissed, and they signed a certificate of division of opinion, the formal parts of which were like those of the certificate in *Jewell* v. *Knight*, *ante*, 426, and the rest of which was as follows:

"On April 5, 1879, William H. Craft, one of the defendants, was indebted to Fletcher and Churchman, under the firm name of S. A. Fletcher & Co., known as Fletcher's Bank, in about the sum of $33,000. He was also indebted to William Smith and others, the complainants, and other eastern creditors, in about the sum of $16,000. Craft had been for many years a dealer in watches and jewelry in the city of Indianapolis, and had enjoyed good credit, both at Indianapolis and in the eastern cities, among manufacturers and wholesale dealers. By an

invoice taken about the date above named, it became known to him that his entire assets amounted to about $33,000. The indebtedness to the bank of S. A. Fletcher & Co. was evidenced by two promissory notes of $12,500 each, dated December 27, 1878, and due in thirty and sixty days respectively, and one note of $7313.19, dated August 17, 1877, which, with accrued interest, amounted to $8085.35, payable to F. M. Churchman. The notes for $12,500 each were for money borrowed of the bank as follows, to wit: in November, 1876, $7000; in February, 1877, $6000; in August, 1877, $2500; in October, 1877, $6500; and other sums, making the total amount due in December, 1878, $25,000. The loans were made upon 90 days' time, and ten per cent annual interest deducted in advance at the time of the loan and of each renewal, the renewals having been regularly and promptly made every 90 days until December 28, 1878, at which time some of the notes were overdue. No further renewals were made. The note for $7313.19 was executed August 17, 1877, the money having been used by Craft in making the last payment on a stock of jewelry purchased by Craft at the date of the execution of said note.

"The debts owed by Craft to his eastern creditors were for stock purchased from time to time for the purpose of replenishing his store, and his eastern debts were about fifty thousand dollars in 1876, when he began to borrow money from the Fletcher Bank.

"At the time the notes for $12,500 each were given, it was understood between Craft and the bank that Craft should not buy so heavily as he had been doing theretofore, and carry a less stock and apply his sales (as far as practicable) in reducing the debt to the bank. At that time Craft represented his stock as being worth $60,000.

"On the said 5th day of April, after completing his inventory and finding from it his inability to pay all his debts, he went to the office of Ritter & Ritter, attorneys, they being his legal advisers, to counsel with them in regard to his affairs, and thence sent for F. M. Churchman, the business manager of Fletcher's Bank, and made known to Churchman his finan-

cial condition, intimating at the same time an intention to make an assignment for the benefit of his creditors. This was the first information that Churchman or the bank had of the insolvency of Craft.

"Churchman reminded Craft of the many conversations they had had together, and that Craft had always said he would protect the bank if anything ever occurred by which he was not able to pay his debts; if he met with any losses or anything of the kind, he would secure the bank, if the bank would loan him the money from time to time. Craft said he had made these promises, and believed he was solvent all the time and able to pay the bank, and intended to pay it and wanted to secure the bank debt. Churchman then told him he did not know of but one way to do it, and that was for the bank to buy the stock. This Craft finally agreed to, and the following bill of sale was drawn up and signed by Craft:

"'Whereas William H. Craft, of the city of Indianapolis, Marion County, State of Indiana, is indebted to Francis M. Churchman, of said city, in about the sum of thirty-one thousand dollars, evidenced by three certain promissory notes, dated respectively each December 27, 1878, two for the sum of $12,500 each and the other for the sum of $7363, due respectively in thirty and two in sixty days after date, and signed by W. H. Craft, now, in consideration of the full payment, satisfaction and surrender of said indebtedness and notes, said Craft does hereby bargain, sell and deliver to said Churchman all his stock of watches, diamonds, jewelry, silverware, fixtures and property of every kind, now owned and used by said Craft in his business at No. 24 East Washington Street in said city; also all the interest of said Craft in the lease held by him to said premises; and the further consideration that said Churchman shall employ said Craft in said business at the rate of one hundred and fifty dollars per month so long as said Churchman shall carry on or continue said business. In witness whereof I have hereunto set my hand and seal this fifth day of April, 1879.

"'William H. Craft.'"

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"The complainants are merchants and manufacturers in Eastern cities, who had for many years dealt with the defendant Craft, selling him goods on credit, and knew nothing of his indebtedness to the bank or of his promise to protect the bank in the manner above found by the court, and continued to sell him goods on credit while he was so borrowing money."

The certificate then stated in detail the names of the plaintiffs, the amounts of their debts (each being for less than $3000) for goods sold at various times before March 26, 1879, and the judgments recovered thereon by them in the Superior Court of Marion County, at different dates from September 18, 1879, to June 9, 1881; that executions were issued upon those judgments, and returned *nulla bona;* and that all of those judgments are in full force, unpaid and unsatisfied; and continued as follows:

"Upon the execution and delivery of the said bill of sale, which was for the use and benefit of the bank, the three notes above mentioned held by the bank were delivered up to the said Craft as paid and satisfied, and Churchman, for the bank, took possession of the property, stock of jewelry and lease mentioned in the bill of sale, and, with Craft as manager, carried on the said business, reducing the stock as rapidly as possible, with a view to closing it out, for about six months, when the balance of the stock was sold out at auction. The bank realized for the entire stock $20,000. Craft received, during the time he was so employed as manager, the sum of $150 per month, as stipulated in the said bill of sale, and had no interest, either directly or indirectly, except as appears by said bill of sale, in the stock of jewelry or the lease or in the proceeds of either after the date of said sale."

The certificate then stated that upon the hearing of the said cause the following questions arose, upon each and all of which the opinions of said judges were opposed, to wit:

"First. Whether the understanding between the said Churchman, representing the said bank, and the said Craft, that if the said bank would loan the said Craft money from time to time, and that if anything should occur by which he, the said Craft, was not able to pay his debts, he would secure

the bank, constituted a fraud upon the said Smith & Co. and other creditors named in the said bill of complaint, so as to invalidate and render void the said sale of the said stock of jewelry and the assignment of the lease so afterwards made to the said Churchman for the use of the said bank.

"Second. Whether the 'further consideration,' mentioned in said bill of sale, by which the said Craft was employed in said business for a compensation at the rate of $150 per month so long as the said Churchman for the said bank should continue or carry on said business, was fraudulent as to the said Smith & Co. and the other creditors of the said Craft, and whether said stipulation vitiated and rendered void said sale made to the said Churchman for the said bank, as to the said other creditors of the said Craft.

"Third. Whether, as a conclusion of law from the above facts which are found by the court, the said sale by the said Craft to the said Churchman for the use of the said bank was and is fraudulent and void, and made to Churchman for the bank with the intent to hinder or delay the said Smith & Co. and the other complaining creditors of the said Craft."

Mr. Benjamin Harrison and *Mr. Horace Speed* for appellants.

Mr. Joseph E. McDonald for appellees. *Mr. John M. Butler* was with him on the brief.

Mr. Justice Gray delivered the opinion of the court.

This case, also, comes before the court upon a certificate of division of opinion, and resembles in many respects that of *Jewell* v. *Knight*, *ante*, 426, argued with it, and just decided.

It is a bill in equity by several creditors, each of whose claims is for less than $5000, to set aside as fraudulent a sale made by their debtor, Craft, a dealer in watches and jewelry, of his whole stock in trade to Fletcher and Churchman, a banking partnership, known as Fletcher's Bank.

The first question certified is, whether the understanding

between the bank and Craft, that if the bank would lend him money from time to time, and that if anything should occur by which he was not able to pay his debts, he would secure the bank, constituted a fraud upon his other creditors, so as to invalidate the subsequent sale of his stock.

What the understanding here referred to was, or how long it had existed, can only be gathered from the statement of a different understanding at the time of the giving of the latest notes by Craft to the bank; from the recital of a conversation between Craft and Churchman on the very day when the bank was first informed of Craft's insolvency and when the bill of sale was executed; and from the other circumstances set forth in the certificate of division.

As the debtor might lawfully prefer one of his creditors if there was no actual fraud, it cannot, in the absence of any finding upon that point, be said, as matter of law, either that the previous agreement to prefer was fraudulent, or that it was not; but the question of fraud or no fraud involved a question of fact, which, if this case had been on the common law side of the court, and either party had desired it, must have been submitted to a jury. *Bank of Leavenworth* v. *Hunt*, 11 Wall. 391; *National Park Bank* v. *Whitmore*, 104 N. Y. 297.

The second question certified is, whether the bill of sale was rendered void as to other creditors by containing a stipulation that the bank should "employ said Craft in said business at the rate of $150 per month so long as" the bank should "carry on or continue said business."

But whether such a stipulation is valid or invalid depends upon its intention. If its object appeared on its face to have been to secure a benefit to the debtor or his family, it would be fraudulent in law. *Lukins* v. *Aird*, 6 Wall. 78; *McClurg* v. *Lecky*, 3 Penrose & Watts, 83; *Harris* v. *Sumner*, 2 Pick. 129. But if its sole purpose was to obtain services necessary to wind up the business and turn the goods into money as promptly and economically as possible, for the benefit of the other party, it is valid. *Wilcoxon* v. *Annesley*, 23 Indiana, 285; *Baxter* v. *Wheeler*, 9 Pick. 21; *Strong* v. *Carrier*, 17

Conn. 319. As was well said by the Supreme Court of Indiana in *Wilcoxon* v. *Annesley*, "Where, as in this case, the purchase was of a stock of goods in a store, and an established trade existing, it seems but reasonable that, at a fair salary, the grantor might be employed, for a time at least, to continue in charge of the business, and that circumstance will not in itself prove the transaction fraudulent." 23 Indiana, 295.

The only facts stated in the certificate, (other than the bill of sale itself,) directly bearing upon the validity of the stipulation, are that the bank, with Craft as manager, carried on the business, reducing the stock as rapidly as possible, "with a view to closing it out," for about six months, when the stock remaining was sold by auction; that the bank realized for the entire stock $20,000; and Craft received the sum of $150 a month, or about $900 in all, and, since the bill of sale, had no other interest, direct or indirect, in the stock of goods or its proceeds. It cannot be concluded as matter of law, either on the face of the bill of sale, or with the aid of this evidence of what was done under its provisions, that the compensation was unreasonable, or that the stipulation in question was fraudulent. Whether, taken in connection with all the previous transactions between the parties, it was fraudulent in fact, was a question to be decided by the Circuit Court.

The third question certified is clearly irregular, as avowedly referring the whole case to the decision of this court.

For these reasons, and upon the authorities collected in *Jewell* v. *Knight*, *ante*, 432, 433, this court has no authority to answer any of the questions certified, and the entry must be

Appeal dismissed.

IN RE AYERS.

IN RE SCOTT.

IN RE McCABE.

ORIGINAL.

Argued November 14, 15, 1887. — Decided December 5, 1887.

It is well settled in this court that, while the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction is not subject to review by writ of error, or by appeal, yet, when a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the original order being void for want of jurisdiction, the order punishing for contempt is equally void; and if the proceeding for contempt result in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner.

Whether a State is the actual party defendant in a suit within the meaning of the 11th Amendment to the Constitution of the United States, is to be determined by a consideration of the nature of the case as presented by the whole record, and not, in every case, by a reference to the nominal parties of the record. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 857, explained and limited.

In order to secure the manifest purpose of the constitutional exemption guaranteed by the 11th Amendment, it should be interpreted not literally and too narrowly, but with the breadth and largeness necessary to enable it to accomplish its purpose; and must be held to cover, not only suits brought against a State by name, but those against its officers, agents, and representatives, where the State, though not named, is the real party against which the relief is asked and the judgment will operate.

If a bill in equity be brought against the officers and agents of a State, the nominal defendants having no personal interest in the subject-matter of the suit, and defending only as representing the State, and the relief prayed for is a decree that the defendants may be ordered to do and perform certain acts which, when done, will constitute a performance of an alleged contract of the State, it is a suit against the State for the specific performance of the contract within the terms of the 11th Amendment to the Constitution, although the State may not be named as a defendant; and, conversely, a bill for an injunction against such officers and agents, to restrain and enjoin them from acts which it is alleged they threaten to do, in pursuance of a statute of the State, in its name, and for its use,

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and which if done would constitute a breach on the part of the State of an alleged contract between it and the complainants, is in like manner a suit against the State within the meaning of that Amendment, although the State may not be named as a party defendant.

The court does not intend to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional state legislation, are guilty of personal trespasses and wrongs; nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest.

A bill in equity was filed by aliens against the Auditor of the State of Virginia, its Attorney General, and various Commonwealth Attorneys for its counties, seeking to enjoin them from bringing and prosecuting suits in the name and for the use of the State, under the act of its General Assembly of May 12, 1887, against tax-payers reported to be delinquent, but who had tendered in payment of the taxes sought to be recovered in such suits, tax-receivable coupons cut from bonds of the State. An injunction having been granted according to the prayer of the bill, proceedings were taken against the Attorney General of the State and two Commonwealth Attorneys for contempt in disobeying the orders of the court in this respect, and they were fined and were committed until the fine should be paid and they should be purged of the contempt. *Held*, that the suit was a suit against the State of Virginia, within the meaning of the 11th Amendment to the Constitution of the United States, and was not within the jurisdiction of the courts of the United States; that the injunction granted by the Circuit Court was null and void; that the imprisonment of the officers of the State for an alleged contempt of the authority of the Circuit Court was illegal; and that the prisoners, being before this court on a writ of *habeas corpus*, should be discharged.

The Virginia act of 1877 concerning suits to collect taxes from persons who had tendered coupons in payment contains no provision as to the tender, or the proof of it, or the proof of the genuineness of the coupon, which violates legal or contract rights of the party sued.

If the holder of Virginia coupons, receivable in payment of state taxes, sells them, agreeing with the purchaser that they shall be so received by the State, the refusal of the State to receive them constitutes no injury to him for which he could sue the State, even if it were suable; and cannot be made the foundation for preventive relief in equity against officers of the State.

On the 11th October, 1887, these petitioners each moved through his counsel for leave to file a petition for a writ of *habeas corpus*. On the 12th October leave was granted, and the writs were ordered to be made returnable on Monday, the

17th October. On the return day, return having been made, the court directed the prisoners to be placed in the custody of the marshal of the court. The same day a motion was made and argued, to release them on bail and to fix a day for hearing. On the 18th October the court ordered the prisoners to be released on their own recognizances, each in the sum of $1000, and assigned the cause for argument on the 14th day of the next November.

The case for argument and decision, as stated by the court, was as follows:

A writ of *habeas corpus*, directed to the Marshal of the United States for the Eastern District of Virginia, having heretofore been issued by this court on the application of Rufus A. Ayers, Attorney General of the State of Virginia, the marshal has made return thereto that the petitioner, whose body he produces, was in his custody and detained by him by virtue of an order, judgment, decree, and commitment of the Circuit Court of the United States for the Eastern District of Virginia, a certified copy of which is attached as a part of the return; and further returned that the petitioner had not paid, and refuses to pay, the fine imposed upon him by said order. The order of commitment, dated at Richmond, October 8, 1887, is as follows:

"*On Attachment for Contempt.*

"In the Circuit Court of the United States for the Eastern District of Virginia.

In Re Rufus A. Ayers.

"This matter came on this day to be heard upon the rule heretofore issued against Rufus A. Ayers, Attorney General of the State of Virginia, to show cause why he should not be attached for contempt in disobeying the restraining order heretofore granted in the suit of *Cooper et al.* v. *Marye et al.* on the 6th day of June, 1887, and his answer thereto.

"On consideration whereof the court is of opinion and doth order and adjudge that the said Rufus A. Ayers is guilty of

contempt in his disobedience of said order, and that he do forthwith dismiss the suit of *The Commonwealth* v. *The Baltimore & Ohio Railroad Company*, instituted by him in the Circuit Court of the City of Richmond, and that for his said contempt he be fined the sum of $500, and stand committed in the custody of the marshal of this court until the same be paid and he purge himself of his contempt by dismissing said suit last herein mentioned."

A transcript of the proceedings, orders, and decrees of the Circuit Court of the United States for the Eastern District of Virginia in the suit of *Cooper et al.* v. *Marye et al.*, referred to in the order of commitment, is also produced, and set out in full as a part of the record in this matter. From that it appears that on June 6, 1887, James P. Cooper and others, suing on their own behalf and for all others similarly situated, being aliens, subjects of Great Britain, filed their bill of complaint in the Circuit Court of the United States for the Eastern District of Virginia against Morton Marye, Auditor of the State of Virginia, Rufus A. Ayers, the Attorney General thereof, and the Treasurers of counties, cities, and towns in Virginia, and the Commonwealth Attorneys of counties, cities, and towns in said State, whose names they prayed they might be allowed to insert in the bill as defendants when discovered.

In that bill it is alleged that, by an act of the General Assembly of Virginia, approved March 30, 1871, and another approved March 28, 1879, the State of Virginia had provided for the issue of a large number of bonds bearing interest coupons, which she thereby contracted should be received in payment of all taxes, debts, and demands due to her, of which large numbers, amounting to many millions of dollars, had been in fact issued; that said coupons, issued under both of said acts, are payable to bearer, and, both as a contract to pay interest and as a contract that they shall be received in payment of taxes, are negotiable instruments, free in the hands of any *bona fide* purchaser for value from any equity or burden whatever; that there are outstanding and overdue in the hands of the public at large more than four millions of dollars

of these overdue coupons; that, in pursuance of a plan subsequently conceived and adopted to destroy the marketable value of these coupons, the General Assembly of the State of Virginia, by the 15th section of an act dated February 14, 1882, forbade all the officers of the State to pay and redeem the same according to the tenor of the contract contained therein, and, by an act dated January 26, 1882, the collectors of taxes were forbidden to receive the same in payment of any taxes due to them; that, nevertheless, these statutes were declared by the Supreme Court of the United States to be unconstitutional and void; that thereafter the complainants, on the faith of said decision and the belief caused thereby that the said State would be utterly unable by any legislative enactment to impair the value of said coupons as a tender for taxes, had bought a large quantity of said coupons in the open money market of the city of London and elsewhere, amounting to more than one hundred thousand dollars nominally, at a cost of more than thirty thousand dollars; that this purchase was made for the purpose of selling said coupons to the tax-payers of Virginia, to be used by them as tenders for taxes due said State, the complainants believing that they would be able to sell said coupons to such tax-payers at a considerable advance on the price paid for them; many of which the complainants have sold to said tax-payers; that the General Assembly of Virginia enacted another statute, dated May 12, 1887, a copy of which is set out as an exhibit to the bill, whereby, as is alleged, "the treasurer of each county, city, and town in the State is ordered to furnish to the Commonwealth's attorney thereof a list of all persons who have tendered the said State's coupons in payment of their taxes, and said Commonwealth's attorneys are ordered to institute suits by summary proceedings in the name of said State against all such persons to recover a judgment against them for the amount of said taxes so previously due by them; that the said tax-payers are thereby required to submit to a judgment against them by default or to appear in court and plead a tender of said coupons, and then prove affirmatively that the coupons tendered by them are the State's coupons and not

counterfeit and spurious coupons, the burden of proving the same being placed upon the tax-payer and the coupon being taken to be *prima facie* spurious and counterfeit."

In the bill it is further alleged "that said act is repugnant to section ten of article one of the Constitution of the United States, for the reason that, taken in connection with said act before mentioned of January 26, 1882, it first commands the State's officers to refuse to receive those coupons which are undoubtedly her own as well as those which are spurious (and your orators charge that there are none such), and then commands her officers to bring said suits against those who have tendered said coupons of said State, as well as against those who have tendered spurious coupons; that it imposes upon the defendants heavy costs and fees, although all taxes due by them were paid by said tender, and it makes the judgment to be recovered in said suit a perpetual lien upon all the property of said tax-payer for said taxes, and for said costs and fees also, thus fixing a perpetual cloud upon the title of said tax-payer to his property."

It is further alleged in the bill, "that, by another act of the General Assembly of said State, approved January 26, 1886, it is provided that upon a trial of the issue to be made up under said act of May 12, 1887, the defendant shall produce the bond from which the coupon so tendered by him was cut, and prove that it was cut from said bond;" and that, as very few of said bonds are owned by persons residing in Virginia, the tax-payers would be utterly unable to produce said bonds, as required by said act.

It is further alleged therein, "that, by another act of said General Assembly, approved ——, 1886, it is provided that the tax-payer undertaking to prove said tender shall not be allowed to introduce expert evidence to prove the genuineness of said coupons, and all that have been issued under either of said acts are engraved only, as said acts provided they may be, and are not signed manually." Wherefore, it is alleged, that "said tax-payers who cannot produce said bonds will be utterly unable to prove their coupons to be genuine upon said trial, the State thus forcing them into a lawsuit in her own courts,

in which she has taken effectual precautions beforehand to make it impossible they can win, and to make it a legal certainty that they must lose when they cannot produce said bonds; that said act is a device and trick enacted to take away from and deprive said coupons of their value as tender for taxes."

It is further alleged therein that the Supreme Court of Appeals of the State of Virginia has decided that said last-named two acts, requiring said bonds to be produced, and forbidding the use of expert testimony, are valid laws, not repugnant to the Constitution of the United States.

It is further alleged in the bill, that, as the great bulk of the tax-payers of Virginia pay small sums, "if her officers are allowed to enforce said act of May 12, 1887, against them, the profit to be derived from purchasing your orators' coupons will be too small to induce them to do so, and, indeed, it will be impossible for them to use said coupons at all, except in the very limited cases in which they can produce said bonds;" and that "your orators will not only lose the profit which they had a right to expect they would make when they purchased said coupons, but they will be unable to sell them to Virginia's tax-payers at any price, and thus their entire property in the same will be destroyed; and your orators charge and aver that, in any event, unless they are granted the injunction hereinafter prayed for, they will lose a sum greater than $2000."

It is further charged in the bill "that the treasurer of each county, city, and town in said State is about to report to each Commonwealth's attorney the name of every tax-payer who has tendered coupons, and each Commonwealth's attorney is going at once to institute the suits provided for by said act of May 12, 1887, against persons holding coupons bought from your orators, as well as against all others; and they are informed and believe and so charge, that, in every case in which tenders of coupons have been made to the Auditor of the State, who is Morton Marye, (and many have been made to him,) the said Auditor, and Hon. R. A. Ayers, who is Attorney General thereof, are about to institute the suits

which said act provides for their instituting, whereby all coupons which your orators have sold to Virginia tax-payers will be condemned as spurious, although they are all genuine coupons issued by the State of Virginia, and all her tax-payers will be intimidated and deterred from buying from your orators and all others in the future any more of said coupons."

It is further charged in an amended bill "that acts of the General Assembly of the State of Virginia, which are repugnant to section 10 of Article I of the Constitution of the United States, commanded the treasurer of each county to levy on and sell the property of each tax-payer who has tendered coupons in payment of his taxes; and said acts also command said treasurers to return the real property of such tax-payers delinquent where no personal property can be found to be seized and sold; and your orators charge, therefore, that unless said officers are enjoined from bringing said suits hereinbefore described the treasurer of each county will proceed to execute said other unconstitutional acts by levying on such tax-payer's property, or by returning the same delinquent where no personal property can be found, thus creating a cloud upon the title of such tax-payer's property."

The prayer of the bill is that "the said Morton Marye, Auditor of Virginia, R. A. Ayers, the Attorney General thereof, and the treasurer and Commonwealth's attorney of each county, city, and town in the State of Virginia, may be made parties defendant hereto, and that they, their agents and attorneys, may be restrained and enjoined from bringing or commencing any suit provided for by said act of May 12, 1887, or from doing any other act to put said statute into force and effect, and that until the hearing of a motion for said injunction a restraining order may be made to that effect," and for general relief.

The act of May 12, 1887, set out as an exhibit to the bill, is as follows:

Statement of the Case.

"An act to provide for the recovery, by motion, of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered. (Approved May 12, 1887.)

"1. Be it enacted by the General Assembly of Virginia, that all taxes, including taxes on licenses, now due or which may hereafter become due to the Commonwealth, in payment of which any paper or instrument purporting to be a coupon detached from a bond of this State shall have been or may hereafter be tendered and not accepted as payment and not otherwise paid, may be recovered in the Circuit Court having jurisdiction over the county or corporation in which said taxes shall have been assessed, or if the tender was made to the auditor of public accounts in payment of taxes which he is authorized by law to receive, the said taxes may be recovered in the Circuit Court of the City of Richmond.

"2. The court shall have jurisdiction without regard to the amount of the taxes claimed and though the amount be less than twenty dollars.

"3. The proceeding shall be by motion, in the name of the Commonwealth, on ten days' notice, and shall be instituted and prosecuted by the attorney for the Commonwealth or corporation in which the proceeding is, or, if it be instituted by direction of the auditor of public accounts, in the Circuit Court of the City of Richmond.

"4. The notice may be served in any county or corporation in the State in the mode prescribed by the first section of chapter one hundred and sixty-four of the code (edition of eighteen hundred and seventy-three), or it may be served on any agent of the defendant in the county or corporation in which the proceeding is, and the word 'agent,' as here used, shall include any person who shall have made the tender aforesaid on behalf of the defendant, or if there be no known agent of the defendant in the said county or corporation it may be served by the publishing the same one time in some newspaper printed in the county or city where the tax was assessed, or if there be no paper printed in such county

or city then in some newspaper published in some county or city, nearest to the county or city where such tax was assessed.

"5. The motion may be tried or heard by the court or jury as motions in other civil cases. If the defendant relies on a tender of coupons as payment of the taxes claimed, he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered, and the clerk shall carefully preserve them. Upon such plea filed the burden of proving the tender and the genuineness of the coupons shall be on the defendant. If the tender and the genuineness of the coupons be established, judgment shall be for the defendant on the plea of tender. In such case the clerk shall write the word 'proved,' and thereunder his name in his official character, across the face of the coupons, and transmit them, together with a certificate of the court that they have been proven in the case, to the auditor of public accounts, who shall deliver the coupons to the second auditor, receiving therefor the check of the second auditor upon the treasurer, which check he shall pay into the treasury to the credit of the proper tax account.

"6. If the defendant fails in his defence and the taxes claimed are found to be due the State, any coupon filed by him with a plea of tender (and not spurious) shall be returned to him, and there shall be judgment for the Commonwealth for the aggregate amount of the taxes due and the interest thereon from the time they became due till the date of the judgment, with interest on the said aggregate amount from the date of the judgment until payment, and costs.

"7. No antecedent lien of the Commonwealth for the taxes for which any judgment is rendered shall be deemed to be merged in the judgment or otherwise impaired by the recovery of the same, but such lien shall continue in force notwithstanding the judgment.

"8. Every such judgment shall be docketed, as prescribed by law in other cases, and the clerk shall issue execution thereon, directed to the sheriff of any county (or sergeant of any city) who shall account for the money collected thereon to the auditor of public accounts.

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"9. Should coupons be tendered the officer in satisfaction of said execution, he shall note the fact of such tender upon the execution and return it to the clerk's office; and thereupon the auditor of public accounts may direct an action to be brought upon the judgment. This action shall be instituted and prosecuted in the mode herein prescribed for actions to recover judgments for taxes, and similar actions may be instituted whenever coupons are tendered in satisfaction of any judgment obtained by the Commonwealth under the provisions of this act.

"10. The clerk of the court in which any such judgment is rendered, in behalf of the Commonwealth shall, as soon as it is rendered, transmit a certified abstract thereof to the auditor of public accounts, who shall record the same in a book to be kept for that purpose.

"11. Immediately after the passage of this act the county and city treasurers, and all other officers authorized by law to collect or receive money for taxes due the Commonwealth, including the license taxes, shall report to the Commonwealth's attorneys of their respective counties and cities, and also to the auditor of public accounts, the names of all persons assessed or liable therein for taxes due the Commonwealth who have heretofore tendered (otherwise than for identification and verification) coupons for such taxes, and which taxes remain unpaid, the amount of the taxes due, on what account, and when they become payable, and a description, as far as possible, of the coupons tendered, and when tendered; and they shall thereafter make like reports whenever and as soon as any such tender may be made. As soon as the auditor of public accounts shall receive such reports he shall credit the proper officer with the taxes named therein for which coupons were tendered.

"12. The attorneys for the Commonwealth, and the Attorney General, when it is his duty under this act to represent the Commonwealth in any case in the Circuit Court in the City of Richmond, upon such report being made to them, or whenever they are otherwise informed of any such tender having been made, shall forthwith institute and prosecute such proceedings as are hereinbefore required.

"13. In any case instituted under the provisions of this act, in which there is a judgment for the Commonwealth, a fee of ten dollars shall be allowed the attorney for the Commonwealth, or the Attorney General, as the case may be, which fee and fees of the clerk and other officers for services rendered in the case, as well as such other costs as are allowed by law in other cases in which the Commonwealth is a party, shall be taxed in the costs against the defendant. The Commonwealth shall not be liable for any fees or costs in any proceedings under this act.

"14. If any officer fail to perform any duty required of him by this act he shall be fined not less than one hundred dollars nor more than five hundred dollars.

"15. This act shall be in force from its passage."

On this bill the following order was made:

"Circuit Court of the United States for the Eastern District of Virginia.

"James P. Cooper, H. R. Beeton, F. J. Burt, N. J. Chinnery, W. M. Chinnery, F. P. Leon, and W. G. Woolston,

against

"Morton Marye, Auditor, R. A. Ayers, Attorney General, the Treasurers of Counties, Cities and Towns in Virginia, and the Commonwealth Attorneys of Counties, Cities and Towns in said State, whose names complainants have leave to insert as they may be discovered.

"Upon reading the bill of the complainants, it is ordered that Morton Marye, Auditor, R. A. Ayers, Attorney General, each and every treasurer of a county, city, or town in the State of Virginia, and each and every Commonwealth attorney for a county, city, or town in said State, be restrained from bringing or commencing any suit against any person who has tendered the State of Virginia's tax-receivable coupons in payment of taxes due to said State, as provided for and directed by the act of the Legislature of Virginia, approved May 12, 1887, described in the bill, and of which a copy is attached

thereto, and that each and all of said parties, their agents and attorneys, be restrained from doing any act to put said statute into force and effect until the further order of the court.

"And it is ordered that the motion for an injunction in this case be set down for hearing at the Circuit Court of the United States at Richmond, Virginia, on the first Monday in October next; provided that the Attorney General of the State of Virginia, or either of the defendants, may move the court for an earlier hearing thereof after ten days' written notice to the solicitor of the complainants; and provided further, that a copy of this bill and of this order be served on the Attorney General of the State of Virginia within ten days after the filing thereof."

"June 6, 1887."

A copy of this order, together with a copy of the bill, was served on the petitioner Ayers, the Attorney General of Virginia, on June 7, 1887.

On October 8, 1887, the following proceedings took place, viz.:

"And now, at this day, to wit, at a Circuit Court of the United States for the Eastern District of Virginia, held at Richmond, in said district, this 8th day of October, A.D. 1887.

"J. P Cooper and Others
against } In Equity.
Morton Marye, Auditor, &c., and Others.

"This cause came on this day to be heard upon the motion of the complainants for a preliminary injunction and was argued by counsel; upon consideration whereof it is adjudged, ordered, and decreed, for reasons stated in writing and made part of the record, that the injunction be issued as prayed in the bill and remain in force until the further order of the court.

"Hugh L. Bond,
"Circuit Judge.

"Thereupon the complainants, by counsel, called the attention of the court to the fact that the defendant, R. A. Ayers, Attorney General of the State of Virginia, was guilty of

contempt by his disobedience of the restraining order issued in this cause on 6th day of June, 1887, and the said R. A. Ayers, being called upon to answer in this behalf, filed in open court his answer in writing, which answer is in the words following to wit:

"Answer of Defendant R. A. Ayers.

"The answer of R. A. Ayers, Attorney General of the State of Virginia, to a rule awarded against him by this honorable court.

"To the Honorable Judge of the Circuit Court of the United States for the Eastern District of Virginia:

"By an order entered in the chancery cause of James P. Cooper et als. against Morton Marye and others, summoning him to show cause why he should not be fined and imprisoned for disobeying the injunction heretofore awarded in said suit, restraining him and others from instituting the suits required by an act of the General Assembly of Virginia, entitled 'An act to provide for the recovery by motion of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered,' approved May 12, 1887, by instituting a suit against the Baltimore and Ohio Railroad Co., respondent, answering, says that he admits that he instituted the suit against the Baltimore and Ohio Railroad Company to recover taxes due by it to the State of Virginia after he had been served with the injunction order in this case; that he instituted the said suit because he was thereunto required by the act of the General Assembly of Virginia aforesaid, and because he believed this court had no jurisdiction whatever to award the injunction violated. Respondent disclaims any intention to treat the court with disrespect, and states that he has been actuated alone with the desire to have the law properly administered.

"R. A. Ayers,
"Att'y-Gen'l of Virginia.

"Subscribed and sworn to before me this 8th day of October, 1887. "M. F. Pleasants, Clerk."

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And thereupon the order was made adjudging the petitioner guilty of contempt by his disobedience of said order, and requiring him forthwith to dismiss the suit of *The Commonwealth* v. *The Baltimore and Ohio Railroad Company*, instituted by him in the Circuit Court of the City of Richmond, fining him $500 for his contempt, and directing that he stand committed in the custody of the marshal of the court until the same be paid, and he purge himself of his contempt by dismissing said suit last mentioned.

In the same case, the proceedings resulting in the commitment and imprisonment of the petitioner John Scott, are as follows:

On August 23, 1887, on affidavit, showing that John Scott, attorney for the Commonwealth for Fauquier County, Virginia, had been served with a copy of the restraining order of June 6, 1887, and that in violation thereof he had brought certain suits against parties in said county, for the recovery of taxes alleged to be due by them to the State of Virginia for the year 1886, for which they had previously tendered tax-receivable coupons, said actions being brought under the act of the General Assembly of May 12, 1887, a rule was entered upon the said Scott to show cause, on September 22, 1887, why he should not be attached for contempt. On that day the said Scott answered the rule, justifying his action on the ground that the order which he had disobeyed was void for want of jurisdiction in the Circuit Court to make it. On September 24, 1887, in pursuance of leave given, the complainants filed an amendment to their bill, making Scott, as attorney for the Commonwealth for said County of Fauquier, a formal party defendant, and alleging that a judgment had been rendered against the defendant in each of the suits brought by the said Scott under the said act, a list of which, with the amounts of the several judgments, was set out.

Thereupon, on October 8, 1887, the following order was made: "The court, therefore, doth adjudge, order, and decree that, for his contempt of this court, said John Scott do pay a fine of $10, and dismiss the cases which he has brought in the Circuit Court of Fauquier County, Virginia, in violation of the

restraining order heretofore made in the cause of *Cooper and Others* v. *Marye and Others*, on the 6th day of June, 1887; and, further, that he enter satisfaction of the judgments heretofore obtained by him against the defendants in said causes, and that he stand committed to the custody of the marshal of this court until this order is obeyed, and the fine hereby imposed upon him is paid. And it is further ordered that the said John Scott do pay the costs of these proceedings."

Similar proceedings were had in respect to J. B. McCabe, the Commonwealth's attorney for Loudoun County, Virginia, the other petitioner. On July 11, 1887, an order was entered granting a rule against him to show cause why he should not be attached for an alleged contempt of the court in disobeying the restraining order made in the cause on June 6, 1887. Upon proof by affidavit that the said McCabe, as such attorney, had commenced proceedings under the act of May 12, 1887, to recover taxes alleged to be due to the State of Virginia from certain parties therein named, who had previously tendered tax-receivable coupons in payment thereof, he answered the rule, denying the validity of the order which he had violated; and thereupon, on October 8, 1887, the matter coming on to be heard, it was ordered and adjudged by the court "that the said J. B. McCabe is guilty of contempt in his disobedience of said order, and that he do forthwith dismiss all suits under the act of May 12, 1887, now pending in the Circuit Court of Loudoun County. And the court doth further order and adjudge, that the said J. B. McCabe, for his said contempt, be fined $100; that he be taken into the custody of the marshal of this court, and by him held until the said fine be paid, and he purge himself of the said contempt by dismissing the suits brought or prosecuted in violation of the restraining order of this court; and that he pay the costs of these proceedings."

Mr. Roscoe Conkling and *Mr. J. Randolph Tucker* for petitioners. *Mr. C. V. Meredith* and *Mr. W. W. Gordon* were with them on their brief.

I. The restraining order or injunction was to proceedings in a state court, and is beyond the jurisdiction of the court,

under the provisions of the act of Congress. § 720, Rev. Stat. This will readily appear. By the judiciary act of 1789, c. 20, § 14, the power to issue writs by the circuit courts was limited by the words "Which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." Rev. Stat. § 716. The act of March 2, 1793, c. 22, § 5, provided that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State." The original power to award injunctions in the Circuit Court of the United States is derived from these provisions and with this limitation. In its original grant it was as auxiliary to the exercise of its jurisdiction. The limitation by the act of March, 1793, was placed upon it at the same session that the Eleventh Amendment to the Constitution was proposed, and both were conservative of state exemption from Federal interference. An exception to this was afterwards made in the case of bankruptcy. Nor is there any distinction between injunctions to stay proceedings already begun, and injunctions to prevent their institution. See *Daly* v. *Sheriff*, 1 Woods, 175; *Railroad Co.* v. *Scott*, 4 Woods, 386; *Fisk* v. *Union Pacific Railroad Co.*, 10 Blatchford, 518; *In re Schwartz*, 14 Fed. Rep. 787; *Rens. & Saratoga Railroad* v. *Bennington, &c., Railroad*, 18 Fed. Rep. 617; *Diggs* v. *Wolcott*, 4 Cranch, 179; *Peck* v. *Jenness*, 7 How. 612, 625; *Freeman* v. *Howe*, 24 How. 450; *Watson* v. *Jones*, 13 Wall. 679; *French* v. *Hay*, 22 Wall. 231, 250; *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340; *Dietzsch* v. *Huidekooper*, 103 U. S. 494.

II. Section 16 of the act of 1789 (Rev. Stat. § 723) provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." In *Baker* v. *Biddle*, 1 Baldwin, 405, this was held to be an absolute limitation on the jurisdiction, and that any decree beyond this jurisdiction was void. We insist that the remedy in this case at law, were the proceeding in a court of the United States, would make this bill in equity of no force; but as against an adequate remedy in a state court this injunction is null and of

no force, for reasons stated under the first point, and applicable here. The statute complained of provides for the defence by plea of tender and for trial by jury, and if the right of the defendant under the Constitution of the United States be infringed, his ultimate appeal to this court would protect him.

III. Complainants had no equity by their original bill or any of the amended bills. They are not tax-payers; they are speculators in coupons. No right as tax-payers to tender coupons is asserted in their behalf. In an amended bill and in one paper it appears that complainants sold coupons to tax-payers on a covenant to furnish counsel and save harmless the buyers. But this gives no equity to the complainants, as asserted in this case. This is shown by the decision of this court in *Carter* v. *Greenhow*, 114 U. S. 317. The case presented here as there is an abstract issue, not a practical one, until by judicial procedure the right of the tax-payer is denied. And in *Marye* v. *Parsons*, 114 U. S. 325, this court held that coupon-holders, if not tax-payers, could not have the benefit of injunction. It is *damnum absque injuria*. The complainants demand an abstract decree, not a practical remedy for any wrong to them, according to *Hagood* v. *Southern*, 117 U. S. 52. In the only cases referred to in the record of a tax-payer's complaint, it does not appear that the tax-payer asserted his right in the suits complained of and that his right was denied. The bill is without equity and the injunction utterly void.

IV. There is not only no equity in complainants, but if there were there is none against the defendants, your petitioners. They have no interest in the suits or in the taxes for which they are instituted. They are lawyers. The complainants have no equity to restrain an attorney from bringing a suit in a matter in which he is not interested. *Poore* v. *Clark*, 2 Atk. 515; *Cockburn* v. *Thompson*, 16 Ves. 321, 325; *Wilkins* v. *Fry*, 1 Meriv. 244, 262; *Kerr* v. *Watts*, 6 Wheat. 550; *Caldwell* v. *Taggart*, 4 Pet. 190; *Mechanics' Bank* v. *Seton*, 1 Pet. 299; *Story* v. *Livingston*, 13 Pet. 359; *McArthur* v. *Scott*, 113 U. S. 340; *Williams* v. *Bankhead*, 19 Wall. 563.

V. If the injunction be lawful, then was the commitment

lawful, or did it not transcend the power of the court? Conceding all that has thus far been controverted, we insist that the order of commitment was without authority.

This order is void, 1st, because it makes the term of imprisonment without end or determinable only upon an impossible condition; and, 2d, because it is really operative only on the right and interest of the State, who is not a party in this case and cannot be made one, but is decreed against by a duress of imprisonment on her officers, to violate their duty by destroying her rights.

Osborn v. *Bank of the United States*, 9 Wheat. 738, may be again cited in opposition to this position; but there the fund, the *res litigata*, was in the hands of the agent — here it never was.

VI. The only ground for this injunction is that the law of 1887 is unconstitutional, and that the authority thereby given to the Attorney General and other attorneys for the State is null and void.

This brings up the question, Is that law a violation of the Constitution of the United States?

For a moment look at the circumstances under which it was passed.

This court had decided that any levy by an officer after tender of genuine coupons, and not accepted, was illegal and made the officer a trespasser. The officer became a trespasser if he levied, and was liable to the State if he accepted coupons which turned out to be spurious, against which she had a clear right to protect herself. These treasurers in the country were not experts, and she might well distrust their judgment in receiving all which were tendered.

And when tendered and refused, the tax-payer retained the coupons and brought trespass in the Circuit Court of the United States, and recovered back in damages the tax paid by the levy. The State, paying these judgments for her officers, was without tax paid either in money or coupons; and the right of the State to these coupons so tendered and taken back has been denied, and none have ever been delivered by such tax-payers.

It is obvious that in this state of things, the same coupon might serve as a tender for many tax-payers, in fraud of the right of the State to have her taxes paid in money or in these coupons.

To avoid all this — to compel the tax-payer to pay in coupons what taxes he refused to pay in money, to verify the genuineness of the coupons tendered, and to forbear the *ex parte* procedure by levy — the statute of May 12, 1887, was passed.

On its face, in its preamble, in the procedure provided, there is no taint of unconstitutionality, according to the rulings of this court. See *Murray* v. *Hoboken Co.*, 18 How. 272; *Collector* v. *Day*, 11 Wall. 113; *Antoni* v. *Greenhow*, 107 U. S. 769; *Bissell* v. *Heyward*, 96 U. S. 580.

VII. This is a suit in fact against the State of Virginia, and all proceedings are null and void. It makes the Attorney General and all attorneys for the Commonwealth parties defendant as such officers. It compels them, not as ministerial but as discretionary officers, to regulate their official action by the will of a Federal judge. It takes them away from their duties and imprisons them until they surrender the suits and judgments of the State, and compels the State into the alternative of accepting what is tendered in taxes, whether spurious or not, or taking nothing. It has driven the State from levy for her taxes and now seeks to exclude her from her own courts as a suitor. If this is not a breach upon the immunity of the State under the Eleventh Amendment, what is its value?

A historical epitome of the proposal and adoption of this amendment is pertinent to this inquiry. Alexander Hamilton, in the 81st number of the Federalist, discusses the question whether a State can be sued in the Federal courts by a citizen of another State. He seems to treat the possibility of her being sued by one of her own citizens as too remote even for hypothesis. He declares the fear of such a construction is chimerical.

But within a few years after the Government went into operation the Supreme Court, in *Chisholm* v. *Georgia*, 2 Dall. 419, entered judgment for a citizen against a State. Many

such suits were pending in this court, most of them, perhaps all, by citizens of another State against one of the States. The original records in this court show the following: *Huger* v. *South Carolina*, *Oswald* v. *New York*, *Vassall* v. *Massachusetts*, *Von Stophust* v. *Maryland*, *Cutting* v. *South Carolina*, *Hollingsworth* v. *Virginia*, *Grayson* v. *Virginia*.

The judgment in *Chisholm* v. *Georgia* was rendered on the 18th of February, 1793. Great alarm was produced among the States by this decision, and on the 20th of February, 1793, an amendment was proposed in the Senate of the United States which read:

"The judicial power shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Its consideration was delayed until January 21, 1794, when it had assumed the form it now has.

"The judicial power shall *not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Mr. Gallatin proposed an amendment, "Except in cases arising under treaties made under the authority of the United States." This was voted down.

On the same day an amendment was proposed so that the article would read thus: "The judicial power of the United States extends to all cases in law or equity in which one of the United States is a party, but none shall be prosecuted where the cause of action shall have arisen before the ratification of this amendment." This was voted down. The amendment as finally adopted was then passed by the Senate — ayes, 23; noes, 2.

It went to the House of Representatives. An amendment was proposed there in these words: "When each State shall have previously made provision in their own courts whereby such suit may be prosecuted to effect." Voted down — ayes, 8; noes, 77. The Eleventh Amendment was then adopted by the House: ayes, 81; noes, 9. It may be well to notice in passing that on the 2d March, 1793, the act passed Congress

which forbade injunctions by a Federal court to stay proceedings in a state court.

The amendment was ratified in 1798. In *Grayson* v. *Virginia*, 3 Dall. 320, this court directed process against Virginia to be served on the Governor and *Attorney General* of the State. In *Hollingsworth* v. *Virginia*, 3 Dall. 378, the court unanimously dismissed all pending suits against States on its docket as being forbidden by the Eleventh Amendment.

This historic statement justifies the following conclusions: (1) It shows that by the Constitution makers it was ordained that the original Constitution *should not be construed* (as it had been in *Chisholm* v. *Georgia*) to extend to any suit by a citizen of one State, or foreign subjects against a State. (2) If any of these suits were those of citizens against his own State (as it may have been from the names of the plaintiffs in *Huger* v. *South Carolina* and *Grayson* v. *Virginia*) they, with those against a State by parties not citizens thereof, were equally condemned by this amendment.

This amendment is an authoritative interpretation of the original Constitution. It was an imperative mandate to the judiciary not to *construe* their jurisdiction so as to entertain such suits. It was a recoil from such a construction in the interests of the immunity of a member of the Union from being impleaded in a Federal court by any person whatever. How, then, should it be construed by this court now?

The answer seems plain. It should be interpreted in favor of the immunity, and to defeat every device which would destroy or impair it. The court should not see how near an approach a suit may make to the fences which constitute the immunity, but how far it must keep away, lest it trench upon the sovereignty of the State. Devices which do not assail directly, but which furtively and adroitly avoid the thing forbidden in form, but do the thing substantially and in effect, must be condemned as contrary to its true purpose and meaning.

We hold that this is an injunction against the State in fact:

1. Because, as already indicated, it destroys an essential function of State autonomy — *the power to sue her debtor in*

her own court and by her own officers. It imprisons them for asserting her right as her law officers. *Collector* v. *Day*, 11 Wall. 113, is conclusive on this point. If the State can *only* sue by such professional attorneys, is not an injunction upon the only possible agency through which the invisible, immaterial State can act, a clear destruction *pro tanto* of State autonomy? As you cannot enjoin a State from suing — as you cannot serve the injunction, if you could do so, on an invisible and intangible entity, as she can only exert this function by human agencies — can there be a doubt that in cutting these off you leave the State maimed and helpless, a sovereign without will and without capacity to act? In fact it is obvious that to constrain her you must constrain these agencies, the *sine qua non* of her action; and, if this be so, how is this amendment of avail if, unable to touch her, you cut off her only means of acting?

2. In suing the executive officer, the Attorney General (on whom, as a representative of the State, in *Grayson* v. *Virginia*, this court ordered process against the State to be served), you sue the State; you enjoin it. In the Virginia cases, 100 U. S. 303–370, this court held that every officer of a State who acted for the State in the execution of its laws was the State under the Fourteenth Amendment. Shall the State be bound for their act and yet their act not be the State's under the immunity of the Eleventh Amendment? Suppose an injunction was granted against the Attorney General and all District Attorneys of the United States to prevent suits in the name of the United States, could there be a doubt that that would be an injunction upon the Government? See *United States* v. *McLemore*, 4 How. 286; *Hill* v. *United States*, 9 How. 386; *Mississippi* v. *Johnson*, 4 Wall. 475; *Georgia* v. *Stanton*, 6 Wall. 50.

3. This decree interferes with the discretion of these officers, and they are not merely ministerial officers. Let it be remembered, no suit is ordered under this law against any man *who has paid his taxes.* The law is explicit on this point. The Attorney General and other attorneys are discretionary officers, charged with functions which demand intelligent discre-

tion. In such cases they are held to be the *State*. See *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Cunningham* v. *Macon, &c., Railroad*, 109 U. S. 446, and cases reviewed. Where the mind and will of the State (the invisible sovereign) operate through the mind and will and according to the discretion of its officers, they are the State and must be so held, or the Eleventh Amendment means nothing. See *Louisiana* v. *Jumel*, 107 U. S. 711; *Antoni* v. *Greenhow*, 107 U. S. 769; *Hagood* v. *Southern*, 117 U. S. 52. This last case is very pertinent, for the suit and decree were against the officers in their official capacity and operated on their discretion.

4. The *Virginia Coupon Cases*, 114 U. S. 269, are cited against the views presented. In these cases the majority of the court based their conclusions on several grounds: (1) The officer was ministerial; but in this case there is discretion. (2) In that case there was actual taking of property, which was trespass unless justified by *respondeat superior*, which was denied him. In that case the officer seized and held property. In this case he holds and has seized none; he only sues one who is a confessed debtor: but if he did not so confess, merely suing is no trespass and no invasion of right which a valid plea at law will redress. The officer in that case might, *ex mero motu*, have trespassed. Here the attorney cannot, for there is no trespass, and he has no interest and takes none. (3) In that case the officer made the aggression on the citizen, for which the court held he should have redress. In this case he makes none; he summons him who is a debtor to try whether he ought on his tender to be discharged. Clearly the coupon cases do not govern this. This strikes at the very citadel of the State's immunity. A levy without right is trespass. A suit without good ground is not a wrong of which a party can complain if his defence is allowed, for which he can enjoin. Virginia has a right to sue, giving her citizens a fair trial, and doing so neither she nor her officers can be enjoined.

VIII. The prisoners must be discharged upon either of two grounds: (1) If the court, on any ground previously maintained, was without jurisdiction or transcended its jurisdiction (as in the imprisonment until the prisoner did the impossible

or improper thing), this court will discharge. *Ex parte Parks*, 93 U. S. 18, 23; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Carll*, 106 U. S. 521; *Ex parte Bigelow*, 113 U. S. 328; *Ex parte Fisk*, 113 U. S. 713; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Virginia*, 100 U. S. 339, 343; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Harding*, 120 U. S. 782; *Ex parte Bain*, 121 U. S. 1: or, (2) In a case where this court has appellate power ultimately, on final decree and on interlocutory proceedings, liberty is unjustly taken away and contrary to equity, but within jurisdictional power, we insist that there is no good reason why, *in favorem libertatis*, this court should not grant release under *habeas corpus*. If not, the deprivation might continue until the final decree.

Mr. C. V. Meredith filed a separate brief for petitioners, citing: I. As to the nature of remedy by *habeas corpus*, *Ex parte Fisk*, 113 U. S. 713; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Rowland*, 104 U. S. 604. II. That the Virginia statute was not unconstitutional, *Antoni* v. *Greenhow*, 107 U. S. 769; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Rutherford* v. *Greene*, 2 Wheat. 196; *Supervisors* v. *Brogden*, 112 U. S. 261; *Beers* v. *Arkansas*, 20 How. 527; *Bank of Washington* v. *Arkansas*, 20 How. 530; *United States* v. *Dickson*, 15 Pet. 141, 165; *Lynchburg* v. *Railroad Co.*, 80 Virginia, 237; *Shepherd* v. *Frys*, 3 Grattan, 442; *Tennessee* v. *Sneed*, 96 U. S. 69; *Newsom* v. *Thornton*, 66 Ala. 311; *Savings Bank* v. *United States*, 19 Wall. 227. III. That the burden of proving the genuineness of the coupons was a common law burden thrown upon the person tendering them, *Shepherd* v. *Frys*, *supra*. IV. That expert testimony was not admissible to prove their genuineness, *Rowt* v. *Rile*, 1 Leigh, 216; *Harriot* v. *Sherwood*, Va. Law Journal, 1884, p. 107; *Burress* v. *Commonwealth*, 27 Grattan, 934; or, if admissible, did not form part of the contract, *Ogden* v. *Saunders*, 12 Wheat. 213, 350; *Griffith* v. *Williams*, 1 Cr. & Jer. 47; *Moore* v. *United States*. 91 U. S. 270. V. That the suit was against the State. On this point the brief said: The question as to what is a suit

against a State, has been so frequently discussed here, and so frequently decided by this court, that no discussion, in opposition to the decisions of this court, will be indulged in this brief. So far as the positions assumed in this brief are concerned, it is not deemed necessary to ask for the slightest modification of any of the principles announced in those decisions. Here those principles will be recognized as *stare decisis*.

The question as to what is a suit against a State, first arose after the adoption of the Eleventh Amendment to the Constitution in the case of *Osborn* v. *Bank of the United States*, 9 Wheat. 738. As to that decision we submit: (1) That the case did not call for a decision of the question, because the Bank was not an individual, but a part of the government of the United States. It was held in *McCulloch* v. *Maryland*, 4 Wheat. 316, that the Bank was an instrument which was "necessary and proper for carrying into effect the powers vested in the government of the United States." That construction was reaffirmed in *Osborn* v. *Bank of the United States*. See p. 860. There is no provision of the United States Constitution preventing the National Government from suing a State. No decision therefore of the question was called for by the case. (2) We insist that this court has repeatedly overruled the announcement made in that case that "the Eleventh Amendment which restrains the jurisdiction granted by the Constitution over suits against the State, is, of necessity, limited to those suits in which a State is a party *on the record*." It is true that that guide was recognized in *Davis* v. *Gray*, 16 Wall. 203, 220. But this latter case has been spoken of by this court as going to the extreme limit of jurisdiction. Notwithstanding this recognition, we insist that the test, so announced, has frequently been disregarded by this court. See *Woodruff* v. *Trapnall*, 10 How. 190; *Curran* v. *Arkansas*, 15 How. 304; *State Bank of Ohio* v. *Knoop*, 16 How. 369; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Kendall* v. *United States*, 12 Pet. 524, 613; *Decatur* v. *Paulding*, 14 Pet. 497; *United States* v. *Seamen*, 17 How. 225, 230; *United States* v. *Guthrie*, 17 How. 284; *Mississippi* v. *Johnson*, 4 Wall. 475, 498; *Gaines* v. *Thompson*, 7 Wall. 347; *Litch-*

field v. *Register*, 9 Wall. 575; *Secretary* v. *McGarrahan*, 9 Wall. 298; *Louisiana* v. *Jumel*, 107 U. S. 711; *Poindexter* v. *Greenhow*, 114 U. S. 270. There this court, by a majority opinion, delivered by Mr. Justice Matthews, held that that suit was not one against a State, and enumerated the tests by which this court decides whether a suit is against a State or not. The tests are as follows: (1) Whether a State is named as a party on the record; (2) Whether the action is directly upon the contract; (3) Whether the suit was brought to control the discretion of an executive officer of a State; (4) Whether the suit was brought for the purpose of administering the funds actually in the public treasury; (5) Whether it is an attempt to compel officers of the State to do acts which constitute a performance of its contract by the State; (6) Where the case is such that the State is a necessary party, that the defendant may by protected from liability to it.

As the minority of this court held in the case just cited that that case was one against a State, it cannot be presumed that they were of opinion that the tests just enumerated should be more limited. It can therefore be regarded that any case that comes within the said tests is held by this court to be a suit against a State. We insist, so far as this brief claims, that the suit of complainants comes within the third and fifth tests.

This court has repeatedly decided what is a ministerial act, and what is one requiring the exercise of official discretion. See *United States* v. *Guthrie*, 17 How. 284; *Gaines* v. *Thompson*, 7 Wall. 347; *Mississippi* v. *Johnson*, 4 Wall. 475; *Litchfield* v. *Register*, &c., 9 Wall. 575; *Secretary* v. *McGarrahan*, 9 Wall. 298; *United States* v. *Seamen*, 17 How. 225; *Decatur* v. *Paulding*, 14 Pet. 497.

In this case the State, though nominally not a party, is substantially the real party against whom the relief is asked, within the principle laid down by this court in *Hagood* v. *Southern*, 117 U. S. 52. The bill shows no personal claim against any of the defendants. It does not allege that any one of them proposes to commit a trespass, in this differing from *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311.

VI. The bill is without equity and should have been dismissed, *Parsons* v. *Marye*, 114 U. S. 327; *Hagood* v. *Southern*, *supra*.

The counsel for petitioners also filed with their brief, a copy of the brief of *Mr. John A. Campbell*, and *Mr. J. C. Egan*, in *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*, 108 U. S. 76.

Mr. D. H. Chamberlain and *Mr. William L. Royall*, opposing.

It will not be disputed that the only question arising now upon this record, is that of the jurisdiction of the court below to make the restraining order of June 6th, 1887. This question will depend upon: (1) The constitutional and statutory jurisdiction given to the United States Circuit Courts; (2) the sufficiency of the averments of the bill; and (3) the subject matter of the suit. It is believed that all the questions which can be considered in determining the general question of jurisdiction of the court below in these proceedings, can be determined without difficulty and by the simple application of cases already decided by this court.

The chief peculiarity of these present cases is found in the fact that the defendants in the original bill — the petitioners in the present proceedings — are *officers of the State of Virginia*. This fact suggests the foremost, if not the most important, question to be considered.

I. Stripped of all disguises and reduced to its simplest statement, the question which arises under this view of the case is, *May a state officer be enjoined by the United States Circuit Court from doing what an unconstitutional state statute directs him to do?*

Attention is called to this statement of the issue, for it is believed to express every consideration which is really involved in these cases.

What may be described as *two lines of cases*, bearing on this question, appear in the reported decisions of this court. One line, which tends to restrict the right of the courts to act upon

state officers for the enforcement of duties and obligations of the State towards private parties. Another line, which tends to maintain such right and to enforce it somewhat broadly and fully.

These two lines of cases are marked in general by the distinction of *strict* and *liberal* construction which has prevailed so extensively and steadily in our judicial and political history; a distinction which is natural and inevitable, arising from the nature of human language as well as from the nature of the human mind.

The leading case in the first line of cases above referred to may be said to be the case of *Louisiana* v. *Jumel*, 107 U. S. 711, decided by this court in 1882. The Legislature of Louisiana, by a statute of 1874, provided for an issue of state bonds for the purpose of refunding an existing series of state bonds. This act provided in terms for the levy annually of a tax of 5½ mills on the dollar on the assessed value of all real and personal property in the State for the purpose of paying the interest and principal of these new bonds. The funds derived from this levy were directed to be kept apart and appropriated to that purpose and no other; and it was made a felony for any agent or officer or liquidator of the State to divert said funds from such purpose. This tax was further made "a continuing annual tax" until the principal and interest of the bonds should be paid or redeemed; and the appropriation of said funds was made "a continuing annual appropriation" during the same period; and it was made the duty of the officers, specified in the act, "to collect said tax annually and pay said interest and redeem said bonds until the same shall be fully discharged." It was further provided in the same act that each provision of the act should be, and was declared to be, a contract between the State of Louisiana and each and every holder of such bonds.

Shortly after the passage of this act, the State adopted an amendment to its constitution declaring the said issue of bonds "to create a valid contract between the State and each and every holder of said bonds which the State shall by no means and in no wise impair." And the said bonds were declared to

be "a valid obligation of the State in favor of any holder thereof." And the courts were forbidden to enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor.

In January, 1880, a new constitution of Louisiana went into effect, by which it was provided that the interest on the bonds issued under the act of 1874, which bore 7 per cent interest, should be fixed at 2 per cent for five years, 3 per cent for fifteen years thereafter, and 4 per cent thereafter, and limiting the annual tax for the payment of said interest to three mills. The new constitution further provided that the coupons of the bonds of 1874, falling due January 1, 1880, should be remitted and "any interest taxes collected to meet said coupons are hereby transferred to defray the expenses of the state government."

This case thus presented (1) a contract between the State and individuals holding her bonds, whereby interest at 7 per cent was secured to the holders by a perpetual levy and appropriation of taxes; (2) a subsequent constitutional enactment reducing the rate of interest without the consent of the bondholders, and diverting funds already raised and in the treasury, from the payment of the interest to which they had been originally pledged and devoted.

This court in its opinion cited and commented upon *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Board of Liquidation* v. *McComb*, 92 U. S. 531; and *United States* v. *Lee*, 106 U. S. 196. The scope and limit of its decision are clear. The suits were suits, in the judgment of this court, not only to compel a State to execute its contract, but to compel it "by assuming the control of the administration of the fiscal affairs of the State to the extent that may be necessary to accomplish the end in view;" that is to say, to the extent (1) of restraining the fiscal officers of the State from applying the taxes collected to the use to which they were devoted by the legislation of 1879; and (2) of compelling such officers to apply said funds to the payment of the principal and interest of the bonds as required by the legislation of 1874.

The case of *Antoni* v. *Greenhow*, 107 U. S. 769, followed immediately. It was a petition for mandamus by Antoni against the treasurer of the city of Richmond, to compel him to accept in payment of taxes, a coupon of the bond issue of 1871, which, by the terms of the act authorizing the issue, was made "receivable by all tax collectors in payment of all taxes, debts and demands due the State."

In 1882, the State of Virginia had passed an act providing, in substance, that upon the tender of coupons in payment of taxes, the tax collectors should receive the same for the purpose of "identification and verification," and, at the same time, should require the tax-payer to pay his taxes in current funds; and upon such payment the tax-payer might bring his suit against the Commonwealth, and thereupon an issue should be tried by a jury, whether the coupons tendered were genuine legal coupons, and upon a decision of this issue in favor of the tax-payer, and a judgment in his favor, the money already paid by him for taxes should be repaid to him out of the treasury. The act further provided that when a mandamus should be brought to compel a tax collector to receive coupons for taxes, the tax-payer should be required, first to pay his taxes in money, and thereupon an issue should be framed as to whether the coupons tendered were genuine coupons; and upon a final decision of this issue in favor of the tax-payer, a mandamus should issue requiring the coupons to be received, and thereupon the money already paid by the tax-payer should be refunded to him.

From a careful study of this case it will thus be seen that, as presented by the opinion of the court, it decides no question as to the amenability of state officers to judicial process, either for the enforcement, or protection against impairment, of a state contract; and that the opinion of a minority concurring in the judgment of the court goes only to the extent of holding that there is no remedy *against the State itself:* and that a suit *to compel state officers to do acts which constitute a performance of its contract*, is a suit against a State itself.

The case of *Cunningham* v. *Macon & Brunswick Railroad*

Co., 109 U. S. 446, decided at October Term, 1883, was a suit by a citizen of the State of Virginia against the Governor and Treasurer of the State of Georgia, the defendant railroad company, and certain directors of the company and other citizens of the State of Georgia. In that case the State of Georgia had endorsed the bonds of the railroad company, and taken a lien upon the road as its security. The company having failed to pay interest, the Governor took possession of the road and put it in the hands of a receiver, who sold it to the State. The State then took possession of the road, and substituted its own bonds in the place of the endorsed bonds of the company. The holders of second mortgage bonds of the same company, issued after the State's endorsement of the former bonds and before the company's default in interest, filed a bill in equity to foreclose their mortgage and to set aside the former sale to the State, and to be let in as prior in lien. The state officers — Governor and Treasurer — demurred, and the court below dismissed the bill.

In deciding this case, the court examined the general question of judicial proceedings affecting a State, to which the State was not a party, and made the following general classification of the previous cases: (1) Cases where property of the State, or property in which the State had an interest, came before the court or under its control without being taken forcibly from the possession of the government, where the State might, if it chose, intervene to claim or protect its rights. (2) Where an individual was sued in tort for some act injurious to another, in regard to person or property, where his defence was that he acted under the orders of the government. In these cases, the court said: he is not sued as, or because he "is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him," and to this class the court assigned the case of the *United States* v. *Lee*, 106 U. S. 196. (3) Cases where "the law has imposed upon an officer of the Government a well-defined duty in regard to a specific matter not affecting the general

powers or functions of the Government, but in the performance of which one or more individuals have a distinct interest, capable of enforcement by judicial process." Under this last head, the court referred to the case of *Davis* v. *Gray*, 16 Wall. 203, and remarked that "It is clear that in enjoining the Governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine."

In *Hagood* v. *Southern*, 117 U. S. 52, a suit in equity was brought by the assignees of the Blue Ridge Railroad Company against the Comptroller General of the State of South Carolina, and the several County Treasurers within the State, praying that the defendants, the County Treasurers, "may be decreed to receive the said revenue bond scrip in payment of said taxes due by your orator to the State of South Carolina, and that on their refusal to do so, they may be enjoined from enforcing the said tax by selling the property of your orators or in any other manner, and that, on such refusal, the lien of said taxes on the property of your orators may be declared to be discharged." The court said: "The case thus comes directly within the authority of *Louisiana* v. *Jumel*, 107 U. S. 711. . . . In the present cases the decrees were not only against the defendants in their official capacity, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office." And it proceeded to point out the distinction between this case and *Osborn* v. *Bank of the United States*, *Davis* v. *Gray*, *Board of Liquidation* v. *McComb*, and *Allen* v. *Baltimore & Ohio Railroad Co.*

The cases now examined are all the cases in this court which, in our judgment, can be said to belong to that line of cases which we have described as restricting or delimiting the extent to which the judicial process may be applied for the protection of contract rights, invoked on behalf of private complainants. The boundaries which these cases mark out are as distinct, probably, as the nature of the subject admits of. Stated in a condensed form, they go to the extent of declaring: (1) That when positive affirmative relief is sought, by the enforcement, through judicial process, of a

State's contracts, although the state officers only are the defendants, the suit is in substance a suit against the State, and barred by the 11th Amendment; (2) That when the relief sought, as in *Louisiana* v. *Jumel*, goes to the extent of requiring the courts to virtually assume control and administration of a part of the executive functions of the state government, the suit is not only in substance against the State, but it calls for a usurpation by the courts of the functions of the political sovereign.

We turn now to the second line of cases which we have described as maintaining somewhat broadly and fully the right and duty of the courts to exercise the judicial power in protecting rights embodied in state contracts, and guarded by the Constitution of the United States.

The earliest and most commanding authority, as well as, perhaps, the amplest expression of the judicial power and duty in such cases, is *Osborn* v. *Bank of the United States*, 9 Wheat. 738. We do not hesitate to say, with boldness and a high degree of confidence, that we rely upon that case as warranting all the relief which was sought in the suit below out of which these proceedings have sprung. The court is here presented with the printed record at large of this case, as it lies in the archives of this court, which shows more fully than the report in Wheaton, that, on all points, it is an express authority in support of the positions of the complainants in this bill.

[The counsel referred to a printed copy of that record, which had been filed in this case. After reviewing that case at length, counsel continued:]

It is sometimes sought to minimize the scope and force of this decision by representing it as affecting only the question of *the restoration of the money seized from the bank*. An examination of the case shows, as we have seen, that the decree below not only decreed the restoration of the funds seized, but decreed a perpetual injunction against the defendants, state officers, "from proceeding to collect any tax which has accrued or may hereafter accrue from the complainants, *under the act of the General Assembly of Ohio, in the bill and proceedings mentioned.*" In other words, the state officers were forever

enjoined from carrying into effect, or executing, the statute in question, *a statute which commanded them in terms to do what the Circuit Court enjoined.* The succession of human events seldom presents two cases more nearly identical in principle than *Osborn* v. *Bank of the United States*, and the present case, — an identity stronger and more controlling than any identity of mere facts, — and on the authority of that case we rest this.

The next important case involving similar questions in this court, is *Davis* v. *Gray*, 16 Wall. 203. In that case, a person who had been appointed receiver of a railroad holding a large grant of lands, made to it by the State, sought to enjoin the officers of the State which, by the adoption of a new constitution, had declared said grant forfeited to the State, for the benefit of its school fund, from granting said lands to other persons. The suit was brought against Davis, Governor of the State, and Keuchler, Land Commissioner of the State. These facts make the case even stronger or more emphatic, in its direction, than *Osborn* v. *Bank of the United States.*

The case was decided here in 1872, the Chief Justice and one Associate Justice dissenting. The court held that a Circuit Court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the Constitution of the United States, when such execution will violate the rights of the complainant; that, where the State is concerned, it should be made a party, if it can be done; but that the fact that it cannot be done is a sufficient reason for omitting to do it, and the case may proceed to decree against the State officers, in all respects as if the State were a party to the record. And, finally, that, in deciding who are parties to the suit, the court will not look beyond the record; and that, making a state officer a party does not make the State a party, though the State's statute may prompt the officer's action, and she may stand behind him as the real party in interest.

Although *Davis* v. *Gray* is a perfectly clear and express decision of this court, about the meaning of which there can be no doubt, it is not necessary in the present case to invoke

its authority to its full extent. It not only decides all, but much more than all that is required in the present case.

McComb v. *Board of Liquidation*, 92 U. S. 531, is in every respect a leading case upon the present subject, the opinion being a very elaborate and careful one, the case being decided by an unanimous court, and the jurisdictional question being decided expressly upon the authority of *Osborn* v. *Bank* and *Davis* v. *Gray*.

The suit was for a perpetual injunction to restrain the Board of Liquidation of the State of Louisiana, from using certain bonds for the liquidation of a certain debt claimed to be due from the State to a private corporation, and from issuing any other state bonds in payment of such alleged debt.

This court distinctly considered the jurisdictional question involved, arising from the fact that the suit was against *state officers*.

United States v. *Lee*, 106 U. S. 196, was a suit in ejectment brought by Lee against Kaufman and Strong, to recover possession of what is known as the Arlington estate in Virginia. Kaufman and Strong holding merely as the agents and representatives of the United States, the land in question being in use as a national cemetery, for the most part, the United States, though not a party to the suit, defended the action by its proper law officers, though declining to submit itself as a defendant to the jurisdiction of the court. The writs of error in this court were taken and prosecuted, one by the United States, *eo nomine*, the other by the Attorney General, in the names of Kaufman and Strong, the defendants below. This court stated one of the two questions arising here on the record, as follows:

"1. Could any action be maintained against the defendants for the possession of the land in controversy under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in the plaintiff?"

At page 204, the court stated that the plaintiffs in error in behalf of the United States, asserted the proposition "that the court can render no judgment in favor of the plaintiff against

the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses;" and the court said, "This proposition rests on the principle that the United States cannot be lawfully sued without its consent, in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the Government. The first branch of this proposition is conceded to be the established law of this country and of this court, at the present day; the second as a necessary or proper deduction from the first is denied."

The court then proceeded with an elaborate examination of American and English cases, and especially of the cases in this court which bear upon the general question, and cited especially and relied especially upon *Osborn* v. *The Bank of the United States* and *Davis* v. *Gray*. It then affirmed the judgment of the court below.

Poindexter v. *Greenhow*, 114 U. S. 270, was decided upon the authority especially of *Osborn* v. *Bank of the United States* and *United States* v. *Lee*. In that case an action of detinue was brought by a tax-payer, who had duly tendered tax-receivable coupons in payment of his taxes, against the person who, under color of office, as tax collector, acting under a void law, passed by the Legislature of the State, had refused to receive such tender, and had proceeded, by seizure and sale of the property of the plaintiff, to enforce the collection of such taxes; and it was held that such action was against the tax collector personally, as a wrong-doer, and not against the State, within the meaning of the 11th Amendment. And it was further held that such tax collector, when sued as a wrong-doer, cannot rest on the assertion of his defence as an officer of the State, but is bound to establish that he has acted under a valid authority, and must produce a valid law of the State which constitutes his warrant; thus following, almost in identical terms, the decision and language of this court in *Cunningham* v. *Macon & Brunswick Railroad Company*, 109 U. S. 446.

In *Allen* v. *Baltimore & Ohio Railroad Company*, 114 U. S. 311, Allen, the defendant below, was the Auditor of the State, the other defendants being the Treasurer of the State and the Treasurer of Augusta County, in Virginia. In that case an injunction was sought to prevent the collection of taxes, after a tender of payment in tax-receivable coupons; and it was held as sanctioned by repeated decisions of this court, and as common and unquestioned practice in similar cases, that the remedy by injunction was authorized. In this case, also, the court relied upon *Osborn* v. *Bank of the United States*, as well as upon *Board of Liquidation* v. *McComb*, and numerous other cases therein cited.

In *Ralston* v. *Missouri Fund Commissioners*, 120 U. S. 390, which was a suit brought by a private individual to restrain the Fund Commissioners from selling the Hannibal & St. Joseph Railroad, the distinction is clearly drawn between a suit to "compel a state officer to do what a statute has prohibited him from doing" and a suit "to get a state officer to do what a statute requires of him;" and it would seem to be a just conclusion from this distinction that, although the defendant is a state officer, if the suit is to compel him to do what a statute requires and, *a fortiori*, to restrain him from doing what a statute directs, when such statute is seen to be unconstitutional, there can be no objection to the suit on account of the official character of the defendant.

The cases which have now been examined seem to be sufficient to illustrate the line of cases which we have above described as asserting and enforcing somewhat broadly and fully the right of the courts to coerce or restrain state officers, in the interest of private parties who show themselves aggrieved by actual or threatened action of such state officers. But upon the general question, which we have said is all that is involved in the present proceedings, — whether a state officer may be enjoined from doing what an unconstitutional state statute directs him to do, — a multitude of other authorities in this court might be cited. See especially *Dodge* v. *Woolsey*, 18 How. 331; *Hawes* v. *Oakland*, 104 U. S. 450; *Huntington* v. *Palmer*, 104 U. S. 482; *Tomlinson* v. *Branch*,

15 Wall. 460; and *Transportation Co.* v. *Parkersburg*, 107 U. S. 691.

II. It was urged in the court below, and is now, against the jurisdiction of the Circuit Court in this case, that that court is prevented from issuing an injunction or restraining order, by the provision of § 720, Rev. Stat., which is in these words: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in case where such injunction may be authorized by any law relating to proceedings in bankruptcy." This section has been in force since the act of May 2, 1793; and if it is applicable to the present case, it would deprive the Circuit Court of power to issue the restraining order in question. Our position in answer to this objection is, that it applies only to proceedings which are actually begun or pending in a state court at the time when the writ of injunction is applied for and issued. *Fisk* v. *Union Pacific Railway Co.*, 10 Blatchford, 578; *State Lottery Co.* v. *Fitzpatrick*, 3 Woods, 222; *Moore* v. *Holliday*, 4 Dillon, 52; *Live Stock, &c.*, v. *Crescent City, &c.*, 1 Abbott, U. S. 388; *Watson* v. *Bondurant*, 2 Woods, 166; *Haines* v. *Carpenter*, 91 U. S. 254; *Diggs* v. *Wolcott*, 4 Cranch, 179. Our conclusions from these authorities are that § 720 has no application to suits not actually depending in the state courts at the time of the issuing of the restraining order or injunction. In the present case, it is conceded that no suits had been begun at the time the restraining order was issued.

A somewhat metaphysical argument has been advanced, in answer to the view that the section applies only to suits actually depending, to the effect that the word "stay" in § 720 must be interpreted to cover all steps, acts, and means which may *result in staying* suits in state courts, including the prevention in any way or any case of the bringing of suits there. This plainly is too elastic and comprehensive. If to "stay" means here, to prevent in any sense, then almost any injunction or restraining order may be said to be forbidden by this section. "Proceedings in a state court" is a phrase needing no interpretation, commentary, or gloss. It means

and must mean, unless excessive refining is to be attributed to our early legislators (1793), proceedings which are *pending in* a state court, and not proceedings which may be contemplated or designed to be brought there.

In opposition to the cases now cited is the single case of *Rensselaer & Saratoga Railroad Co.* v. *Bennington, &c., Railroad Co.*, 18 Fed. Rep. 671. If the circumstances and facts of that case would make it an authority, in opposition to the cases which have been above cited, it may be said to stand alone, and to be the only authority which holds that the United States courts are prohibited by § 720 from restraining parties from bringing suits which have not already been begun in the state courts.

III. But it is said that the complainants in the present case do not show themselves to have such an interest in the subject matter of the suit as to give them a standing in the court below.

The substantial averments of the bill upon this point are: (1) That the complainants were the owners of $100,000 worth of tax-receivable coupons of Virginia, for which they had paid over $30,000; (2) That they have sold $50,000 of that amount for $15,000, or more, to tax-payers of Virginia, who have tendered the same to the proper state officials in payment of their taxes, and that said officers have refused to receive the same; (3) That if the officers of the State are permitted to enforce the act of May 12, 1887, the complainants will be unable to sell the remaining $50,000 of their coupons to the tax-payers of that State, at any price, and thus that their entire property in the same will be destroyed. It is unnecessary to do more than observe here that the averments of the bill must be taken as true, for the purposes of these proceedings, no answer to the bill having been filed.

The question arises, upon these averments, whether they are sufficient to give the complainants a standing in court. The only authorities which have been heretofore cited to show a want of sufficient interest in this suit are *Marye* v. *Parsons*, 114 U. S. 325, and *Hagood* v. *Southern*, 117 U. S. 52. Under these decisions it is urged that the complainants have no legal

ground of complaint, because they are not tax-payers and have never, as such, tendered any coupons; and that as to them the State had passed no law violating the obligation of her contract.

Marye v. *Parsons* presented these features: (1) That the relief sought was a mandatory injunction, which was intended to effect a specific performance of the contract to receive coupons in payment of taxes; (2) That the complainant, having no taxes to pay, could only avail himself of the benefit of the contract to receive the coupons in payment of taxes, by transferring them to a tax-payer; (3) That having transferred them, he would have extinguished his own interest in the coupons and would have deprived himself of any further right to insist upon the performance of the State's contract.

In the present case, however, it is seen that: (1) Unlike *Marye* v. *Parsons*, the only relief which the complainants seek is the preventive relief of an injunction to restrain state officers from destroying the value of the coupons; (2) The complainants in this case *have* transferred $50,000 of their coupons to tax-payers, who have tendered them, and they have been refused; and (3) That as to the remaining $50,000, the execution of the act of May 12, 1887, as is alleged, will destroy entirely the value of these coupons. Manifestly, therefore, the case of *Marye* v. *Parsons* does not control the present case.

Hagood v. *Southern*, 117 U. S. 52, has already been stated in this argument. The only point in it, which bears upon the present question, is that the court there says of the complainant, that: "It cannot be said, as a matter of law, that the contract is broken until [the scrip] has been tendered for taxes due from a holder and been refused; nor that the legal right of the holder is threatened unless he is in a situation to make a present tender for that purpose. He has no legal right to have this scrip received for taxes, unless he owes taxes for which it is receivable; and in order that it may be used for the payment of the taxes of another, he must transfer it to the new holder, and that would divest himself of all right to enforce a contract to which he is no longer a party and in

which he has ceased to have a legal interest." How far, then, the case of *Hagood* v. *Southern* differs from the present case need not further be pointed out.

This brings us to an examination of the act of May 12, 1887, and it is evident that in every case of the tender of coupons heretofore or hereafter, the tax-payer is subjected to a suit for his taxes, notwithstanding such tender, and upon the trial of the suit he is compelled to file his coupons with the clerk; he is next required to produce the bond from which his coupon was cut and to prove that it was actually cut therefrom; he is next forbidden to introduce expert evidence of the genuineness of the coupons, though the coupons are engraved and not signed manually; and thereupon if he fails in his defence, as he inevitably must fail, the judgment of the court will be that he has failed to establish the genuineness of his coupons; and that hence, being spurious, they are not to be returned to him, but to remain in the custody of the clerk.

It is, therefore, as clear as a mathematical demonstration, that the effect of the act of May 12, 1887, *is to sequester, confiscate and destroy the coupons which may have been tendered heretofore or which may hereafter be tendered.*

Who shall say that this does not constitute such an interest on the part of these complainants as warrants them in coming into a court of equity for appropriate relief? Certainly, the cases of *Marye* v. *Parsons* and *Hagood* v. *Southern* do not, in the remotest degree, stand in their way.

IV. We assert the total and palpable unconstitutionality of the whole act of May 12, 1887, on account of the provisions of that act itself. That act, in its foreground, directs and requires the officers of the State to bring suits for the recovery of taxes from all tax-payers who have already tendered or who may hereafter tender, coupons of the tax-receivable bonds of Virginia, in payment of their taxes. This alone stamps the act as not only unconstitutional, but as a flagrant and open contempt of the solemn and repeatedly affirmed decision of this court in *Poindexter* v. *Greenhow*.

The decision and the effect of *Poindexter* v. *Greenhow* is that any act of the State of Virginia which directs any pro-

ceeding against a tax-payer, for the purpose of compelling him to pay the same taxes again, after a tender of coupons, is unconstitutional and void.

The act of May 12, 1887, is, upon this broad ground, which is completely covered by that decision, *totally and irredeemably unconstitutional.*

In closing, we desire to point out here, especially, that what is sought in our present case is not an *affirmative* remedy; that is to say, we do not seek to compel the performance of any act whatever on the part of state officers. It does not fall, then, under this aspect, within the principle laid down in *Louisiana* v. *Jumel*, or in the separate concurring opinion of the four justices of this court in *Antoni* v. *Greenhow*. We are seeking to compel the performance of no acts; but simply to restrain the officers of the State of Virginia from destroying the value of our coupons by enforcing the act of May 12, 1887.

Mr. Royall also filed a separate brief, opposing.

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

It is established by the decisions of this court, that while "the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error or appeal to this court," yet, when "a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void;" and that, "when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner." *Ex parte Fisk*, 113 U. S. 713, 718.

In *Ex parte Rowland*, 104 U. S. 604, the commissioners of a county in Alabama were, on a writ of *habeas corpus*, discharged by this court from imprisonment to which they had been adjudged in consequence of an alleged contempt of the Circuit Court of the United States for the Middle District of

Alabama, in refusing to obey the command of a peremptory writ of *mandamus* issued by that court requiring them to levy certain taxes. This court said (page 612): "If the command of the peremptory writ of *mandamus* was in all respects such as the Circuit Court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court. *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Virginia*, 100 U. S. 339."

In *Ex parte Bain*, 121 U. S. 1, it was held that a prisoner who had been tried, convicted, and sentenced to imprisonment, by a Circuit Court of the United States, the indictment having been amended by the district attorney, by leave of the court, after it had been returned by the grand jury, was entitled to his discharge under a writ of *habeas corpus* issued by this court, on the ground that the proceeding was void. The court said (page 13): "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment."

The question in the present case, therefore, is whether the order of the Circuit Court of June 6, 1887, forbidding the petitioners from bringing suits under the act of May 12, 1887, in the name and on behalf of the State of Virginia, as its attorneys, for the recovery of taxes, in payment of which the tax-payers had previously tendered tax-receivable coupons, is an order which that court had power by law to make. The question really is whether the Circuit Court had jurisdiction to entertain the suit in which that order was made, because the sole purpose and prayer of the bill are, by a final decree, perpetually to enjoin the defendants from taking any steps in

execution of the act of May 12, 1887. If the court had power, upon the case made in the record, to entertain the suit for that purpose, it had equal power, as a provisional remedy, to grant the restraining order, the violation of which constitutes the contempt adjudged against the petitioners.

The principal contention on the part of the petitioners is that the suit, nominally against them, is, in fact and in law, a suit against the State of Virginia, whose officers they are, jurisdiction to entertain which is denied by the 11th Amendment to the Constitution, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." On the other hand, it is contended by counsel for the complainants in that cause, who have argued against the discharge of the petitioners, that the suit is not within that prohibition.

It must be regarded as a settled doctrine of this court, established by its recent decisions, "that the question whether a suit is within the prohibition of the 11th Amendment is not always determined by reference to the nominal parties on the record." *Poindexter* v. *Greenhow*, 114 U. S. 270, 287. This, it is true, is not in harmony with what was said by Chief Justice Marshall in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 857. In his opinion in that case he said: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State by the citizens of another State or by aliens." And the point as involved in that case was stated by Mr. Justice Swayne, delivering the opinion of the court in *Davis* v. *Gray*, 16 Wall. 203, 220, as follows: "In deciding who are parties to the suit the

court will not look beyond the record. Making a state officer a party does not make the State a party, although her law may have prompted his action and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case." But what was said by Chief Justice Marshall in *Osborn* v. *Bank of the United States*, *supra*, must be taken in connection with its immediate context, wherein he adds (page 858): "The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties." This conveys the intimation, that where the defendants who are sued as officers of the State, have not a real, but merely a nominal interest in the controversy, the State appearing to be the real defendant, and therefore an indispensable party, if the jurisdiction does not fail for want of power over the parties, it does fail, as to the nominal defendants, for want of a suitable subject matter.

This, indeed, seems to be the interpretation put upon this language by Chief Justice Marshall himself in the opinion of the court, delivered by him in the case of *The Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 123, 124. After quoting the paragraphs from the opinion in the case of *Osborn* v. *Bank of the United States*, above extracted, the Chief Justice mentioned the case of *Georgia* v. *Brailsford*, 2 Dall. 402, where the action was not in the name of the State, but was brought by the Governor in its behalf, and added: "If, therefore, the State was properly considered as a party in that case, it may be considered as a party in this." He further said: "The claim upon the Governor is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially. The decree is pronounced, not against the person, but the officer, and appears to have been pronounced against the successor of the original defendant;

as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant." It was therefore held, in that case, that the State was in fact, though not in form, a party defendant to the suit, and that, consequently, the Circuit Court had no jurisdiction to pronounce the decree appealed from. See also *Ex parte Juan Madrazzo*, 7 Pet. 627. This view was reiterated by this court in *Kentucky* v. *Dennison*, 24 How. 66, 98, where it was said to be settled, "that where the State is a party, plaintiff or defendant, the Governor represents the State, and the suit may be, in form, a suit by him as Governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant." Accordingly, in *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U. S. 446, it was decided that in those cases where it is clearly seen upon the record that a State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. The inference is, that where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction.

The very question was presented in the cases of *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*, 108 U. S. 76. In each of those cases there was upon the face of the record nominally a controversy between two States, which, according to the terms of the Constitution, was subject to the judicial power of the United States. So far as could be determined

by reference to the parties named in the record, the suits were within the jurisdiction of this court; but, on an examination of the cases as stated in the pleadings, it appeared that the State, which was plaintiff, was suing, not for its own use and interest, but for the use and on behalf of certain individual citizens thereof, who had transferred their claims to the State for the purposes of suit. It was accordingly unanimously held by this court, that it would look behind and through the nominal parties on the record, to ascertain who were the real parties to the suit. The Chief Justice, speaking for the court in that case, made a review of the circumstances which led to the adoption of the 11th Amendment, and, in concluding his opinion, said: "The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued; and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed." p. 91.

The converse of that case is to be found in *Hagood* v. *Southern*, 117 U. S. 52. There, the State of South Carolina, which was the party in interest, was not nominally a defendant. The nominal defendants were the Treasurer of the State of South Carolina, its Comptroller General, and the treasurers of its various counties and their successors in office. The object of the bills was to obtain on behalf of the complainants, by judicial process, the redemption by the State of certain scrip of which they were holders, according to the terms of a statute in pursuance of which it was issued, by the levy, collection, and appropriation of a special tax pledged to that purpose, as they claimed, by an irrepealable law, constituting a contract protected from violation by the Constitution of the United States. The decrees of the Circuit Court granting the relief were reversed, and the cause remanded, with

instructions to dismiss the bills, on the ground that the suits, though nominally against the officers of the State, were really against the State itself. In its opinion this court said (page 67): "These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such if it chooses; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed; the one required to perform the decree; and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the 11th Amendment to the Constitution of the United States."

The conclusions in the case of *Hagood* v. *Southern* were justified by what had previously been decided by this court in the cases of *Louisiana* v. *Jumel* and *Elliott* v. *Wiltz*, 107 U. S. 711. Those cases had for their object, one, by injunction, to restrain the officers of the State from executing the provisions of the act of the General Assembly alleged to be in violation of the contract rights of the plaintiffs, and the other, by mandamus, to require the appropriation of money from the treasury of the State in accordance with the contract. This relief, it was decided, was not within the competency of the judicial power. The Chief Justice said, on that point (page 727): "The remedy sought, in order to be complete, would require the court to assume all the executive authority

of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full; and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power, in their administration of the finances of the State."

It is, therefore, not conclusive of the principal question in this case, that the State of Virginia is not named as a party defendant. Whether it is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record.

The substantial averments of the bill are, 1st, that the complainants were the owners of $100,000 worth of tax-receivable coupons of Virginia, for which they had paid over $30,000; 2d, that they have sold $50,000 of that amount for $15,000 or more to tax-payers of Virginia, who have tendered the same to the proper state officials in payment of their taxes, but that said officers have refused to receive the same; 3d, that if the officers of the State are permitted to enforce the act of May 12, 1887, the complainants will be unable to sell the remaining $50,000 of their coupons to the tax-payers of that State at any price, and thus their entire property in the same will be destroyed; 4th, that the act of May 12, 1887, is unconstitutional and void, because it impairs the obligation of the contract of

the State of Virginia by which it agreed to receive coupons cut from its bonds in payment of debts, demands, and taxes due to it.

The particulars in which this contract is alleged to be violated by the provisions of that act are, first, that, in disregard of tenders of tax-receivable coupons made by tax-payers in payment of taxes, the act of the General Assembly peremptorily requires actions at law to be brought in the name of the State of Virginia against all such tax-payers as delinquent; second, because in the trial of such actions it is required that the defendant shall not only prove the fact of tender, but the genuineness of the coupons tendered; third, that as part of that proof he is required to produce the bond itself from which such coupon is said to have been cut; and, fourth, that he is not permitted to introduce expert testimony to prove the genuineness of the coupons tendered. The prayer of the bill is, that the Attorney General of the State of Virginia, and the Commonwealth's attorneys for the counties, be restrained by injunction from commencing and prosecuting any suits under the act of May 12, 1887, for the recovery of taxes against parties alleged to be delinquent, but who in fact have tendered tax-receivable coupons in payment of taxes due.

It is to be noted that there is no direct averment in the original or amended bills that the coupons alleged to have been tendered in payment of taxes by those tax-payers against whom the defendants threatened to bring suits under the act of May 12, 1887, were purchased from the complainants, although it incidentally appears otherwise upon the record that some of them may have been. The injunction, however, prayed for is to prevent the bringing of any suits under that act against tax-payers who have tendered coupons, whether the coupons were purchased from the complainants or not.

It is also to be observed that the only personal act on the part of the petitioners sought to be restrained by the original order of June 6, 1887, in pursuance of the prayer of the bill, is the bringing of any suit under the act of May 12, 1887, against any person who had tendered tax-receivable coupons in payment of taxes due to the State of Virginia. Any such suit,

must, by the statute, be brought in the name of the State, and for its use.

It is immaterial, in our opinion, to consider the matters which are alleged in respect to the course and conduct of such a suit after its institution, by reason of the provisions contained in other acts of the General Assembly of the State restricting the mode of proof of the genuineness of the coupons tendered. What is required by the act of May 12, 1887, is that, "If the defendant relies on a tender of coupons as payment of the taxes claimed, he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered, and the clerk shall carefully preserve them. Upon such plea filed the burden of proving the tender and the genuineness of the coupons shall be on the defendant. If the tender and the genuineness of the coupons be established, judgment shall be for the defendant on the plea of tender. In such case the clerk shall write the word 'proved,' and thereunder his name in his official character, across the face of the coupons, and transmit them, together with a certificate of the court that they have been proven in the case, to the auditor of public accounts, who shall deliver the coupons to the second auditor, receiving therefor the check of the second auditor upon the treasurer, which check he shall pay into the treasury to the credit of the proper tax account."

If a suit may be rightfully brought at all by the State to recover a judgment for taxes, in such a case, certainly, there is nothing in these provisions that violates any legal or contract right of the party sued. If he defends the action on the ground of a lawful tender of payment, he must, of course, plead the tender, and may rightfully be required to bring into court the tender alleged to have been made. Under the issue upon this plea the burden is upon the defendant of proving the truth of its allegations. What shall be the amount and kind of proof necessary to establish the defence involves questions of law which can only be raised and decided in the course of the trial. Their determination is for the court where the trial is to be had. If, in pursuance of other acts of the General Assembly, the contract rights of the defendant, as a tax-payer having

tendered tax-receivable coupons, are denied to him in that trial, by reason of requirements in regard to the nature and quantity of proof as to the genuineness of the coupons, the errors of law thus committed can only be remedied, according to the common course of judicial proceedings, by a writ of error, which, as it would present a Federal question, might ultimately be sued out in this court. But it is not to be assumed in advance, either, that such questions will arise, or that, if they arise, they will be erroneously decided. The question, therefore, is narrowed to the single inquiry of the equitable right of the complainants to enjoin the petitioners against bringing any such suits at all.

It seems to be supposed in argument, that the right of tax-payers in Virginia, who have tendered tax-receivable coupons in payment of their taxes to the proper collecting officer, to be forever thereafter free from suit by the State to recover judgment for such taxes, rests upon the proposition that such a tender is in law a payment of the taxes, so as to extinguish all claim for them on the part of the State. This proposition, indeed, is said to be justified by the authority of certain language in the opinion of this court in the case of *Poindexter* v. *Greenhow*, 114 U. S. 270. In that case the effect of a tender in payment of taxes upon the subsequent act of the collector in seizing the personal property of the tax-payer was considered and decided, but there is nothing in the opinion which countenances the idea that such a tender was a payment of the taxes, so as to extinguish all subsequent claim of the State therefor. Its effect was precisely defined in the following statement (page 299): "His tender, as we have already seen, was equivalent to payment, *so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property.*" There is nothing in the opinion to indicate that the party making the tender was relieved from the operation of the rule of law, making it necessary to keep the tender good, or that a subsequent action at law for the recovery of the taxes would be unlawful, reserving, of course, in such a case, the admitted right of the defendant to plead the fact of his tender and bring it into court, in pursuance of the usual practice in such cases, as a defence.

It follows, therefore, in the present case, that the personal act of the petitioners sought to be restrained by the order of the Circuit Court, reduced to the mere bringing of an action in the name of and for the State against tax-payers, who, although they may have tendered tax-receivable coupons, are charged as delinquents, cannot be alleged against them as an individual act in violation of any legal or contract rights of such tax-payers.

Much more difficult is it to conceive that it constitutes a grievance of which the complainants in the principal suit have any legal right to complain. No suits against the complainants themselves are apprehended, and their pecuniary interest in the actions threatened against tax-payers, who have made tenders of tax-receivable coupons purchased from them, with their guaranty against loss in consequence thereof, is collateral and remote. The bringing of such actions is no breach of any contract subsisting between the complainants and the State of Virginia. All rights under the contract contained in the coupons they parted with when they transferred them to tax-payers. If the complainants have agreed in that transfer that they shall be received by the State in payment of taxes, that is a contract between the complainants and the tax-payer, their assignee, to which the State is not a party. It is one the complainants have voluntarily entered into, and for which the State cannot be held responsible.

In that aspect, the case does not differ in principle from *Marye* v. *Parsons*, 114 U. S. 325. The consequential losses in the diminution of the market value of the coupons which they still hold, and the liability of the complainants to make good their warranty to tax-payers to whom they have transferred the others, are not direct and legal consequences of any breach of the contract made with the State of Virginia, by which the coupons are made receivable in payment of taxes. As such damage could not be recovered in a direct action upon the contract, if the State were suable at law, so neither can it be made the foundation of any preventive relief by injunction.

These considerations, however, are adverted to in this con-

nection, not so much for the purpose of showing that the substance of the bill presents a case the subject matter of which is not within the jurisdiction of the court, as to show that it does not allege any grounds of equitable relief against the individual defendants for any personal wrong committed or threatened by them. It does not charge against them in their individual character anything done or threatened which constitutes, in contemplation of law, a violation of personal or property rights, or a breach of contract to which they are parties.

The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the State of Virginia. The acts sought to be restrained are the bringing of suits by the State of Virginia in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains — supposing that such a suit could be maintained — it would have been subjected to the jurisdiction of the court by process served upon its Governor and Attorney General, according to the precedents in such cases. *New Jersey* v. *New York*, 5 Pet. 284, 288, 290; *Kentucky* v. *Dennison*, 24 How. 66, 96, 97; Rule 5 of 1884, 108 U. S. 574. If a decree could have been rendered enjoining the State from bringing suits against its tax-payers, it would have operated upon the State only through the officers who by law were required to represent it in bringing such suits, viz., the present defendants, its Attorney General, and the Commonwealth's attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment.

The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the

court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?

It is, however, insisted upon in argument that it is within the jurisdiction of the Circuit Court of the United States to restrain by injunction officers of the States from executing the provisions of state statutes, void by reason of repugnancy to the Constitution of the United States; that there are many precedents in which that jurisdiction has been exercised under the sanction of this court; and that the present case is covered by their authority.

The principal authority relied upon to maintain this proposition is the judgment of this court in the case of *Osborn* v. *Bank of the United States*, 9 Wheat. 738. As strengthening the argument based upon that decision, our attention is called by counsel to a feature of the case which it is said does not clearly appear from the official report by Mr. Wheaton. The original record of the case shows that the bill, after setting out the substance of the act of the Legislature of Ohio complained of, alleged that Osborn, the Auditor of the State, and the officer upon whom the execution of the statute of the State was enjoined, "daily gives it out in speeches that he will execute and enforce the provisions of the said act of Ohio against your orators." And it is part of the prayer of the bill "to stay and enjoin said Ralph Osborn, auditor as aforesaid, and all others whom it may concern in anywise, from proceeding against your orators under and in virtue of the act of Ohio aforesaid, or any section, part, or provision thereof." It also appears that it was part of the decree of the Circuit Court, from which the appeal was prosecuted, "that the defendants and each of them be perpetually enjoined from proceeding to collect any tax, which has accrued or may hereafter accrue, from the complainants under the act of the General Assembly of Ohio in the bill and proceedings mentioned." But the act of the Legislature of Ohio, declared to be unconstitutional and void in that case, had for its sole purpose the levy and collection of an annual tax of $50,000 upon each office of discount and deposit of the Bank of the United States within that State, to

be collected, in case of refusal to pay, by the Auditor of State by a levy upon the money, bank notes, or other goods and chattels, the property of the bank, to seize which it was made lawful, under the warrant of the auditor, for the person to whom it was directed, to enter the bank for the purpose of finding and seizing property to satisfy the same. The wrong complained of and sought to be prevented by the injunction prayed for was this threatened seizure of the property of the bank. An actual seizure thereof, in violation of the injunction, was treated as a contempt of the court, for which the parties were attached, and the final decree of the Circuit Court restored the property taken to the possession of the complainant. In disposing of the case in this court, the opinion of Chief Justice Marshall concludes as follows, 9 Wheat. 871: "We think then that there is no error in the decree of the Circuit Court for the District of Ohio, so far as it directs restitution of the specific sum of $98,000, which was taken out of the bank unlawfully and was in the possession of the defendant Samuel Sullivan when the injunction was awarded in September, 1820, to restrain him from paying it away, or in any manner using it, and so far as it directs the payment of the remaining sum of $2000 by the defendants Ralph Osborn and John L. Harper; but that the same is erroneous so far as respects the interest on the coin, part of the said $98,000, it being the opinion of this court that while the parties were restrained by the authority of the Circuit Court from using it they ought not to be charged with interest. The decree of the Circuit Court for the District of Ohio is affirmed as to the said sums of $98,000 and $2000, and reversed as to the residue."

The mandate from this court was in accordance with the terms of this judgment.

There is nothing, therefore, in the judgment in that cause, as finally defined, which extends its authority beyond the prevention and restraint of the specific act done in pursuance of the unconstitutional statute of Ohio, and in violation of the act of Congress chartering the bank, which consisted of the unlawful seizure and detention of its property. It was conceded throughout that case, in the argument at the bar and in the

opinion of the court, that an action at law would lie, either of trespass or detinue, against the defendants as individual trespassers guilty of a wrong in taking the property of the complainant illegally, vainly seeking to defend themselves under the authority of a void act of the General Assembly of Ohio. One of the principal questions in the case was whether equity had jurisdiction to restrain the commission of such a mere trespass, a jurisdiction which was upheld upon the circumstances and nature of the case, and which has been repeatedly exercised since. But the very ground on which it was adjudged not to be a suit against the State, and not to be one in which the State was a necessary party, was that the defendants personally and individually were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that therefore it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the State. This they were not permitted to do, because the authority under which they professed to act was void.

In pursuance of the principles adjudged in the case of *Osborn* v. *Bank of the United States*, *supra*, it has been repeatedly and uniformly held by this court that an injunction will lie to restrain the collection of taxes sought to be collected by seizures of property imposed in the name of the State, but contrary to the Constitution of the United States, the defendants being officers of the State threatening the distraint complained of. The grounds of this jurisdiction were stated in *Allen* v. *Baltimore & Ohio Railroad Co.*, 114 U. S. 311. The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable. This principle was plainly stated in the opinion of the court in *Poindexter* v. *Greenhow*, 114 U. S. 270, as follows (page 282): "The case then of the plaintiff below is reduced to this: He had paid the tax demanded of him by a

lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully with force and arms seized, taken, and detained the personal property of another." It was also stated (page 288): "The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defence, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do." The legislation under which the defendant justified being declared to be null and void as contrary to the Constitution of the United States, therefore left him defenceless, subject to answer to the consequences of his personal act in the seizure and detention of the plaintiff's property, and responsible for the damages occasioned thereby.

This principle is illustrated and enforced by the case of *United States* v. *Lee*, 106 U. S. 196. In that case the plaintiffs had been wrongfully dispossessed of their real estate by defendants, claiming to act under the authority of the United States. That authority could exist only as it was conferred by law, and as they were unable to show any lawful authority under the United States, it was held that there was nothing to prevent the judgment of the court against them as individuals, for their individual wrong and trespass. This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a State or of the United States, where the objection has been interposed that the State was the real defendant, and has been

overruled. The action has been sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character.

The present case stands upon a footing altogether different. Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the State of Virginia by the acts of its General Assembly referred to in the bill of complaint, there is nevertheless no foundation in law for the relief asked. For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself. This results from the 11th Amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other States or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against the State by name, it is admitted could not be brought. In *Hagood* v. *Southern*, 117 U. S. 52, it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State," the court was without jurisdiction, because it was a suit against a State.

The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be

not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State. Such is the precise character of the suit in the Circuit Court against the petitioners in which the order was made, the violation of which constitutes the contempt for which they have been committed to the imprisonment from which they seek delivery by these writs.

It may be asked what is the true ground of distinction, so far as the protection of the Constitution of the United States is invoked, between the contract rights of the complainant in such a suit, and other rights of person and of property. In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied.

The distinction, however, is obvious. The acts alleged in the bill as threatened by the defendants, the present petitioners, are violations of the assumed contract between the State of Virginia and the complainants, only as they are considered to be the acts of the State of Virginia. The defendants, as individuals, not being parties to that contract, are not capable in law of committing a breach of it. There is no remedy for a breach of a contract, actual or apprehended, except upon the contract itself, and between those who are by law parties to it. In a certain sense and in certain ways the Constitution of the United States protects contracts against laws of a State subsequently passed impairing their obligation, and this provision is recognized as extending to contracts between an individual and a State; but this, as is apparent, is subject to the other constitutional principle, of equal authority, contained in the 11th Amendment, which secures to the State an immunity from suit. Wherever the question arises in a litigation between individuals, which does not involve a suit against a State, the contract will be judicially recognized as of binding force, notwithstanding any subsequent law of the State impairing its obligation. But this right is incidental to

the judicial proceeding in the course of which the question concerning it arises. It is not a positive and substantive right of an absolute character, secured by the Constitution of the United States against every possible infraction, or for which redress is given as against strangers to the contract itself, for the injurious consequences of acts done or omitted by them. Accordingly, it was held in *Carter* v. *Greenhow*, 114 U. S. 317, that no direct action for the denial of the right secured by a contract, other than upon the contract itself, would lie under any provisions of the statutes of the United States authorizing actions to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the Constitution of the United States. In that case it was said (page 322): "How, and in what sense, are these rights secured to him by the Constitution of the United States? The answer is, by the provision of Article I, § 10, which forbids any State to pass laws impairing the obligation of contracts. That constitutional provision, so far as it can be said to confer upon or secure to any person any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are, nevertheless, passed by the legislature of a State, they are unconstitutional and void. In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution." But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution.

It cannot be doubted that the 11th Amendment to the Con-

stitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana* v. *New Orleans*, 102 U. S. 203. That obligation, by virtue of the provision of Article I, § 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the 11th Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. *Beers* v. *Arkansas*, 20 How. 527; *Railroad Co.* v. *Tennessee*, 101 U. S. 337. The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted,

not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.

But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. In respect to the latter class of cases, we repeat what was said by this court in *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541: "A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." An example and illustration of this class will be found in *Seibert* v. *Lewis*, 122 U. S. 284.

Nor need it be apprehended that the construction of the 11th Amendment, applied in this case, will in anywise embarrass or obstruct the execution of the laws of the United States, in cases where officers of a State are guilty of acting in violation of them under color of its authority. The government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals owing obedience to its authority. The penalties of disobedience may be visited upon them, without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority, and the extent and limits of that authority the government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

In contradistinction to these classes of cases, for the reasons given, we adjudge the suit of *Cooper and Others* v. *Marye and Others*, in which the injunctions were granted against the present petitioners, to be in substance and in law a suit against the State of Virginia. It is, therefore, within the prohibition of the 11th Amendment to the Constitution. By the terms of that provision, it is a case to which the judicial power of the United States does not extend. The Circuit Court was without jurisdiction to entertain it. All the proceedings in the exercise of the jurisdiction which it assumed are null and void. The orders forbidding the petitioners to bring the suits, for bringing which they were adjudged in contempt of its authority, it had no power to make. The orders adjudging

them in contempt were equally void, and their imprisonment is without authority of law. It is therefore

Ordered that the petitioners be discharged.

MR. JUSTICE FIELD concurring.

I concur in the judgment discharging from arrest and imprisonment the Attorney General of Virginia, and other officers of the State, who were adjudged by the Circuit Court to be guilty of contempt in refusing to obey the order of that court in the case of *Cooper* v. *Marye*, and were fined, and committed until the fine should be paid, and they should purge themselves of their contempt by doing the acts commanded. I also concur in the main position stated in the opinion of the court, upon which the discharge of the petitioners is ordered; namely: that the case of *Cooper* v. *Marye* was in law and fact a suit by subjects of a foreign state against the State of Virginia. To a suit of that character the judicial power of the United States cannot, by the Eleventh Amendment of the Constitution, be extended. The object of that suit was to enjoin the Attorney General and the Commonwealth's attorneys of the several counties, cities, and towns of Virginia from bringing any suits in the name of the Commonwealth to enforce the collection of taxes, for the payment of which coupons originally attached to her bonds had been tendered. To enjoin the officers of the Commonwealth, charged with the supervision and management of legal proceedings in her behalf, from bringing suits in her name, is nothing less than to enjoin the Commonwealth, for only by her officers can such suits be instituted and prosecuted. This seems to me an obvious conclusion.

The reason given in the bill in *Cooper* v. *Marye*, for seeking the injunction, is that the State has passed various acts creating impediments in the way of holders of coupons establishing their genuineness, by which their value will be practically destroyed, and the performance of these obligations be evaded, unless the officers of the State are restrained from prosecuting such suits. The numerous devices to which the State has resorted in order to escape from her obligations under the

forms of law may, it is true, seriously embarrass the coupon holder in the assertion of his claims; but that is not a sufficient reason for denying to the State the right to prosecute her demands for taxes in her own courts. If the obstacles to the maintenance of the claims of the coupon holder, presented by the State legislation, are repugnant to the Constitution and laws of the United States, we cannot assume in advance that they will be sustained by the courts of Virginia when the coupons tendered are produced in the suits mentioned, and for that reason deny to her a hearing there upon her own demands. If they should be sustained, a remedy may be found in this tribunal, where decisions in conflict with the Constitution and laws of the United States may be reviewed and corrected.

There are many cases — indeed, they are of frequent occurrence — where officers of the State, acting under legislation in conflict with the Constitution and laws of the United States — may be restrained by the Federal courts, as where those officers attempt, by virtue of such legislation, to take private property for public use without offering compensation, or in other ways to deprive one of the use and enjoyment of his property. I do not understand that the opinion of the court is against this doctrine; but, on the contrary, that it is recognized and approved. There is a wide difference between restraining officers of the State from interfering in such cases with the property of the citizen, and restraining them from prosecuting a suit in the name of the State in her own courts to collect an alleged claim. Her courts are at all times as open to her for the prosecution of her demands as they are open to her citizens for the prosecution of their claims.

I, however, make this special concurrence in the opinion of the majority because of language in it expressing approval of the positions taken by the court in *Louisiana* v. *Jumel*, from which I dissented — not agreeing with the majority either in the statement of the object of that case, or in the law applicable to it. 107 U. S. 728. I considered that case as brought to compel the officers of the State to do what she had by her laws and former constitution consented they might

by the judicial tribunals be required to do. I expressed, at the time, against the majority of the court, my conviction of the invalidity and unconstitutionality of the ordinance of repudiation embodied in the new constitution of Louisiana. At the same time I also expressed in *Antoni* v. *Greenhow* my opinion of the equally invalid legislation of Virginia. 107 U. S. 784. I adhere to my dissenting opinions in those cases, and in concurring in the judgment in this case I do not in any respect depart from or qualify what I there said.

Mr. Justice Harlan dissenting.

As I adhere to the views expressed by me in *Louisiana* v. *Jumel*, 107 U. S. 746; *Antoni* v. *Greenhow*, 107 U. S. 801; and *Cunningham* v. *Macon & Brunswick Railroad Company*, 109 U. S. 458; and as I concurred in the judgments in *Poindexter* v. *Greenhow*, 114 U. S. 273, and *Allen* v. *Baltimore & Ohio Railroad Company*, 114 U. S. 311, I feel obliged to dissent from the opinion and judgment in these cases.

In *Cooper* v. *Marye, &c.*, the jurisdiction of the Circuit Court cannot be questioned, so far as it depends upon the citizenship of the parties; for the plaintiffs are subjects or citizens of Great Britain, and the defendants are citizens of Virginia.

Whether the plaintiffs merely as holders of Virginia coupons, and not tax-payers in that Commonwealth, have any legal ground of complaint, by reason of the refusal of her officers to accept, when tendered, like coupons which the plaintiffs sold or transferred to tax-payers to be used in meeting their taxes; whether the statutes under which those officers proceeded, or intend to proceed, are repugnant to the Constitution of the United States, and, therefore, void; whether the preliminary injunction in question should or should not have been refused upon the ground that such tax-payers have a complete and adequate remedy at law; whether the necessity of avoiding conflicts between the courts of the United States and the officers of a State, acting in obedience to her statutes, was not ample reason for refusing

to grant such injunction; or whether an officer ought to be enjoined from merely bringing a suit in behalf of the public — the suit itself not necessarily, or before judgment therein, involving an invasion of the property rights of the defendant therein — are all matters which the Circuit Court, sitting in equity, was competent to determine upon the final hearing in *Cooper* v. *Marye, &c.* Those questions are not open for consideration here except upon the appeal from the final decree in that case; consequently, I am not at liberty now to express an opinion as to any of them.

The only inquiry now to be made is, whether *Cooper* v. *Marye* is a suit against Virginia within the meaning of the 11th Amendment to the Constitution of the United States. If it be, I agree that the prisoners must be discharged; for the judicial power of the United States does not extend to suits against a State by citizens of another State, or by subjects of foreign countries.

But I am of opinion that it is not a suit of that character. I stand upon what was adjudged in *Osborn* v. *United States Bank*, 9 Wheat. at page 857. Chief Justice Marshall, speaking for the court in that case, said: "It may, we think, be laid down as a rule *which admits of no exception*, that in all cases where jurisdiction depends on the party, it is the party *named in the record.* Consequently, the 11th Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State by the citizens of another State, or by aliens. The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, *in the exercise* of its jurisdiction, the court *ought* to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

These principles have been recognized in several decisions of

this court, notably in *United States* v. *Lee* and *Kaufman* v. *Lee*, 106 U. S. 196, 213, 215. That was an action to recover a body of land in Alexandria County, Virginia, two hundred acres of which constituted Arlington Cemetery, previously established by the United States as a military station and as a national cemetery for the soldiers and sailors of the Union. When the action was brought that cemetery was in the actual possession of the United States by the defendants, *as their officers*. Those officers certainly had no personal interest in the result of the suit. They simply represented the United States, who were the real parties in interest. As the United States were not parties to the record, and because they could not be made parties, the court proceeded to a determination of the case between the parties before it. The result was a judgment, determining that Lee had a legal right to the possession of Arlington Cemetery as against the officers of the United States having it under their control. The authority and duty of the court to proceed in the case, notwithstanding the United States were not before the court, was rested mainly upon the decision in *Osborn* v. *Bank of the United States*, from which was quoted, with emphatic approval, the following language: "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit." And in order that no one might suppose that *Osborn* v. *Bank of the United*

States had been modified or overruled by subsequent decisions, the court in the Lee case, after referring to several decisions, said: "These decisions have never been overruled. On the contrary, as late as the case of *Davis* v. *Gray*, 16 Wall. 203, the case of *Osborn* v. *Bank of the United States* is cited with approval, as establishing these, among other propositions: 'Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.' Though not prepared to say now that the court can proceed against the officer 'in all respects' as if the State were a party, this may be taken as intimating, in a general way, the views of the court at that time."

In *Poindexter* v. *Greenhow*, 114 U. S. 270, we sustained a suit by a private individual against a treasurer, charged with the duty of collecting taxes, to recover certain personal property which the defendant had seized for the non-payment of taxes due Virginia from the plaintiff in that suit. In seizing the property the officer disregarded the tender, previously made, of the State's coupons. It was earnestly contended that, as the officer only did what the State by her statutes had commanded him to do, and had himself no personal interest in the matter, the suit against him was, in legal effect, one against the State; that a suit to recover property seized for the non-payment of taxes, in conformity with the statutes of Virginia, had the same result as a direct suit against the State to compel her performance of her contract with the coupon holder, or to enjoin her officer from carrying those statutes into effect. But this view was overruled, mainly upon the authority of *Osborn* v. *Bank of the United States*, from which the court

quoted, with approval, the same passages as are to be found in the opinion in Lee's case, and in reference thereto observed: "This language, it may be observed, was quoted with approval in *United States* v. *Lee*. The principle which it enunciates constitutes the very foundation upon which the decision in that case rested." In Poindexter's case we said that the immunity from suit secured to the States by the Constitution "does not exempt the State from the operation of the constitutional provision that no State shall pass any law impairing the obligation of contracts; for, it has long been settled that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. It is true, that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the State itself, on the part of the injured party, being a citizen of another State, or a citizen or subject of a foreign state. But it is equally true, that whenever, in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, *the jurisdiction is not thereby ousted, but must be exercised*, with whatever legal consequences to the rights of the litigants may be the result of the determination."

Upon identically the same grounds rests our decision in *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311, in which we maintained the right of that company to an injunction to prevent the collection of taxes by distraint upon its property after a tender of the State's tax-receivable coupons in payment of such taxes. That suit was against the Auditor of Public Accounts and the Treasurer of Virginia. They certainly had no personal interest in the collection of the taxes, but were only obeying the statutes of the State which they assumed to be constitutional and binding upon them. But the effect of that suit was to say to the State of Virginia that she should not collect her revenue in the mode proposed by the statute, and thereby violate rights secured by the Constitution of the United States. In vain was it urged by the officers of the

State that Virginia was the real party in interest; that, as the State could only act by her officers, to enjoin them was to enjoin the State; and that consequently the suit was one against the State within the meaning of the Eleventh Amendment. This court overruled that contention, holding, in substance, that, the State of Virginia not being named as a party, and it being impossible to make her a party, her officers could be prevented from touching the property of the railroad under a statute void under the Constitution of the United States.

The result, then, of former decisions is: That a suit against officers of the United States to recover property not legally in their possession, is not a suit against the United States; and that neither a suit against officers of the State to recover property illegally taken by them, in obedience to the statutes of the State, nor a suit brought against state officers to enjoin them from taking, under the command of the State, the property of a tax-payer who has tendered coupons for taxes due to her, were suits against the State within the meaning of the 11th Amendment of the Constitution. And now it is adjudged, in the cases before us, that a suit merely against state officers to enjoin them from bringing actions against tax-payers who have previously tendered tax-receivable coupons is a suit against the State. There is, I grant, a difference between the cases heretofore decided and the case of *Cooper* v. *Marye;* but the difference is not such as to involve the jurisdiction of the Circuit Court, but, rather, to use the language of Chief Justice Marshall, "the exercise of its jurisdiction."

The Commonwealth of Virginia has no more authority to enact statutes impairing the obligation of her contracts than statutes impairing the obligation of contracts exclusively between individuals. *State of New Jersey* v. *Wilson*, 7 Cranch, 164, 166; *Providence Bank* v. *Billings*, 4 Pet. 514, 560; *Green* v. *Biddle*, 8 Wheat. 1, 84; *Woodruff* v. *Trapnall*, 10 How. 190, 207; *Wolff* v. *New Orleans*, 103 U. S. 358, 367; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 673. A statute which is void, as impairing the obligation of the State's contract, affords no justification to any one, and confers no authority. If an officer proposes to enforce such a

statute against a party, the obligation of whose contract is sought to be impaired, the latter, in my judgment, may proceed, by suit, against such officer, and thereby obtain protection in his rights of contract, as against the proposed action of that officer. A contrary view enables the State to use her immunity from suit to effect what the Constitution of the United States forbids her from doing, namely, to enact statutes impairing the obligation of her contract. If an officer of the State can take shelter behind such immunity while he proceeds with the execution of a void enactment to the injury of the citizen's rights of contract, it would look as if that provision which declares that the Constitution of the United States shall be the supreme law of the land, anything in the constitution or laws of a State to the contrary notwithstanding, had lost most, if not all, of its value in respect to contracts which a State makes with individuals.

I repeat, that the difference between a suit against officers of the State, enjoining them from seizing the property of the citizen, in obedience to a void statute of the State, and a suit enjoining such officers from bringing under the order of the State, and in her name, an action which, it is alleged, will result in injury to the rights of the complainant, is not a difference that affects the jurisdiction of the court, but only its exercise of jurisdiction. If the former is not a suit against the State, the latter should not be deemed of that class.

SPRAUL *v.* LOUISIANA.

ORIGINAL MOTION IN A CAUSE BROUGHT UP BY WRIT OF ERROR TO THE SUPREME COURT OF LOUISIANA.

Submitted November 21, 1887. — Decided December 5, 1887.

A supersedeas obtained by a plaintiff in error under the provisions of Rev. Stat. § 1007 does not operate to enjoin the defendant in error from bringing a new suit on a new cause of action, but arising out of the same general matter, and involving the same questions of law which are brought here for review.

Opinion of the Court.

THIS was a motion for a rule on J. V. Guilotte, mayor of the city of New Orleans, and Henry Larque, lessee of the public markets of New Orleans, to show cause why they should not be punished for a contempt of the supersedeas in this case. The case is stated in the opinion of the court.

Mr. J. Hale Sypher and *Mr. West Steever* for the motion.

No one opposing.

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

This motion is denied. The plaintiffs in error were proceeded against in the name of the State of Louisiana before the recorder of the first recorder's court of the city of New Orleans for an alleged violation of an ordinance of that city. The judgment of the recorder's court does not appear in the printed record, but the case was taken by appeal to the Supreme Court of the State, and in the opinion of that court it is stated that the appeal was by the defendants "from judgments rendered against them for the payment of a fine, and in default of payment sentencing them to imprisonment for the violation of ordinance No. 4798, A. S., which forbids the keeping of private markets within six squares of a public market within the limits of the city of New Orleans." The order of the Supreme Court was, "that the judgment appealed from be affirmed with costs."

To reverse this judgment of the Supreme Court the present writ of error was sued out, and a supersedeas obtained, in accordance with the provisions of § 1007, Revised Statutes, May 12, 1887. The complaint now is, that with this supersedeas in force, the mayor of the city and the lessee of the public markets have caused suits to be begun in the Civil District Court of the Parish of New Orleans to enjoin the plaintiffs in error, and each of them, "from opening, maintaining, or carrying on a private market . . . anywhere . . . in the city of New Orleans within six squares of a public market," and "that the grounds on which said injunctions are

based are the same law and city ordinance, the same defendants, and the same location of mercantile business, as that involved in said writ of error, being the same persons and same cause of action in said injunctions, and based on the same law and city ordinance, identical in every particular with the cases involved in said writ of error."

It is not alleged that any attempt has been made to carry the judgment which is here for review into execution. The whole gravamen of the charge made in support of this motion is, that the mayor and lessee of the markets have commenced another suit in another court upon another cause of action growing out of violations of the same ordinance. The supersedeas provided for in § 1007 of the Revised Statutes stays process for the execution of the judgment or decree brought under review by the writ of error or appeal to which it belongs. It operates on the judgment or decree, not on the questions involved considered apart from the particular suit in which they were decided. The new suits now complained of are not brought to give effect to the judgment in this case, but to enjoin the plaintiffs in error from further violations of the ordinance which was the foundation of the prosecution now here for review. This judgment is in no way connected with or made the basis of the injunction in the Civil District Court. Both suits may involve the consideration of the validity of the same ordinance, but the last is in no sense process for the execution of the judgment in the first. It follows, that, upon the showing made by the plaintiffs in error themselves, there is no ground for proceeding here against the mayor or the lessee of the market, and that the rule ought not to issue.

Denied.

MR. CHIEF JUSTICE WAITE. We understand that the motions in HUG *v.* LOUISIANA (No. 1272); ROUCHE *v.* LOUISIANA (No. 1273); and SPRAUL *v.* LOUISIANA (No. 1274); involve precisely the same question, and they are consequently also

Denied.

BENITES *v.* HAMPTON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Submitted November 8, 1887. — Decided December 5, 1887.

There being no assignment of errors in the transcript annexed to the writ of error, no specification of errors in the brief, no statement presenting the questions involved, no reference to pages in the argument, and generally a non-compliance with the provisions of the statute and the rules of this court in these respects, the case is dismissed for those causes.

An assignment of errors on appeal from the District Court to the Supreme Court of a Territory cannot be accepted in this court as the equivalent of the assignment required by the statute.

THE case is stated in the opinion of the court.

Mr. E. D. Hoge for plaintiff in error.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* for defendant in error.

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

Section 997 of the Revised Statutes is in these words:

"There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

Rule 8, § 1, of this court is as follows:

"The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, under his hand and the seal of the court."

Rule 21 requires printed briefs to be filed, and § 2 of that rule provides that the brief shall contain, "in the order here stated:

"(1) A concise abstract, or statement of the case, present-

ing succinctly the questions involved and the manner in which they are raised.

"(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

"(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length."

Sections 4 and 5 of the same rule are as follows:

"4. When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

"5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court."

This statute and these rules have been disregarded altogether in this case. No assignment of errors is found in the transcript annexed to and returned with the writ. The assignment of errors on the appeal from the District Court to the Supreme Court of the Territory cannot be accepted in this

court as the equivalent of the assignment required by the statute.

The brief contains no specification of errors such as is required by the rule, and there is no statement of the case presenting the questions involved, or the manner in which they are raised. In the argument there is no reference to the pages of the record relied on to support the points which are made. Not only is there a failure to quote the full substance of the evidence admitted or rejected, of which complaint is made, but even the names of the several witnesses upon whose testimony the objections rest are not mentioned. In short, to get at the matter which is complained of, we must hunt through what is called a "proposed statement on appeal and motion for a new trial," filling thirty pages of the record, with nothing in the brief to aid us in the search. This we are unwilling to do. In the present crowded state of our docket, we must insist on a reasonable compliance with the rules which have been adopted to facilitate the investigation of cases and help us in our work.

We therefore dismiss the case, under § 5 of Rule 21, for want of an assignment of errors and of a brief such as is required by the rules.

Dismissed.

LE SASSIER *v.* KENNEDY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Argued November 7, 1887. — Decided December 5, 1887.

A sold to B shares in a national bank, and signed a transfer on the books of the company, leaving the name of the transferee blank. After it was known that the bank was embarrassed, B sold the shares to C, an irresponsible person, and filled his name in in the blank. A, being subsequently adjudged liable as shareholder under the national banking law in a suit brought by the receiver, paid the judgment and brought suit in the Supreme Court of Louisiana against B for neglect of duty in failing to insert his name in the transfer. *Held*, that the case did not arise under the National Banking Act, and that therefore no Federal question was involved.

THE case is stated in the opinion of the court.

Mr. Enoch Totten for plaintiff in error. *Mr. Henry C. Miller* filed a brief for same.

Mr. W. Hallett Phillips for defendant in error. *Mr. James McConnell* was with him on the brief.

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

At the hearing of this cause a motion was made to dismiss the writ of error for want of jurisdiction, on the ground that no Federal question was involved in the decision below. This motion will be first considered. The facts as disclosed by the record are as follows:

On the 24th of February, 1873, Le Sassier & Binder sold to Samuel H. Kennedy at New Orleans, through his broker, E. C. Feinour, forty shares of the capital stock of the Crescent City National Bank, and in accordance with the prevailing custom at that place upon such sales, signed a transfer of the shares sold upon the transfer book of the bank, leaving the name of the transferee blank. On the 15th of March Kennedy sold the same stock to Thomas A. Adams, a responsible person, but at the request of the purchaser the transfer on the books of the bank was made to Morris Dyer, who was irresponsible, by writing his name in the blank left for the name of the transferee in the assignment which had been signed by Le Sassier & Binder. The bank was known to be embarrassed March 14, and on the 17th of that month it closed its doors, and soon afterwards a receiver was appointed, under the national banking act, by the Comptroller of the Currency. On the 1st of August, 1874, the receiver, by direction of the Comptroller, brought a suit against the shareholders, to enforce their individual liability for the debts of the bank, under § 5151 of the Revised Statutes. To this suit Kennedy was made a party as the holder of the shares which had been sold to him as above. He appeared and filed an answer, setting up his sale to Adams as a defence. Upon the hearing a final decree was rendered

June 2, 1876, dismissing the bill as to him. A suit was then brought by the receiver against Le Sassier & Binder, alleging that they were the owners of the stock at the time of the failure of the bank. They notified Kennedy that this suit had been begun, and that if their defence failed they should fall back on him, and hold him for whatever amount they might be compelled to pay "on stock which, from February 24, 1873, they had ceased to own, and had transferred to him." In the answer of Le Sassier & Binder they set up the sale to Kennedy as a defence to the action. At the final hearing a judgment was rendered against them on the pleadings and proofs, May 16, 1879, for $2800, and interest at five per cent per annum from July 23, 1874. This judgment they paid, and then brought the present suit against Kennedy to recover from him the amount of their payment.

In the petition it was alleged that, upon the sale of the stock to Kennedy and the signing of the transfer on the books of the bank, it became his duty to insert his name in the blank left for that purpose, and that they had been compelled to pay the judgment in favor of the receiver "owing to the conduct of the said Kennedy in not causing his name to be inserted in the transfer book aforesaid as transferee of said stock, and preserving in said transfer book of said bank, contrary to his obligation and duty, the said transfer in blank, with your petitioners' name signed thereto, from the time of said sale to him until said . . . bank failed, and owing to the other acts of the said . . . Kennedy in the premises by which he subjected your petitioners to a liability which was his own, and which he should have met; that his said conduct and acts were violative of his obligations in the premises and your petitioners' rights; were unlawful, illegal, and have caused to your petitioners loss and damage to the extent of . . . said amount paid by them."

From this statement of the case it is apparent that the suit was not brought against Kennedy to enforce any liability of his under the national banking act. That liability was disposed of in the suit of the receiver against him for its enforcement. Neither do Le Sassier & Binder claim under the

receiver, nor are they seeking to enforce the liability of Kennedy as a shareholder. Their claim, and their only claim, against him is for his failure to insert his own name, or that of some other responsible person, in the blank which had been left by them in the transfer they signed on the books of the bank for the stock he had bought. His obligation to them, if any there is, grows out of his contract with them as a purchaser, and not out of the banking law. That presents no Federal question. There is nothing in that law which makes it his duty to save his assignors from harm by reason of their former ownership, or which required him to register his ownership for their protection.

Neither is it at all important that, in its opinion, the Supreme Court of the State expressed a doubt as to the correctness of the judgment against Le Sassier & Binder. That judgment, as it stood, was conclusive on that point, and if Kennedy had been liable to them at all, it would have been for the amount adjudged, because he had been called upon to defend if he desired to do so. He was discharged, not because the judgment was wrong, but because he had not, in the opinion of the court, been guilty of any neglect of duty towards those against whom it was rendered, which would make him liable to them therefor.

The motion to dismiss is granted.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY *v.* MADISON.

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

Argued November 11, 1887. — Decided December 5, 1887.

If the jury return a verdict for the plaintiff after the court in its charge instructs them to "disregard altogether" evidence on the plaintiff's part, which had been improperly introduced and had been excepted to, the defendant cannot assign error here in this respect.

Opinion of the Court.

Rulings of the court below on questions of law will not be considered here on a writ of error, unless it appears from the bill of exceptions, or otherwise in the record, that the facts were such as to make them material to the issue which was tried.

The case is stated in the opinion of the court.

Mr. J. E. Ingersoll for plaintiff in error. *Mr. L. A. Russell* was with him on the brief.

Mr. Edward S. Meyer for defendant in error.

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

This suit was brought by Madison, the defendant in error, for injuries received by him through the alleged negligence of the New York, Lake Erie and Western Railroad Company, while he was in its employ as a brakeman. He charged in his petition that "after a train of cars operated by said defendant, and on which train he was employed as aforesaid, had stopped at the town of Mantua, a station along the line of said company in the district and division aforesaid, it became necessary in the course of his duties to step between two cars of said train for the purpose of uncoupling them, and while so engaged, without any fault or negligence on his part, but through the fault and negligence of this defendant in permitting its road-bed at said town to remain in an unsafe, insecure, and dangerous condition, all of which was unknown to this plaintiff, his right foot was caught and held fast in said road-bed, and while so caught and held, being unable to extricate it, he was, without any fault on his part, but through the negligence and carelessness of defendant, struck, jammed, and run over by one of defendant's cars, so injuring his left leg as to necessitate its amputation and cause the loss thereof."

The answer denied that the injury was caused by the negligence of the company, and insisted that it happened through the fault of the plaintiff himself.

The errors assigned here are:

1. That the Circuit Court erred in the admission of incompetent evidence at the trial; and,

2. That the Circuit Court erred in its charge to the jury.

In reference to the first of these assignments the bill of exceptions shows that at the trial several witnesses were called by the plaintiff, who were permitted to testify to certain alterations which were made in the road-bed by the section foreman, with the knowledge and approval of the road-master, after the accident occurred. This was objected to at the time, and exceptions were duly taken; but the court, in submitting the case to the jury, directed them to disregard that testimony altogether, as it had been improperly admitted, and must not be considered as tending to prove that the "railroad track was not in a reasonably safe condition at the time." It is true that, in one place in its charge, the court said this evidence was "not to be regarded . . . as an admission of the defendant of the defective character of the road-bed," but afterwards it was expressly stated that the testimony was not to be considered at all, as the section foreman could not at the time the alterations were made do anything that would bind the company upon the question of the condition of the track when the accident occurred. The jury could not have been misled on this subject.

As to the other error assigned, it is sufficient to say that there is nothing in the record to show the materiality of the charge complained of, or of the requests to charge which were refused. No part of the evidence, save that which was excepted to, is set out in the bill of exceptions, and there is no such statement of the facts proven as will enable us to see that the charge as given or refused had any reference to the case as it appeared at the trial. The record as it comes to us presents only abstract questions of law, which may or may not have been ruled in a way to affect the defendant injuriously. It has long been settled that such questions will not be considered here on a writ of error unless it appears from the bill of exceptions, or otherwise in the record, that the facts were such as to make them material to the issue which was tried. As was said in *Dunlop* v. *Monroe*, 7 Cranch, 242, 270: "Each bill of exceptions must be considered as presenting a distinct and substantive case; and it is on the evidence stated in itself alone, that

the court is to decide. We cannot go beyond it and collect other facts which must have been in the mind of the party, and the insertion of which in this bill of exceptions could alone have sanctioned the opinion as prayed for." To the same effect is *Worthington* v. *Mason*, 101 U. S. 149, 152, where this appears: "As we understand the principles on which judgments here are reviewed by writ of error, that error must appear by some ruling on the pleadings, or on a state of facts presented to this court. Those facts, apart from the pleadings, can only be shown here by a special verdict, an agreed statement duly signed and submitted to the court below, or by bill of exceptions. When in the latter, complaint is made of the instructions of the court given or refused it must be accompanied by a distinct statement of testimony given or offered which raises the question to which the instructions apply." "The proof of the facts which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them." See also *United States* v. *Morgan*, 11 How. 153, 158; *Reed* v. *Gardner*, 17 Wall. 409; *Jones* v. *Buckell*, 104 U. S. 554; *Phœnix Life Ins. Co.* v. *Raddin*, 120 U. S. 183, 196.

Upon the record as it comes to us we find no error, and the judgment is consequently

Affirmed.

STRYKER v. GOODNOW'S ADMINISTRATOR.

CHAPMAN v. SAME.

WELLES v. SAME.

LITCHFIELD v. SAME.

LITCHFIELD v. SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Argued November 1, 1887. — Decided December 5, 1887.

Upon the record in this case, the question whether the lands of the plaintiffs in error were taxable is not a Federal question, but is one on which

the decision of the highest court of the State of Iowa is conclusive; and it is not reviewable here.

Homestead Company v. *Valley Railroad*, 17 Wall. 153, is a judicial precedent, which might have been referred to as a reason for holding that taxes paid, under the circumstances in which the payments of taxes in contention in these suits were made, cannot be recovered by the party paying them from the true owners of the land; but it is no bar, as an estoppel, to the recovery in these cases.

The judgment of this court in *Wolcott* v. *Des Moines Company*, 5 Wall. 681, while it may be referred to by the parties in this suit as a judicial precedent, does not operate as an estoppel against the defendant in error.

The filing of a brief in a suit by a person interested in the question to be decided, but not a party to the suit, does not estop him in a suit of his own from presenting the same question.

In equity, in a state court of Iowa, to recover from the plaintiffs in error, defendants below, sums of money alleged to have been paid by defendant in error on lands in Iowa adjudged to be the property of the plaintiffs in error; and also to have the several amounts of the taxes decreed to be special liens on the lands. Decrees awarding the relief asked for by the plaintiff below, to review which these writs of error were sued out. The case, and what was claimed to make the Federal question, are stated in the opinion.

Mr. C. H. Gatch for plaintiffs in error. *Mr. William Connor* was with him on the brief.

Mr. George Crane for defendant in error.

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

These suits all grew out of the delay which attended the settlement of the controversies in reference to the Des Moines River improvement land grant made by Congress to the Territory of Iowa, August 8, 1846, which will be hereafter referred to as the river grant. 9 Stat. 77, c. 103. The character of those controversies may be seen by referring to the cases of *Dubuque and Pacific Railroad* v. *Litchfield*, 23 How. 66; *Wolcott* v. *Des Moines Company*, 5 Wall. 681; *Williams* v.

Baker, 17 Wall. 144; *Homestead Company* v. *Valley Railroad*, 17 Wall. 153; and *Wolsey* v. *Chapman*, 101 U. S. 755. At first it was supposed, both by the officers of the United States and of the State, that the grant embraced lands above the Raccoon Fork of the river, and the State of Iowa made conveyances to the Des Moines Navigation and Railroad Company, under which John Stryker, Richard B. Chapman, Grace H. Litchfield, Edwin C. Litchfield, J. B. Plumb, and William B. Welles each claimed title to separate tracts in that locality as *bona fide* purchasers.

On the 15th of May, 1856, Congress made another grant of lands to the State to aid in the construction of railroads. 11 Stat. 9, c. 28. This grant conflicted with the river grant if the last-named grant extended above the Raccoon Fork. The title of the State under the railroad grant to some of the lands above the Fork, was transferred to the Dubuque and Pacific Railroad Company, and that company, on the 25th of October, 1859, began a suit in ejectment against Edwin C. Litchfield to recover possession of one of the tracts. In that suit it was decided by this court, April 9, 1860, that the river grant did not extend above the Fork. *Dubuque and Pacific Railroad* v. *Litchfield*, *ubi supra*. Thereupon Congress, on the 2d of March, 1861, passed a joint resolution relinquishing the interest of the United States in the lands above the Fork to the State for the benefit of *bona fide* purchasers under the river grant.

The Des Moines Navigation and Railroad Company, holding title from the State to the lands above the Fork under the river grant, conveyed one of the tracts, on the 8th of August, 1859, to Samuel G. Wolcott, by deed, with full covenants of warranty. In 1865, Wolcott brought suit against the Navigation and Railroad Company in the Circuit Court of the United States for the Southern District of New York to recover damages for a breach of the covenants in that deed, alleging that the title had failed. In that case it was decided by this court, May 13, 1867, that the railroad grant in 1856 did not include any of the lands above the Raccoon Fork which had been claimed under the river grant, and that the title of Wolcott

under his deed from the Navigation and Railroad Company had not failed. *Wolcott* v. *Des Moines Co.*, *ubi supra*. While that case was pending in this court, the attorney of the Dubuque and Pacific Railroad Company was allowed to file a brief in support of the claim of Wolcott that the title was in that company and not in the Navigation Company.

The title which the Dubuque and Pacific Railroad Company claimed from the State under the railroad grant passed to the Dubuque and Sioux City Railroad Company in the month of August, 1861, and that company afterwards paid the taxes assessed and levied on the lands in dispute for the years 1861, 1862, and 1863. Those for the year 1861 were paid October 31, 1866; those for 1862, December 9, 1863; and those for 1863, January 20, 1864. On the 12th of November, 1863, the Railroad Company conveyed to the Iowa Homestead Company, an Iowa corporation, its title to the lands in dispute between the Railroad Company and the claimants under the river grant. The Homestead Company afterwards paid the taxes on the lands for the years 1864, 1865, 1866, 1867, 1868, 1869, 1870, and 1871.

On the 12th of October, 1869, the Homestead Company began a suit in equity in the District Court of Webster County, Iowa, to quiet its title to the lands, making the Des Moines Navigation and Railroad Company, Samuel G. Wolcott, William B. Welles, Roswell S. Burrows, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, the Des Moines Valley Railroad Company, Thomas Colter, Jacob Crouse, and John P. McDermott, defendants. In the bill it was alleged that the Homestead Company had been in possession of the lands since 1861, and that "they have paid taxes thereon to the State of Iowa since, . . . and if their title has failed they are entitled to have their taxes refunded since 1861 by the holder of the legal title, who has not paid them."

As to the defendants Wolcott, Welles, Burrows, Edwin C. Litchfield, McAlpine, Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Wade, and Stryker,

it was alleged that they held title to certain parcels of the lands under the river grant. The defendants Colter, Crouse, and McDermott were alleged to be preëmption claimants. The Des Moines Navigation and Railroad Company was the corporation to which the State transferred the river grant, and from which the other defendants, who hold under that grant, got their respective titles. The Des Moines Valley Railroad Company was made a defendant because of its claim of title to lands involved in the suit but which did not pass to the Des Moines Navigation and Railroad Company under the river grant. The prayer of the bill as to the several claimants under the river grant was, that the Homestead Company might be quieted in its title, and "that, in the event of a decree that the plaintiff's present title, or any part of it, has failed, the Des Moines Navigation and Railroad Company and its assigns may be decreed to repay to the plaintiff all taxes which *he* has paid on said lands, and interest thereon."

Afterwards, on the 13th of October, 1868, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, three of the defendants, and citizens of New York, filed their petition for the removal of the suit to the Circuit Court of the United States for the District of Iowa, under the act of March 2, 1867 (14 Stat. 558, c. 196), on the ground of "prejudice or local influence." This petition was accepted by the state court and an order entered "that this cause be transferred to the said Circuit Court . . . as to said defendants *in re.*" Under this order the petitioning parties entered a copy of the record in the Circuit Court on the 17th of March, 1869, and during the summer or fall of that year the defendants, the Des Moines Navigation and Railroad Company, the Tracys, the Litchfields, Wolcott, Chapman, McAlpine, Welles, Wade, and Stryker, all answered, setting up their titles under the river grant to the specific tracts of land held by them respectively, and, as to the taxes paid by the Homestead Company, averring that they were paid "voluntarily, with a knowledge of all the facts, and that the complainant is not entitled to have the same or any part thereof refunded."

On the 13th of May, 1870, the following entry was made by the Circuit Court in the cause:

"The Iowa Homestead Company, Complainant,

v.

"The Des Moines Navigation & Railroad Company, Samuel G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Edwin C. Litchfield, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, et al., Defendants.

"This action was commenced in the District Court of Webster County, Iowa, at the October term of said District Court. The defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, filed their affidavit, bond, and petition asking the removal of this action from said District Court to this court, under the provisions of the act of Congress approved March 2d, 1867, entitled 'An act to amend an act for the removal of causes in certain cases from the state courts,' approved July 27, 1866.

"And it appearing to said District Court that said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker were non-residents of the State of Iowa and residents of the State of New York, and that their application for the removal of this cause to this court in all respects conformed to the requirements of said act of Congress, the said District Court, at the October term thereof, in the year 1868, made the usual order transferring and removing this cause to this court as to the defendants Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, and this cause as to said defendants was removed to this court for trial.

"And it appearing that the defendants, Samuel G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, are, each and every of them, non-residents of the State of Iowa and district of Iowa, and under the statute above referred to are also entitled to a removal of this cause from the state court, and that said defendants, with the express consent and approval of the plaintiff, have appeared and answered the bill herein, and asked to be made

parties defendant, and that their rights may be heard and determined in this court and on the trial of this action.

"And it further appearing to this court that the defendants so asking to be made parties defendant hold under the same title as the defendants Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, and that their defence is in all respects identical, with the said plaintiff consenting, it is ordered that said Samuel G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, and each and every of them, be made parties defendant herein; that the answer filed by said persons be taken and deemed their answer to the complainant's bill; and that by their appearance and answer herein the said persons be deemed and treated as defendants herein and their rights in the premises adjudicated in and by this court in this action."

Afterwards the case came to this court in due course on appeal, where, on the 28th of April, 1873, it was decided that the defendants holding under the river grant had the better title, and that the Homestead Company could not recover for the taxes because they were paid voluntarily, without any request from the owners of the land and with a full knowledge of all the facts. A decree was thereupon entered affirming a decree of the Circuit Court dismissing the bill. *Homestead Company* v. *Valley Railroad*, 17 Wall. 153.

The Dubuque and Sioux City Railroad Company assigned to Edward K. Goodnow, then in life, all its claims against the owners of the lands in dispute for taxes paid, and he, on the 26th of July, 1880, brought suits in the Circuit Court of Webster County, one against John Stryker, one against the executor of Edwin C. Litchfield, one against Richard B. Chapman, one against Grace H. Litchfield, and, on the 30th of June, 1881, another against the executor and grantees of William B. Welles, to recover from them respectively the amounts due for the taxes of 1861, 1862 and 1863, paid by the Railroad Company on their several tracts of land.

As defences to the actions each of the defendants set up in his answer:

1. That, as to the taxes of 1861 and 1862, the lands belonged at the time of the levies respectively to the United States; "that the title thereto was in the United States, and that said lands were not subject to taxation by Webster County for any purpose for said years, and that if any taxes were assessed and levied thereon for the years aforesaid the same were not a valid or binding lien upon said lands."

2. That Goodnow and his assignor were estopped by the decree in the suit of the Homestead Company against the Des Moines Navigation and Railroad Company and others from a recovery in this action, that suit having been brought, among other things, for the same taxes, and having been prosecuted under the advice and direction of the Dubuque and Sioux City Railroad Company before its assignment to Goodnow.

In the suits against Chapman, Welles, the executor of Edwin C. Litchfield, and Grace H. Litchfield, an additional defence was made, to wit, that the decision of this court, at December term, 1866, in the case of *Wolcott* v. *Des Moines Company*, 5 Wall. 681, was a final determination of the disputed questions as to the title and ownership of the lands above the Raccoon Fork in controversy between the Dubuque and Sioux City Railroad Company and the Des Moines Navigation and Railroad Company and its grantees under their respective claims, and that, as these suits were not brought within either five or six years after that decision, they were barred by the statute of limitations.

The Supreme Court of Iowa, on appeal from the decree of the Webster Circuit Court in each of the cases, overruled these defences, denied to the defendants the rights, privileges, and immunities by them respectively set up and claimed under the laws and authority of the United States, and gave judgment against them for the taxes sued for. To reverse those judgments these writs of error were brought. The cases are reported as *Goodnow* v. *Stryker*, 62 Iowa, 221; *Goodnow* v. *Chapman*, 64 Iowa, 602; *Goodnow* v. *Litchfield*, 67 Iowa, 691; *Goodnow* v. *Wells*, 67 Iowa, 654.

The Federal questions relied on in argument are:

1. That as the title to the lands remained in the United

States until March 2, 1861, and as by the act of March 3, 1845, c. 48, § 7, 5 Stat. 743, admitting Iowa into the Union as a State, it was provided that the State should not levy any tax on public lands within its limits "whilst the same remained the property of the United States," the taxes for the year 1861 were illegal and void, because levied in violation of that act of Congress.

2. That the decree in the case of *Homestead Company* v. *Valley Railroad* was in its legal effect a bar to the recovery in this action, and as the Supreme Court of the State decided otherwise it failed to give full faith and credit to the judicial proceedings of this court acting under the authority of the United States.

3. That the judgment of this court in the case of *Wolcott* v. *Des Moines Company* was a final determination on the 13th of May, 1867, against the right of the Dubuque and Sioux City Railroad Company to claim the lands on which the taxes were levied in these cases, and that the legal effect of that judgment was to bar the right of the railroad company, and Goodnow as its assignee, to recover in this action, because the action was not commenced within the time prescribed by the statute of limitations after the rendition of that judgment.

These will be considered in their order.

1. As to the taxes of 1861. It is not contended that these taxes were actually levied upon the lands until after the title had passed out of the United States; but the claim is, that, by the laws of Iowa in force at the time, "government lands entered or located, or lands purchased from the State, shall not be taxed for the year in which the entry, location, or purchase was made," and that, as these taxes were levied within the year after the title passed out of the United States, they were illegal.

Whether the lands were taxable within a year after the title passed out of the United States is not a Federal question. There was nothing in the act of Congress admitting Iowa into the Union, or in any other act of Congress to which our attention has been directed, which in any manner interfered with the power of the State to tax lands as soon as they ceased to

be the property of the United States. The only prohibition was against taxation whilst the United States were the owners. The Supreme Court of Iowa has decided that the statute of the State referred to does not apply to these cases, because these lands were neither "entered" nor "located" within the meaning of those terms as applied to the acquisition of lands from the government. Consequently there was nothing in the laws of Iowa to prevent the levy of the taxes for 1861 as soon as the resolution of March 2d, 1861, went into effect. *Goodnow* v. *Wells*, 67 Iowa, 654. This, it was said, is in accordance with previous cases bearing on the same question, among which *Stryker* v. *Polk County*, 22 Iowa, 131, and *Litchfield* v. *County of Hamilton*, 40 Iowa, 66, were referred to. With the correctness of this decision we have nothing to do. It relates only to the construction of a State statute which is in no way in conflict with the Constitution or any law of the United States. The judgment of the state court on that question is final, and not reviewable here.

We are referred, however, to *Litchfield* v. *County of Hamilton*, 101 U. S. 781, as an authority to the contrary of this. That was a suit in equity brought by Edwin C. Litchfield against the County of Hamilton, in a court of the State, to restrain the collection of taxes for the years 1859, 1860, 1861, 1862, 1863, 1864, and 1865 on lands owned by him in that county, and held under a title similar to that in these cases. The Supreme Court of the State decided (*Litchfield* v. *County of Hamilton*, 40 Iowa, 66) that the taxes for all the years were collectible, and to reverse a decree to that effect the case was brought here upon a writ of error. It was submitted on printed arguments when it was reached in the regular call of the docket. A few days before this submission was made an appeal in the suit of *Edwin C. Litchfield* v. *County of Webster*, brought in the Circuit Court of the United States for the district of Iowa, to enjoin the collection of taxes levied by the county of Webster, for the same years, on lands similarly situated in that county, was submitted under Rule 20, and the two cases were before us for consideration at the same time. We decided unanimously that the lands were not taxable for

the years 1859, 1860, and 1861, and the principal opinion was prepared in the case of Webster County, (101 U. S. 773,) which, being here on appeal from the Circuit Court, was open for consideration upon its merits, without any reference to the limitation of our authority for the review of the judgments of the courts of the States. There was no doubt of our jurisdiction in that case to decide as to the taxes of 1861, and in doing so we held that, as under the statute of Iowa government lands could not be taxed during the year they were entered or located, these lands were exempt for that year. The case of Hamilton County involved precisely the same questions in the state courts as did that of Webster County in the Circuit Court. The two cases were argued here substantially in the same way, and in that of Hamilton County our attention was not specially directed to any difference in the Federal question presented by the tax for 1861 from that involved in the taxes for 1859 and 1860. The ground of decision in the court below was the same for all the years, and, without noticing the distinction which is now made as to our right to decide in that case upon the validity of the tax of 1861, we allowed the judgment to follow that in the case of Webster County, the two cases being exactly the same on their merits. It now appears we were in error in taking jurisdiction and reversing the judgment in the Hamilton County case for the tax of 1861. The Supreme Court of the State has also decided in the case of *Goodnow* v. *Wells*, *ubi supra*, that we erred in the decision of the question involved in the tax of 1861 on its merits, because we held that lands acquired from the United States by the title which was then and now under consideration came within the statutory exemption from taxation in the State for one year after the United States ceased to be the owners, having been misled, as is supposed, by an incorrect statement of the law in *McGregor*, *&c.*, *Railroad Co.* v. *Brown*, 39 Iowa, 655, to the effect that "government lands are not taxable until a year after they are patented." We may remark also, that, in our opinion, the conclusion then reached by us received further support from the cases of the *Iowa Falls and Sioux City Railway* v. *Chero-*

kee County, 37 Iowa, 483; *Goodrich* v. *Beaman*, 37 Iowa, 563; and *Iowa Falls and Sioux City Railway* v. *Woodbury County*, 38 Iowa, 498. But whether we were right then on this question or not, it is unnecessary now to consider, as upon the present record we are clearly of opinion that the decision of the court below, to the effect that the lands were taxable for the year 1861, is not reviewable here. That question is one on which the decision of the highest court of the State is conclusive.

2. As to the estoppel by the decree in the case of the *Homestead Company* v. *Valley Railroad.*

That suit did not embrace the taxes for the years 1861, 1862, and 1863 paid by the Dubuque and Sioux City Railroad Company. The Homestead Company did not acquire title to the lands until November 12, 1863, and it only paid the taxes for 1864 and thereafter. The conveyance by the Railroad Company to the Homestead Company did not profess to transfer the claim of the Railroad Company against the holders of the river grant title for taxes paid or to be paid. The suit of the Homestead Company was for the land, or the taxes *it* had paid. There was no reference in the pleadings to taxes paid by the Railroad Company, and no claim was made for anything except the payments by the Homestead Company itself. The Homestead Company did not profess to sue as trustee for the Railroad Company. It is true that the Railroad Company, as warrantor of the title of the Homestead Company, aided in the prosecution of that suit, and that the decree may be conclusive evidence of a failure of title in a suit brought by the Homestead Company against the Railroad Company to recover damages for a breach of the covenants of warranty in the deed for the lands; but as the taxes paid by the Railroad Company were in no way involved in the suit, neither the Railroad Company nor the defendants in that suit were concluded as to them by anything contained in the decree. The decision may be referred to as a judicial precedent for holding that taxes paid under the circumstances in which these were paid could not be recovered by the party paying them from the true owners of the land, but it is in no sense a

judgment in a suit between the same parties upon the same cause of action as is here involved, and therefore a bar to the recovery in these cases. In our opinion the court below did not fail in its decision to give full faith and credit to that decree.

3. As to the effect of the judgment in *Wolcott* v. *Des Moines Company* upon the operation of the statute of limitations in these cases.

That was a suit between a purchaser of a single half section of the river lands above the Raccoon Fork against his vendor, the Des Moines Navigation and Railroad Company, to recover damages for a breach of the covenants of warranty in the deed of conveyance to him. There was no party to the suit except Wolcott and the Navigation Company. Wolcott claimed nothing under the railroad grant or under the Railroad Company. It is true that the ground of his action was the superior title of the Railroad Company as against that of the Navigation Company at the time of the conveyance of the latter company to himself, but he was neither suing for the Railroad Company nor representing it in the action, so far as anything appears in these records or in that. His suit was nothing more or less than to recover damages from the Navigation Company for a breach of covenants of warranty with himself, in which neither the Railroad Company nor any one claiming under it had any interest. The judgment in the action was conclusive as between him and the Navigation Company upon the cause of action involved, but as to no one else. It settled no title between the Navigation Company or its grantees and the Railroad Company or those claiming under that company. That decision is indeed referred to in the case of *Homestead Company* v. *Valley Railroad*, *ubi supra*, as "settling" "the question of title to the Des Moines River lands," but that was only in the way of judicial authority as a precedent, and not as an estoppel. The legal operation and effect of the judgment as an estoppel was confined to the title of the parties in that suit to the particular half section of land then in controversy. As to any other tract of the river lands and as to any other parties, it stood, in the language of Mr. Justice Miller in *Williams*

v. *Baker*, 17 Wall. 144, only as "an authoritative exposition" of the views of the court on a question which "was argued fully by parties deeply interested on both sides" and which "received attentive consideration," and was, therefore, "entitled to the same weight as other well-considered cases." The judgment can be referred to by the parties to this suit as a precedent, but not as an estoppel.

We have not overlooked the fact that a brief was filed at the hearing in this court on behalf of the Railroad Company to support the claim of Wolcott that the title of that company was the best. Such a proceeding did not make the Railroad Company a party to the suit, or bind it by the decree. Being interested in the question to be decided, the company was anxious to secure a judgment that could not be used as a precedent against its own claims in any litigation that might thereafter arise in respect to its own property. It is not an uncommon thing in this court to allow briefs to be presented by or on behalf of persons who are not parties to the suit, but who are interested in the questions to be decided, and it has never been supposed that the judgment in such a case would estop the intervenor in a suit of his own which presented the same questions. It could be used as a precedent, but not as an estoppel in the second suit.

We find no error in the decisions of the Supreme Court of Iowa upon any of the Federal questions involved in these cases, and each of the judgments is consequently

Affirmed.

CHAPMAN *v.* GOODNOW'S ADMINISTRATOR.

STRYKER *v.* SAME.

ERROR TO THE SUPREME COURT OF IOWA.

Argued November 1, 1887. — Decided December 5, 1887.

While the judgment of this court in *Wolcott* v. *Des Moines Company*, 5 Wall. 681, may be referred to by parties as a judicial precedent, it is not

Opinion of the Court.

an estoppel as against the defendant in error. *Stryker* v. *Goodnow*, *ante*, 527, affirmed to this point.

The Supreme Court of Iowa having given full effect to the case of *Homestead Company* v. *Valley Railroad*, 17 Wall. 153, as a bar to the recovery in this suit as it stood originally, but having held that a new cause of action had arisen out of acts of the plaintiffs in error, which were equivalent to an election by them to treat the payments of taxes made by the Homestead Company as payments by themselves, and which implied a new promise of reimbursement for the advancement made; and it appearing that that was the real ground for the decision of the Supreme Court of Iowa, and that it was not used to give color to a refusal to allow the bar of the decree in *Homestead Company* v. *Valley Railroad*, no Federal question on that point is raised by the record.

If a Federal question is fairly presented by the record, and its decision is necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Rev. Stat. § 709, as if it had been specifically referred to, and the right directly refused: but if a decision of such a question is rendered unnecessary by the view which the court properly takes of the rest of the case, within the scope of the pleadings, the judgment is not open to review here.

THESE were suits to recover taxes under circumstances in the main similar to those set forth in *Stryker* v. *Goodnow*, *ante*, 527. The cause was argued with *Stryker* v. *Goodnow*. The case is stated in the opinion of the court.

Mr. C. H. Gatch for plaintiff in error. *Mr. William Connor* was with him on the brief.

Mr. George Crane for defendant in error.

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

These are writs of error for the review of two judgments of the Supreme Court of Iowa — one against Richard B. Chapman, and the other against John Stryker — in suits brought by Edward K. Goodnow, assignee of the Iowa Homestead Company, in his lifetime, to recover money paid by the Homestead Company for taxes levied by the county of Webster on "Des Moines River lands" belonging to Chapman and Stryker, respectively, for the years 1864 to 1871, both inclusive. For a statement of the general facts on which the right of recovery

depends reference is made to the case of *Stryker* v. *Crane*, *ante*, 527. The Homestead Company assigned its claims against these owners after the decree in the suit of *Homestead Company* v. *Valley Railroad*, 17 Wall. 153, was rendered.

The suits were begun August 5, 1876, and in each case a demurrer was filed to the original petition January 19, 1877. On the 12th of February, 1879, the county of Webster appeared in each of the suits and filed a petition therein setting forth "that the taxes mentioned in said petition [that of Goodnow] were duly and legally assessed and levied by said county upon the lands therein mentioned, at the times, for the years and amounts, and in the manner and form alleged and set forth in said petition, and that the said taxes at the times of the said several assessments became and were and still are a valid and binding lien upon said lands in favor of said county;" that Chapman and Stryker were the owners in fee of the several tracts by them respectively claimed at the times of the levies, "and in duty bound to pay said taxes to said county;" that the said taxes had never been paid, and the "whole thereof is still due to said county from the said defendant." Each of these petitions concluded with a prayer for judgment against the defendant for the amount of the taxes, and the enforcement of a lien on the lands for the payment thereof.

On the 5th of April, 1879, Goodnow filed an amendment to his original petition in each of the cases, in which he alleged that when the Homestead Company paid the taxes to the county "it was agreed and understood that if the said county should receive or collect the said taxes of and from the said defendant, the said county would repay the taxes so collected to" the company; and "that said county would sue defendant in its own name for the taxes mentioned in said petition, and in case it should collect the same, would pay them to" the company. And, further, he alleged "that if said defendant refuses to pay said taxes to said county and claims that said taxes have been paid to said county through or by means of the plaintiff's assignor [the Homestead Company] having given or delivered the same to the county, then the defendant is bound to repay the same to plaintiff."

The defendant in each case answered the original and amended petition of Goodnow by denying every allegation therein; setting up the statute of limitations; and charging that the Homestead Company "paid said taxes to said county voluntarily and without the request, knowledge, or consent of the defendant, and with full knowledge of the facts and circumstances upon which the defendant's title to said lands was founded."

To the petition of the county the defendant in each case filed an answer, and, in addition to the defences set up to the petition of Goodnow, claimed that the county was not a party to the suit and not entitled to relief. He also further said "that all of said taxes mentioned in said petition were duly paid by the Iowa Homestead Company as soon as the same became due, and said defendant is no longer liable therefor."

Afterwards, on the 3d of June, 1881, each of the defendants filed in his own case an amended answer, setting up the decree in the case of *Homestead Company* v. *Valley Railroad*, as a bar to the action, and also insisting that the "question of title and ownership of the lands . . . was distinctly decided and determined" in the case of *Wolcott* v. *Des Moines Company*, 5 Wall. 681.

The Circuit Court of Webster County, in which the suit was originally begun, gave judgment for the defendants, but on appeal to the Supreme Court of the State that judgment was reversed on the grounds stated in an opinion, which is as follows:

"I. The defendant pleaded as one of its additional defences that the plaintiff's right of recovery is barred by a prior adjudication, to wit, an adjudication in the case of *The Iowa Homestead Company* v. *The Des Moines Navigation and Railroad Company, John Stryker, et al*, reported in 17 Wall. 153. To this plea the plaintiff replies, in substance, that if it should be conceded that the court made an adjudication in that case denying a right of recovery for the taxes in question in this case, yet this action is not barred, because a right of recovery has arisen since that time. The fact relied upon as giving such right of recovery is, that the defendant now claims, as he did not then, the benefit of the payments made by the Homestead

Company. After this action was instituted, a petition was filed in the case by Webster County, averring, among other things, that the taxes in question have never been paid by any one, and that the same are now due to the county from the defendant. To this petition the defendant answered, averring 'that all of said taxes mentioned in said petition were duly paid by the Iowa Homestead Company, . . . and said defendant is no longer liable therefor.' The question presented is as to whether, if the payments in the first instance were officious, as we may assume was held, and the defendant for that reason was not liable, the subsequent adoption of the payments for the purpose of escaping liability to the county should be regarded as an adoption of the payment as between the defendant and plaintiff.

"If the plaintiff's assignor had made the payments in the name of the defendant as his assumed agent, any act of the defendant indicating an intention to claim the benefit of the payments would constitute a ratification of the acts by which the payments were made. But the defendant contends that the case is different where a person pays another person's debt, not under a claim of action for such person, but under the mistaken supposition that the debt is due from himself. The defendant's position is that in such case there is no act of assumed agency to ratify. It must be conceded, we think, that in one sense this is so. The plaintiff's assignor did not hold himself out as the defendant's agent; nevertheless, when the defendant claims the benefit of the payments, he elects to treat the acts of payment as done for himself. Having elected to so treat the acts, he ought not to complain if the court treats them in the same way. Natural justice certainly requires that if the defendant has the benefit of payments as discharging his liability to the county, he should reimburse the plaintiff, whose assignor made the payments. If we were to take any other view, it appears to us that we should attach more importance to the form than the substance of things. We do not overlook the fact that, under ordinary circumstances, every tax-payer has the right, as between himself and third persons, to pay his own taxes in his own way, and to pay them to the county to

which they are due, and not be compelled to run after a self-substituted creditor and make payment to him. Where, therefore, such payment is made by a third person, the tax-payer has a right to ignore the payment if he chooses to do so. But if he chooses not to ignore, but to claim the benefit of it, we see no reason why we may not regard him as treating the act of payment as done for him; and, if we do so regard him, there is no difficulty in finding an implied promise to reimburse the payer or his assignee.

"We ought, perhaps, to say in this connection, that the doctrine has been announced that there can be no ratification of an act not done avowedly for the principal. Story on Agency, § 251; *Fellows* v. *Commissioners*, 36 Barb. 655. But the case before us is peculiar. The act done was such that it necessarily inured to the defendant's sole benefit. Besides, the circumstances under which the act was done should not be overlooked. The defendant neglected the payment of the taxes, which was a duty of public concern. He allowed the plaintiff's assignor, under an honest claim of title to the land, to discharge this duty for several years in succession. Now, while the plaintiff is not allowed, by reason of the prior adjudication, to set up these facts as alone sufficient to create a liability on the part of the defendant, they may be considered, we think, in connection with the fact that the defendant has since claimed the benefit of the payments as sufficient to render such claim of benefit a ratification, if it otherwise would not be." *Goodnow* v. *Stryker*, 61 Iowa, 261.

The cause was then remanded to the Circuit Court, where a judgment was rendered, in accordance with the opinion of the Supreme Court, against the defendant for the amount of the taxes paid, without interest, but on a second appeal to the Supreme Court this judgment was modified so as to make it include interest, and a new judgment was entered in that court accordingly. Upon that judgment the writ of error in the case of Stryker was sued out.

In the case of Chapman a judgment was also rendered by the Circuit Court in favor of the defendant, but on appeal to the Supreme Court that judgment was reversed, on the same

ground stated in the opinion in the case of Stryker, and a final judgment was entered in that court for the amount of the taxes paid and interest. *Goodnow* v. *Chapman*, 64 Iowa, 602. For the review of that judgment the writ of error was sued out in the case of Chapman.

In each of the cases the Supreme Court has certified that upon the hearing the defendant claimed immunity from the entire demand on account of the prior adjudication between him and the assignor of Goodnow in the case of *Homestead Company* v. *Valley Railroad*, which was denied, and also on account of the judgment in the case of *Wolcott* v. *Des Moines Company*, which was also denied.

These rulings are assigned for error here.

As to the effect of the judgment in *Wolcott* v. *Des Moines Company* on the rights of the parties to this suit, it is only necessary to refer to what was said on that subject in the other case of *Stryker* v. *Crane* [*Goodnow's Administrator*], which has just been decided. The cases are identical so far as this question is concerned, and there was no error in the ruling of the Supreme Court thereon.

As to the decree in the case of *Homestead Company* v. *Valley Railroad*, the court held in effect that it was a bar to a recovery on the cause of action as it stood originally and at the time of the decree, but that since then a new cause of action had arisen, because both Chapman and Stryker had adopted the payments made by the Homestead Company as payments made on their account, and from this the law implied a promise to repay what had been paid for their use. The theory of the court seems to have been that Chapman and Stryker, as owners of the land, were bound in law to the county for the payment of the taxes notwithstanding what had been done by the Homestead Company. When, therefore, the county sued them for the taxes and they set up the payment by the company as a defence, they made the acts of the company their own, and thus became obligated to repay what had been paid for them.

Whether this was the true legal effect of what was done is not a Federal question. All we have to consider is, whether

it was the real ground of decision, and not used to give color only to a refusal to allow the bar of the decree. It cannot be doubted that if Chapman and Stryker had, after the rendition of the decree, got from the Homestead Company permission to use its payments as a defence to the actions brought against them for the taxes, and in consideration thereof had promised to repay what had been advanced for that purpose, a new cause of action would have arisen, to which the decree would not have been a bar. That is in substance what the Supreme Court held was done. The county sued Chapman and Stryker for the taxes which had been levied on their lands, assuming that the payments made by the Homestead Company did not discharge them from their liability as the true owners. To this suit Goodnow, as the assignee of the Homestead Company, was a party, and in his pleadings he insisted that if they refused to pay the county because his assignor had already made the payment, then they would be bound to him for the amount advanced by the company for that purpose. Such being his claim on the record, Chapman and Stryker, each in his own suit, set up as a defence "that all of said taxes . . . were duly paid by said Iowa Homestead Company as soon as the same became due, and said defendant was no longer liable therefor." This the court held to be equivalent to an election by Chapman and Stryker to treat the payments by the company as payments by themselves, and to imply a promise of reimbursement for the advances made. Whether this conclusion was correct or not depends on the tax laws of the State and the principles of general law applicable to such facts, and not on the Constitution or laws or authority of the United States. What was done was not affected by the decree because it was done afterwards. It was in the opinion of the court a new promise, as the money of the Homestead Company was in effect used by the defendants themselves to meet their own liabilities. The fact that the company gave the money to the county for the taxes could not of itself be made a ground of action against the defendants, because the court in the other case, to which they and the company were parties, had decided otherwise, and there had been at the time no election by them

to treat this act of the company as done for them. It was only when this election was made that the liability arose, and as that was after the decree, the new liability was not affected by what had been adjudicated before. The court did not refuse to give faith and credit to the decree, but it acted upon a new cause of action with which the decree had no legal connection. That decree is a bar to the cause of action upon which it was based, but not to a different cause of action arising afterwards.

Neither can we consider whether the court below erred in allowing the county to come in as a party to the suit, and in giving judgment upon the new cause of action which arose after the original suit was begun. The question presented by the new pleadings was a real question in the case, as adjudged by the court, and the manner of getting it in is no more the subject of review here than the decision upon it afterwards.

We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused. But if a decision of such a question is rendered unnecessary by the view which the court properly takes of the rest of the case, within the scope of the pleadings, the judgment is not open to review here. *Chouteau* v. *Gibson*, 111 U. S. 200; *Adams Co.* v. *Burlington & Missouri Railroad*, 112 U. S. 123, 127. Such, in our opinion, were these cases, so far as the question arising out of the prior adjudication in *Homestead Co.* v. *Valley Railroad* is concerned. The Federal question involved in that decree lay behind the alleged new promise, and as the new promise was sustained and a judgment given against the defendants on that account, the effect of the decree did not necessarily enter into the determination of the cause.

Inasmuch, therefore, as there is no Federal question presented

by this branch of the cases, and there was no error in the decision of that involved in the other, the judgment of the Supreme Court of Iowa in each of the cases is

Affirmed.

LITCHFIELD *v.* GOODNOW'S ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Argued November 1, 1887. — Decided December 5, 1887.

Stryker v. *Goodnow, ante*, 527, applied as to the effect of *Wolcott* v. *Des Moines Co.*, 5 Wall. 681.

The plaintiff in error's intestate was not a party to *Homestead Company* v. *Valley Railroad*, nor in privity with those who were parties, and was not bound by the proceedings; and, as estoppels to be good must be mutual, the Homestead Company and its assignees were not bound.

This was a suit to recover taxes paid under circumstances which are set forth in *Stryker* v. *Goodnow*, *ante*, 527. The cause was argued with *Stryker* v. *Goodnow*. The case is stated in the opinion of the court.

Mr. C. H. Gatch for plaintiff in error. *Mr. William Connor* was with him on the brief.

Mr. George Crane for defendant in error.

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

This suit was brought by Edward K. Goodnow, assignee of the Iowa Homestead Company, in his lifetime, against Grace H. Litchfield, in her lifetime, to recover the amount of taxes for the years 1864 to 1871, both inclusive, paid by the Homestead Company on certain tracts of Des Moines River lands held and owned by her, by and through conveyances from the Des Moines Navigation and Railroad Company. For a general statement of the facts reference is made to *Stryker* v. *Crane*, *ante*, 527. The taxes were paid before the decree in *Homestead*

Company v. *Valley Railroad*, 17 Wall. 153, and the assignment was made to Goodnow afterwards. As defences to the action, the prior adjudication in that case was pleaded in bar, and also the statute of limitations based on the decision as to title in *Wolcott* v. *Des Moines Company*, 5 Wall. 681, the same as in *Stryker* v. *Crane*.

Both these defences were overruled by the Supreme Court of the State, and judgment was entered in that court for the amount of taxes paid and interest. *Goodnow* v. *Litchfield*, 63 Iowa, 275.

As to the Federal question arising on the statute of limitations, it is only necessary to refer to what was said on that subject in *Stryker* v. *Crane*, *ante*, 527. There was no error in the decision of the court below on that point.

The defence of prior adjudication is disposed of by the fact that Mrs. Litchfield was not a party to the suit in which the adjudication relied on was had. At the time of the commencement of the suit she was the owner of her lands, and they were described in the bill, but neither she nor any one who represented her title was named as a defendant. She interested herself in securing a favorable decision of the questions involved as far as they were applicable to her own interests, and paid part of the expenses; but there was nothing to bind her by the decision. If it had been adverse to her interest, no decree could have been entered against her personally either for the lands or the taxes. Her lands were entirely separate and distinct from those of the actual parties. A decree in favor of or against them and their title was in no legal sense a decree in favor of or against her. She was indirectly interested in the result, but not directly. As the questions affecting her own title and her own liability for taxes were similar to those involved in the suit, the decision could be used as a judicial precedent in a proceeding against her, but not as a judgment binding on her and conclusive as to her rights. Her rights were similar to, but not identical with, those of the persons who were actually parties to the litigation.

Greenleaf, in his Treatise on the Law of Evidence, Vol. I, § 523, states the rule applicable to this class of cases thus:

"Under the term *parties*, in this connection, the law includes all who are directly interested in the subject matter, and had a right to make defence, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as *strangers* to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term *privity* denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity." The correctness of this statement has been often affirmed by this court: *Lovejoy* v. *Murray*, 3 Wall. 1, 19; *Robbins* v. *Chicago City*, 4 Wall. 657, 673; and the principle has been recognized in many cases. Indeed, it is elementary. *Hale* v. *Finch*, 104 U. S. 261, 265; *Railroad Company* v. *National Bank*, 102 U. S. 14, 22; *Butterfield* v. *Smith*, 101 U. S. 570.

In the condition of parties to the record during the whole course of the litigation between the Homestead Company and those who were named as defendants, Mrs. Litchfield had no right to make a defence in her own name, neither could she control the proceedings, nor appeal from the decree. She could not in her own right adduce testimony or cross-examine witnesses. Neither was she identified in interest with any one who was a party. She owned her lands; the parties to the suit owned theirs; her rights were all separate and distinct from the rest, and there was no mutual or successive relationship between her and the other owners. She was neither a party to the suit, nor in privity with those who were parties;

Counsel for Parties.

consequently she was in law a stranger to the proceedings and in no way bound thereby. As she was not bound, the Homestead Company and its assigns were not. Estoppels to be good must be mutual. This was in effect the decision of the court below, and it was right.

It follows that there is no error in the record, and

The judgment is affirmed.

DES MOINES NAVIGATION AND RAILROAD COMPANY *v.* IOWA HOMESTEAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Argued November 1, 1887. — Decided December 5, 1887.

The Supreme Court of the State of Iowa, in deciding this cause, held, and so stated in its opinion, that the question of prior adjudication of the issue by this court in *Homestead Valley* v. *Railroad Company*, 17 Wall. 153, was not raised before it by counsel for defendant, and therefore was not in the case; and it decided the case without considering that point. On examining the opinion of that court, and the record and briefs, and the briefs in the court below in this case and in the case of *Litchfield* v. *Goodnow*, *ante*, 549, this court is of opinion that the point was raised and discussed in the Supreme Court of Iowa, and *holds* that the action of that court in respect of it was equivalent to a denial of the Federal right so set up.

If a cause is removed in a regular manner from a state court to a Circuit Court of the United States, on motion of one or more of several defendants who have a right to have it removed as to him or them, and the Circuit Court takes jurisdiction, and all parties defendant appear, and no objection to the jurisdiction is made, and the cause proceeds to final judgment, the judgment remains in force and of binding effect upon all the parties, until judicially vacated, although it appears on the face of the record that some of the defendants, who did not join in the petition for removal, were citizens of the same State with the plaintiff.

In equity. Decree for the plaintiff. The defendant appealed. The cause was argued with *Stryker* v. *Goodnow*, *ante*, 527. The case is stated in the opinion of the court.

Mr. C. H. Gatch for plaintiff in error. *Mr. William Connor* was with him on the brief.

Mr. George Crane for defendant in error.

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

This suit was brought by the Iowa Homestead Company against the Des Moines Navigation and Railroad Company to recover the same taxes for the years 1864 to 1871, both inclusive, which formed part of the subject matter of the litigation between the same parties in *Homestead Co.* v. *Valley Railroad*, 17 Wall. 153, referred to in *Stryker* v. *Crane*, *ante*, 527. The Railroad Company set up the decree in its favor in that suit as a bar to the present action, and to this the Homestead Company replied "that the decree or judgment referred to is null and void, for the reason that the courts of the United States had no jurisdiction of said suit, and no legal power or authority to render said decree or judgment."

Upon this part of the case the facts admitted were substantially the same as are set forth in *Stryker* v. *Crane*, *ante*, 527, with the addition of this stipulation made by the parties and filed in the Circuit Court:

"And it is further stipulated that the defendants, Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade, and John Stryker, each and every of whom are citizens of New York, and the Des Moines Navigation and Railroad Company, duly appeared in this court and filed their joint and several answers to complainant's bill, duly verified; that the said answers are not now found with the papers in this cause; that the said answers of said defendants were substantially in all respects like those of the defendants, William B. Welles and Albert Tracy, on file herein and duly verified by them, respectively, except such changes, variations, and alterations as were necessary to present the interests held by said defendants, respectively, in the land in this action."

Other defences were set up in the answer similar to those in *Stryker* v. *Crane*, *ante*, 527; *Chapman* v. *Crane*, *ante*, 540; and *Litchfield* v. *Crane*, *ante*, 549; but it is unnecessary to restate them here.

The case was taken to the Supreme Court of the State on appeal, and among the errors assigned there was this:

"The court erred in holding that plaintiff was not estopped from prosecuting this suit by the former adjudication in said former suit of the Iowa Homestead Company against The Des Moines Navigation and Railroad Company and others."

At the hearing in the Supreme Court a final decree was entered against the Navigation and Railroad Company for the full amount of taxes paid and the interest. The opinion of the court, so far as it related to the question of former adjudication, was in these words:

"The question of former adjudication, discussed in the fifth point of the foregoing opinion, is not discussed by counsel for defendant in this case in his printed brief, though it was pleaded as a defence. Counsel for plaintiff in this case filed a printed brief used in the former case, but upon the fifth point it is not at all applicable, for the reason that the facts involved in the pleas of former adjudication are not identical in each case. The two cases were discussed at the oral argument together, all the points involved in each case being considered, but we were left to the printed briefs and abstracts in order to make application of the arguments properly to the separate cases. Since the submission of the cases counsel for each party has been called upon to express his understanding of the points to be determined in the cases separately. Counsel for defendant claims that the question of prior adjudication, while not presented in his printed brief, was argued orally, and is, therefore, in this case; counsel for plaintiff claims that it is not. Certain is it that it is not made in the printed brief for defendant, and we are unable to say that it was made on the oral argument as applicable to this case. The counsel for defendant having failed to present this point in his brief, he cannot, according to the spirit of our rules, urge it in oral argument. In view of the want of agreement between counsel, we are required to hold that the question of prior adjudication cannot be determined in this case." *Iowa Homestead Co.* v. *Des Moines Navigation and Railroad Co.*, 63 Iowa, 285.

The "foregoing opinion" referred to was that in the case of the *Administrator of Mrs. Grace H. Litchfield* v. *Crane*,

ante, 549. The record in that case, taken in connection with that in this, shows that the answer setting up the former adjudication, the reply thereto and the assignment of errors on this point, were the same in both cases. They differed in their facts only in that Mrs. Litchfield was not actually a party to the former suit upon the face of the record, and the Navigation and Railroad Company was.

We cannot look upon the reason given by the court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling Federal question, fairly presented by the pleadings, proofs and assignment of errors, and necessarily involved in the determination of the case. That question stood in the very front of the litigation, and, if decided in favor of the Navigation and Railroad Company, ended the whole matter. To give a judgment the other way, without considering it, was simply to ignore one of the most important elements of the case as it stood in the record. There can be no escape from this conclusion.

It seems from the opinion, which, as part of the record, we must take notice of, that this case was argued in connection with that of the administrator of Mrs. Grace H. Litchfield. The defence of prior adjudication was made in both, though the facts in the case of Mrs. Litchfield were different from those in this. Mrs. Litchfield was not an actual party to the suit in which the prior adjudication was had, while the Navigation and Railroad Company was; but the question of the jurisdiction of the court for the determination of the rights of the parties was the same in both. In the oral argument, there being but one for the two cases, this point was raised and discussed, but in the printed briefs it was referred to only in that entitled in the suit of the administrator of Mrs. Litchfield. As it was *the* defence in this case, and, if sustained, made it unnecessary to consider anything else, we cannot decide that the court was justified in holding that it could not be determined. Such action was, in our opinion, equivalent to a decision against the Federal right which was actually set up and claimed, and thus our jurisdiction for the

review of the judgment on this question, as well as the others, is complete.

We proceed, then, to consider the only objection which has been made to this defence, and that is, the alleged want of jurisdiction in the courts of the United States — both this court and the Circuit Court — to entertain and finally dispose of the suit in which the prior adjudication was had. It must be conceded that the Homestead Company and the Navigation and Railroad Company were both Iowa corporations, and, therefore, in law, citizens of the same State; but the defendants, the Litchfields and Stryker, who caused the removal to be made, as well as Wolcott, Burrows, McAlpine, Chapman, the Tracys, and Wade, were citizens of the State of New York. After the removal was effected, all the above named defendants, as well as Welles and the Navigation and Railroad Company, appeared, filed answers, and defended the action. The Homestead Company took issue on all the answers, and actually contested the matters in dispute with the Navigation and Railroad Company, as well as the other defendants, in the Circuit Court, and in this court on appeal, without taking any objection to the jurisdiction.

The precise question we have now to determine is, whether the adjudication by this court, under such circumstances, of the matters then and now at issue between the Homestead Company and the Navigation and Railroad Company was absolutely void for want of jurisdiction. The point is not whether it was error in the Circuit Court to take jurisdiction of the suit, or of so much of it as related to the Navigation and Railroad Company, originally, but as to the binding effect of the decree of this court so long as it remains in force, and is not judicially annulled, vacated, or set aside.

It was decided in *Hancock* v. *Holbrook*, 119 U. S. 586, that if a suit, in which there was but one controversy, between a citizen of the State in which the suit was brought and a citizen of another State, was removed from a state court to a Circuit Court of the United States on the ground of "prejudice or local influence," under sub-section 3 of § 639 of the Revised Statutes, which is the reënactment, in the revision, of the act

of March 2, 1867, c. 196, 14 Stat. 558, in force when the proceedings now under consideration were had, it was not error in the Circuit Court to remand the suit if all the defendants were not citizens of different States from all the plaintiffs; but here the question is, whether, if all the parties were actually before the Circuit Court, the decree of this court on appeal is absolutely void, if it appears on the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same State with the plaintiff.

It was settled by this court at a very early day, that, although the judgments and decrees of the Circuit Courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different States from the defendants, yet that they were not nullities, and would bind the parties until reversed or otherwise set aside. In *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267, the Circuit Court had taken jurisdiction of a suit and rendered a decree. That decree was reversed by this court on appeal, and the cause remanded with directions to proceed in a particular way. When the case got back it was discovered that the cause was "not within the jurisdiction of the court," and the judges of the Circuit Court certified to this court that they were opposed in opinion on the question whether it could be dismissed for want of jurisdiction after this court had acted thereon. To that question the following answer was certified back: "It appearing that the merits of the cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the Circuit Court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings." That was in 1810. In 1825, *McCormick* v. *Sullivant*, 10 Wheat. 192, was decided by this court. There a decree in a former suit was pleaded in bar of the action. To this a replication was filed, alleging that the proceedings in the former suit were *coram non judice*, the record not showing that the complainants and defendants in that suit were citizens of different States; but this court held

on appeal that "the courts of the United States are courts of *limited*, but not of *inferior*, jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause on a writ of error or appeal; but until reversed they are conclusive between the parties and their privies." "But they are not nullities." There has never been any departure from this rule.

It is said, however, that these decisions apply only to cases where the record simply fails to show jurisdiction. Here it is claimed that the record shows there could be no jurisdiction, because it appears affirmatively that the Navigation and Railroad Company, one of the defendants, was a citizen of the same State with the plaintiff. But the record shows, with equal distinctness, that all the parties were actually before the court, and made no objection to its jurisdiction. The act of 1867, under which the removal was had, provided that when a suit was pending in a 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, . . . such citizen of another State, . . . if he will make and file an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may . . . file a petition in such state court for the removal of the suit" into the Circuit Court of the United States, and, when all things have been done that the act requires, "it shall be . . . the duty of the state court to . . . proceed no further with the suit," and, after the record is entered in the Circuit Court, "the suit shall then proceed in the same manner as if it had been brought there by original process."

In the suit now under consideration there was a separate and distinct controversy between the plaintiff, a citizen of Iowa, and each of the citizens of New York, who were defendants. Each controversy related to the several tracts of land claimed by each defendant individually, and not as joint owner with the other defendants. Three of the citizens of New York caused to be made and filed the necessary affidavit and petition for removal, and thereupon, by common consent

apparently, the suit as an entirety was transferred to the Circuit Court for final adjudication as to all the parties. The plaintiff, as well as the defendants, appeared in the Circuit Court without objection, and that court proceeded as if its authority in the matter was complete. Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal. As the Circuit Court entertained the suit, and this court, on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally on its merits, certainly our decree cannot, in the light of prior adjudications on the same general question, be deemed a nullity. It was, at the time of the trial in the present case in the court below, a valid and subsisting prior adjudication of the matters in controversy, binding on these parties, and a bar to this action. In refusing so to decide, the court failed to give full faith and credit to the decree of this court under which the Navigation and Railroad Company claimed an immunity from all liability to the Homestead Company on account of the taxes sued for, and this was error.

For this reason, the judgment is reversed, and the cause is remanded for further proceedings, not inconsistent with this opinion.

PLUMB *v.* GOODNOW'S ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Argued November 1, 1887. — Decided December 5, 1887.

This case is reversed because the state court failed to give due faith and credit to the decree of this court in *Homestead Company* v. *Valley Railroad*, 17 Wall. 153.

THIS was an action to recover the amount of taxes paid on real estate in Iowa under circumstances similar in the main to those described in *Stryker* v. *Goodnow*, *ante*, 527. This cause was argued with that cause. The case is stated in the opinion of the court.

Mr. C. H. Gatch for plaintiff in error. *Mr. William Connor* was with him on the brief.

Mr. George Crane for defendant in error.

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

This is another suit brought by Edward K. Goodnow, assignee of the Iowa Homestead Company, to recover taxes paid on "Des Moines River Lands" for the years 1864 to 1871, both inclusive. For a general statement of the facts reference is made to *Stryker* v. *Goodnow*, *ante*, 527. Plumb, the plaintiff in error, was defendant below, and set up the prior adjudication in the suit of *Homestead Company* v. *Valley Railroad*, 17 Wall. 153, as a bar to the action. This defence was overruled, and a judgment given against him on the ground that he was not a party to that suit. *Goodnow* v. *Plumbe*, 64 Iowa, 672. The judgment was not only against Plumb personally, but it was made a special lien on the lands, which were the subject of taxation, because he was the actual owner at the time of the levy. The case was treated in all material respects the same as that of *Litchfield* v. *Goodnow*, *ante*, 549. In this there was error, in our opinion.

Opinion of the Court.

Edward Wade was a party to the suit as the apparent owner of the lands now in question, and which were properly described in the bill and included in the litigation. The record in this case shows that the lands were conveyed by the Navigation and Railroad Company to Plumb in 1859, and he, in 1861, conveyed them to Wade in trust as security for a debt he owed a bank. This deed was duly recorded in the proper recording office. In 1865 the lands were sold by Wade under his trust and conveyed to Edward Wesley, for the sole use and benefit of Plumb. This deed was not put on record before the suit of the Homestead Company was begun. As soon as Plumb heard of the suit he employed counsel, and had an answer filed in the name of Wade, setting up a defence to the claim of the company, and asserting that the superior title was in those who held under the river grant. He paid his proportion of the expenses of the litigation, and controlled the defence, so far as Wade was concerned. His interests in the suit were properly represented by Wade, whom he allowed to appear on the records of the county as the real owner of the lands. If there had been a decree against Wade for the taxes, and a lien therefor established on the lands, he would have been bound, and could not have resisted the enforcement of the lien. So, too, if a personal decree had been rendered against Wade for the money, it would have been conclusive in an action by Wade to recover from him money paid for his use in satisfaction of the decree. He was bound, because he was represented in the suit by Wade, under whom he claimed. This case is the converse of that of *Litchfield* v. *Goodnow*, *ante*, 549. There Mrs. Litchfield was not represented in the suit by any one who was a party, and, therefore, she could not claim the benefit of the decree. Here Plumb was represented by Wade, and he stands, consequently, as if he had been himself a party by name.

There were other questions in the case that might have been considered by the court below, but as they were not, and the decision was put entirely on the ground that Plumb was not a party to the decree which was pleaded in bar, we need not pass upon them here.

Citations for Appellants.

Because, therefore, the court failed to give due faith and credit to the decree of the court which was pleaded in bar,

We reverse the judgment, and remand the cause for further proceedings not inconsistent with this opinion.

LACOMBE *v.* FORSTALL'S SONS.

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

Argued November 16, 17, 1887. — Decided December 5, 1887.

The respondents, holding a quantity of securities hypothecated as collateral for an indebtedness due them from an insolvent bank, sold them by public auction, in the manner stated in the opinion of the court, for less than the debt and proved the balance of the debt. When the judgment declaring a dividend was entered, it was stated in it, both parties consenting, that all the rights of both touching damages resulting from the sale of the bonds were expressly reserved. *Held*, that this could not be construed into an admission of the liability of the respondents, or that a just cause of action existed against them.

On the facts established the court *holds:* (1) That the complainants, in endorsing the bonds which are the subject of controversy as payable to bearer after the sale which is objected to, and in delivering them in that condition to the respondents, with the knowledge that they had been or were to be sold again by them, and for the purpose of enabling the respondents to transfer the bonds with a good title, must be considered to have waived any right to sue on the first sale; (2) that, conceding the first sale to have been invalid, it was nevertheless the respondents' duty to sell the bonds at as early a time as possible, and to place the proceeds in the hands of their principals in payment of the debt for which the bonds were pledged, and that they had done this with the consent and aid of the complainants; and (3) that, on the complainants' theory of the relief to which they were entitled, their remedy was at law, and not in equity.

Bill in Equity. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion of the court.

Mr. W. S. Parkerson and *Mr. Crammond Kennedy* for appellants cited: *Louisiana Savings Bank* v. *Bussey*, 27 La.

Ann. 472; *Middlesex Bank* v. *Minot*, 4 Met. 325; *Bryan* v. *Baldwin*, 52 N. Y. 232; *Bryson* v. *Rayner*, 25 Maryland, 424; *S. C.* 90 Am. Dec. 69; *Michoud* v. *Girod*, 4 How. 503; *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720; *Stearns* v. *Marsh*, 4 Denio, 227; *S. C.* 47 Am. Dec. 248; citing *Cortelyou* v. *Lansing*, 2 Caines' Cas. 200; *McLean* v. *Walker*, 10 Johns. 471; *Baker* v. *Drake*, 53 N. Y. 211, 220; *Lallande* v. *Ball*, 20 La. Ann. 193; *Henshaw* v. *Bissell*, 18 Wall. 255; *Brant* v. *Virginia Coal and Iron Co.*, 93 U. S. 326; *Railroad Co.* v. *Dubois*, 12 Wall. 47; *Wilcox* v. *Howell*, 44 N. Y. 398; *Woodgate* v. *Fleet*, 44 N. Y. 1.

Mr. Joseph H. Choate for appellees cited: *Jacquet* v. *His Creditors*, 38 La. Ann. 863; *Milliken* v. *Dehon*, 27 N. Y. 364; *Robinson* v. *Hurley*, 11 Iowa, 410; *S. C.* 79 Am. Dec. 497; *Louisiana Savings Bank* v. *Bussey*, 27 La. Ann. 472; *Baker* v. *Drake*, 53 N. Y. 211; *Suydam* v. *Jenkins*, 3 Sandford Sup. Ct. N. Y. 614; *Shepherd* v. *Hampton*, 3 Wheat. 200; *Ormsby* v. *Copper Mining Co.*, 56 N. Y. 623; *Prince* v. *Connor*, 69 N. Y. 608; *Colt* v. *Owens*, 90 N. Y. 368; *Badillo* v. *Tio*, 7 La. Ann. 487; *Waterhouse* v. *Bourke*, 14 La. Ann. 358; *Chamberlain* v. *Worrell*, 38 La. Ann. 347.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court of the United States for the Eastern District of Louisiana dismissing the bill of the complainants, who are appellants here.

The appellants are commissioners of the Mechanics' and Traders' Bank, a corporation organized under the laws of the State of Louisiana, which being in liquidation, they were appointed as such by one of the state courts of New Orleans. Before the failure of the bank, which was declared to be insolvent on the 19th day of March, 1879, there had been placed by it in the hands of Edmund J. Forstall's Sons, as agents of Baring Bros. & Co., a very considerable amount of public securities, bonds of the city of New Orleans, and coupons, under an agreement that they should hold them as security for the indebtedness of the bank to Baring Bros. & Co., an English

banking house. It is said that these securities, at the time the bill was filed, were of the value of $336,400.

It is alleged in the bill that shortly after the bank was declared to be insolvent, to wit, on or about the 22d day of May, 1879, the said E. J. Forstall's Sons fraudulently pretended to sell said bonds and thereby attempted to deprive the complainants of a large portion of the assets of the bank, which was a great wrong and detriment to the creditors and depositors. The fraud alleged in regard to this pretended sale was, that, offering the bonds without any advertisement, at a private sale, and without notice to complainants, the defendants employed one firm of brokers to sell the securities and instructed another to buy them in on account of said Forstall's Sons, as agents of Baring Bros. & Co., and that they were not sold according to the well-known usage in the city of New Orleans in such cases, nor according to the terms of the contract of pledge. They insist that this sale was made contrary to law and equity, and is therefore void as against the bank and its creditors; they protested against said sale; and that thereafter, to wit, about the 3d of March, 1880, their right to sue for said bonds and any damages arising from said illegal sale was expressly reserved in an agreement and settlement with said Forstall's Sons, as such agents, as well as by judgment rendered by the Fifth District Court, in a suit entitled *State ex rel. Wogan* v. *Mechanics' and Traders' Bank.* They further say that the bonds, which were sold for a very small amount, less than fifty per cent of their face value, are now worth in the market fully such face value, if not more.

The bill requires an answer from the defendants under oath, and appends six specific interrogatories to be answered. The relief prayed is that the pretended sale of the bonds may be decreed to be null and void, and the complainants to be their owners, and that the defendants, Edmund J. Forstall's Sons, be ordered to return them to complainants; and that in default thereof they be decreed to pay their full value of $336,400, subject to the claim of Baring Bros. & Co. against the bank of about $120,000, and for such other and further relief as the nature of the case may require.

Opinion of the Court.

The answer to this bill sets out a copy of the agreement under which Forstall's Sons held the securities, as follows:

"NEW ORLEANS, 11th March, 1876.

"Whereas Messrs. Baring Bros. & Co., of London, have continued in favor of the Mechanics' and Traders' Bank of New Orleans a credit of forty thousand pounds sterling, in accordance with the terms of the letter of Messrs. Baring Bros. & Co., dated 24th May, 1873, and addressed to the said bank, and confirmed by their cable of Oct. 27th, 1873, to Edm. J. Forstall & Sons: Now, in order to secure the full and punctual payment of such amount as may be or become due on account of said credit, the Mechanics' and Traders' Bank does hereby pledge to Messrs. Baring Bros. & Co., and place in the hands of Edm. J Forstall's Sons, as their representatives, the property described on the list annexed to the present.

"And it is hereby agreed that in the event of the non-payment of the amount due as above stated, Edm. J. Forstall's Sons are hereby authorized, as agents of Messrs. Baring Bros. & Co. and of the bank, to cause said pledged property to be disposed of for cash, at public or private sale, at the option of said Edm. J. Forstall's Sons, and the proceeds of said sale shall be applied to the payment of the amount due as aforesaid, with interest accrued thereon, and all commissions, costs, and charges attending said sale, the obligation of the bank for any balance that may be left uncovered by the proceeds of said sale remaining in full force.

"H. GALLY, President.
"MOSES HARRIS, Cashier.
"EDM. J. FORSTALL'S SONS, Agents."

The defendants deny any fraud in the sale of the securities, but admit that, finding it necessary on the failure of the bank to sell the bonds held under the foregoing agreement, they put them into the hands of a broker to be sold on the market in the usual way, and instructed another broker to see that they were not sacrificed, authorizing him to say that they would pay one-eighth of one per cent more for them to the purchaser than they would sell for. They claim that in this

way the securities were returned to them, and that this was done without any fraudulent purpose, but to secure the highest market price for the bonds at the sale. They further deny that they ever made any agreement by which they recognized the right of complainants in the bonds after this sale. They admit that in one or two settlements made in the Fifth District Court, in the course of the liquidation of the bank, certain reservations were made in regard to the rights of the commissioners to assert further claims on those bonds by litigation; but that they never admitted the existence of any right of recovery against these defendants. They say, however, that whatever right complainants may have had to call these defendants to account for any value in the bonds beyond that for which they were sold, was abandoned and expressly given up by the act of the complainants in endorsing the bonds under an order, obtained on the application of said commissioners, from the said Fifth District Court of the Parish of Orleans, under whose jurisdiction the bank was being liquidated; and that thereafter, on or about the 20th day of May, 1880, the complainants did endorse all said bonds to bearer under the certification and seal of office of A. Abat, a notary public, for the purpose of giving authenticity to such action. And complainants did then deliver said bonds so endorsed by them to Forstall's Sons, to be by them sold and disposed of at their free will and pleasure, without any further notice to complainants or accountability or responsibility of Baring Bros. & Co.

They further say that the said bonds were duly and regularly sold and disposed of to strangers by said Edmund J. Forstall's Sons, in good faith and in accordance with the usual and customary course of such business in New Orleans, at the dates and for the prices stated in Exhibit No. 3, annexed thereto, and that such prices were the full and fair values of said bonds at the time of sale, and the utmost and best prices that could be had or obtained for the same. Accompanying this is a schedule of the sales, with the dates, and the prices which the bonds brought. This amount was considerably less than the debt due by the bank to Baring Bros. & Co.

Opinion of the Court.

There is very little contradiction in regard to the facts of the case, as shown by the testimony and the pleadings. As to the question of intentional fraud in the first sale of the bonds, it is repelled by the testimony of the members of the firm of Forstall's Sons, and yet the transaction is one which it might be difficult to sustain in a court of equity. We do not feel, however, called upon, in view of other facts in the case, to decide this question. Nor do we think it necessary to pass upon the effect of what is called in the bill of complaint the right reserved to the complainants to sue the defendants on account of that transaction.

In the course of the administration of the affairs of the bank in the Fifth District Court of Orleans, it became necessary to declare dividends, and Baring Bros. & Co. asserted a claim to a share of such dividends, on account of the difference between the amount of their debt and the amount for which the securities had been sold. This difference was about forty-nine thousand dollars. In submitting to the payment of these dividends the defendants and the complainants agreed to a judgment by the Fifth District Court, which contained the following clause:

"It is further ordered, adjudged, and decreed that all the rights of both the opponents and the bank in liquidation touching the value of 180 missing coupons, and any damages resulting from the sale of the bonds of the bank in pledge by said opponents, are expressly reserved."

It is asserted by defendants that by subsequent settlements and proceedings in that court this reservation was abandoned, and that a judgment of the court on that subject is a bar to the present suit. For a reason, presently to be seen, we do not think it necessary to decide this question either. Whatever the reservation of a right to sue may mean, it cannot be construed into an admission of a liability of the defendants, or that a just cause of action existed, and it may be conceded that up to the time of the endorsement of these bonds to bearer, on the 20th of May, 1880, of which there is no denial, they were still in the possession of Forstall's Sons, under such circumstances that if the amount of the debt to Baring Bros.

& Co. had been tendered to them, and a demand made of the bonds, the plaintiffs would have been entitled to have them delivered up. No such tender was made. No such demand was made. The bonds at that time were but little, if any, more valuable than they were at the time of the first sale by Forstall's Sons.

We are of opinion that the action of the present complainants, in endorsing these bonds as payable to bearer, and delivering them in that condition to Forstall's Sons, with the knowledge that they had been or were to be sold again by that firm, and for the purpose of enabling them to transfer them with a good title, must be considered a waiver of any right to sue on account of the first sale. This endorsement, and the subsequent sale by Forstall's Sons, were in fact a waiver on both sides of the previous sale, and of any rights accruing under it, as well as a consent by both parties to the second sale.

The sales appear to have been made at different times and to different persons, each of whom became therefore an innocent purchaser for value of the bonds which are the subject of controversy. No attempt is made to impeach the fairness of these sales. It is not even charged that the prices obtained were less than the market value of the bonds sold. If the right to sell these bonds for the debt due to Baring Bros. & Co. at that time be conceded, as we think it must be, then no just complaint can be made of the sales or of the proceedings attending them. A full report of those sales, with the amounts received, and a statement of the account as thus adjusted, is set out by the answer as an exhibit.

If the complainants had chosen to stand upon their rights, or the rights of the bank, growing out of the fraud in the first sale, it may be well to consider what course they should have pursued. Treating the first sale as a fraud they might have tendered the amount due on the bonds and brought an action of replevin or sequestration. But there were two reasons why they could not do this. First, they did not have the money to tender to Forstall's Sons for the debt to Baring Bros. & Co., and second, the bonds were not worth any more in the market

than they had been sold for by Forstall's Sons, and the amount credited on the debt to Baring Bros. & Co. They might also have brought an action in the nature of tort for conversion, in which case, if they had succeeded, the value of the bonds would have been the measure of their recovery, after deducting the amount due to Baring Bros. & Co.

It is obvious, as the testimony clearly shows, that the bonds were worth but little more in a fair market at the time this endorsement was made than when they were first sold by Forstall's Sons, and that there was no right of action at law by which any sum could have been recovered worth the litigation. It is, therefore, easy to conceive that when these commissioners of the bank in liquidation asked of the court, in which that liquidation was pending, for power to endorse these bonds and deliver them to Forstall's Sons for sale, that they were doing the wisest thing that could be done at that time for the creditors of the bank, for by such sale the bank would get the benefit of all that the pledged securities were worth then in the market, and by any action at law which they could bring they could recover no more.

The complainants in this case seek to avoid all considerations of this kind by bringing a bill in equity. And, ignoring all the transactions that have taken place about the disposition of the bonds, they ask that the defendants shall be decreed to deliver up these bonds to them, and if they fail to comply with that order that they shall be held liable for the present market value, which has increased during the continuance of this controversy, and since their last sale by Forstall's Sons, to the sum of $336,400, being the par value of the various bonds and coupons.

It is clear that complainants, when they brought this action, knew very well that they could not have the relief asked for in the first part of their claim, because by their own endorsement of the bonds they had been transferred under valid sales to numerous persons, who either held them as innocent purchasers for value or had parted with them to others who held them in the same character. Their only efficient prayer of relief, therefore, was for a decree against the defendants for

the value of the bonds, which they now insist must be estimated as of the time of the decree.

The first objection to this relief is, that it is simply what they could recover, if they could recover at all, in an action at law. It is the damages which, on their theory, are due for an unlawful conversion of the bonds. It is so spoken of by counsel in the argument, and the authorities referred to as furnishing the measure of damages are all in cases of actions at law for what is equivalent to a conversion of property held for another's use. We see no reason why a court of equity should be resorted to for this remedy; nor is there anything in the nature of the transaction, since no actual fraud on the part of Forstall's Sons is proved, why an action at law should not have been the appropriate one to recover these damages. The case is by no means a complex or difficult one. The facts are few and easily proved. The transactions are open and patent to everybody, and an action at law would afford complete and ample remedy for the wrong complained of.

But if we suppose that the nature of the case is one of which a court of equity has jurisdiction, as equity is administered in the Circuit Courts of the United States, then other considerations seem to forbid the relief prayed for, or any equitable relief whatever.

The first of these considerations is, that the complainants, as representing the bank and its creditors, have not only never made any tender for the purpose of redeeming these bonds, but have received their full market value as a credit on the debt to Baring Bros. & Co., to the payment of which they were devoted, as well as permitted the transaction by which these bonds were sold, and the proceeds so appropriated, to stand from May, 1880, when the sale was made, until May, 1882, when the present suit was brought, without any further effort to reclaim the bonds, and without any further protest against that sale, and without payment of any dividend on the sum for which they sold. It is obvious that during the greater part of this time, the value of these bonds was rising in the market, and the persons who had purchased them at open sale for a fair consideration were receiving the benefit of this

increase in price; but *they* were not responsible in any way to the complainants who had endorsed those bonds and thus enabled them to purchase them.

The proposition now made by complainants, that, after waiting during all this time, and seeing the bonds rise in value, they could elect to bring suit in equity when their price had risen to par, and they were worth, with the accumulated interest and coupons, nearly three times what they were sold and accounted for, is one which does not commend itself to a court of equity. It may be true that it was the misfortune of the bank that it had no money during this time to tender for the redemption of these bonds, but it is equally true that if they had made such tender, they well knew that they could not get them, because they had passed from the possession of the present defendants.

Nothing hindered them from bringing their action at law at any time. To say that they could delay for any length of time, within the period of prescription, and bring this suit in equity when the securities bore the highest price in the market, would be very unjust, even if they had given no consent and taken no part in the sale of the bonds. But when we consider, in addition, that the sale could not have been made without their consent, that they themselves procured an order of the court authorizing them to consent, and actually placed upon them the endorsement without which they could not have been sold at all, it is idle to say that they were not bound by that sale, and that now they retain a right to go upon the trustees of this pledge to recover of them the increase in the value of the securities between that time and the present.

This attempt to play fast and loose with a supposed right of action, against parties who were mere agents or trustees, and who had no interest in the cause, while through a series of years the value of the matter in contest went up and down in the scale of public market prices, does not commend itself to the conscience of any one. The truth is, that, conceding the first sale to have been simply void and ineffective, the bonds remaining in the hands of Forstall's Sons, it became

their duty to sell those bonds at as early a time as possible, and place the proceeds in the hands of Baring Bros. & Co., in payment of the obligation of the bank to them. That this has been done faithfully, and with the consent and aid of the complainants, is a sufficient answer to all that is alleged in the bill.

The decree of the Circuit Court dismissing the bill is, therefore,

Affirmed.

TEAL *v.* BILBY.

SAME *v.* SAME.

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

Argued November 4, 7, 1887. — Decided December 5, 1887.

The court below acted properly in ordering the consolidation and trial together of an action of replevin and an action in contract, the parties being the same in both, their rights depending upon the same contract, and the testimony in each being pertinent in the other.

It is competent for parties who have contracted in writing with reference to personal property to make a subsequent verbal agreement as a substitute for a part of the written contract.

When testimony is permitted to go to the jury without any objection, tending to show that changes had been made orally in a written contract between the parties, which were substituted by them in the place of the written contract, it is too late to contend that the jury cannot find, in case it is so proved, that the rights of the parties, as defined in the written contract, have been varied by the verbal agreement.

The burden of proof to establish it is on the party who sets up an oral change in a written agreement; and in determining it the reasons and motives for the alleged change may be shown.

In an agreement to keep, feed, and care for a quantity of cattle, it was agreed that the cattle should be of a certain average, of which fact A was to be the judge. *Held*, that A's action in this respect was not conclusive on the defendant if it was shown that he had been deceived by the plaintiff in not putting him in full possession of knowledge possessed by him, and necessary for the proper discharge of A's duty.

In several other respects, referred to by the court in detail, it is found that there was no error in the charge of the court below.

Opinion of the Court.

THE plaintiff below sued out these writs of error. The case is stated in the opinion of the court.

Mr. Attorney General for plaintiffs in error. *Mr. James S. Botsford* was with him on the brief.

Mr. James Hagerman for defendant in error. *Mr. William Warner* and *Mr. O. H. Dean* were with him on the brief.

MR. JUSTICE MILLER delivered the opinion of the court.

These are separate actions brought by the same plaintiffs against the same defendant in the Circuit Court of the United States for the Western District of Missouri.

The first was an action of replevin, under which the plaintiffs got possession of 1232 head of cattle, and the second was an action to recover damages for a failure on the part of defendant to fulfil a contract of agistment with regard to the same cattle. As the rights of the parties depended upon the same contract, and as the testimony in each case was pertinent in the other, the court very properly ordered their consolidation and trial together before the same jury. The testimony submitted to the jury on both sides of the controversy is embodied in a single bill of exceptions under the introductory phrase that each party offered testimony tending to prove such and such facts. This bill of exceptions is very voluminous, consisting of a great variety of evidence running through twenty-eight pages of printed matter, and to none of it does there appear to have been any objection offered by either party. The questions presented in the record are exclusively upon the charge of the judge to the jury, on exceptions taken by the plaintiffs below, who are also plaintiffs here, and to the refusal of the court to grant such instructions as the plaintiffs' counsel prayed for.

A verdict was rendered for the defendant, holding that he was entitled to the return of the property replevied from him, or to the sum of $23,835.12, which was found by the jury to be the value of his interest in the property. In regard to the other suit the verdict of the jury was simply for the defendant.

Judgments were rendered in accordance with these verdicts, to which the present writs of error are prosecuted.

It seems from the evidence that the plaintiffs, under the partnership style of J. Teal & Company, were owners of about 3000 head of cattle, which they had driven across the plains from Oregon to a shipping point on the Union Pacific Railroad, called Rock Creek Station, in Wyoming Territory. These cattle were shipped from this point to Council Bluffs, in the State of Iowa, between the 14th day of October and the 10th day of November, 1880. On the 3d day of November of that year Teal & Company entered into a written contract with John S. Bilby, of Nodaway County, Missouri, by which Bilby agreed to keep, feed, and care for 1500 of these cattle until December 1, 1881. By this instrument he agreed that he would so feed and care for them that they would increase in weight 450 pounds each, on an average, for which the plaintiffs were to pay him, on their delivery to them, at the rate of five cents per pound for such increase.

It also appears that before the terms of this agreement were decided upon one lot of about 200 cattle had arrived at Council Bluffs, and had been seen by Bilby. It was a part of the agreement that the remainder, as they arrived, should be average lots with those that Bilby had seen, of which fact Mr. Bass, of the firm of Rosenbaum, Bass & Co., who resided at Council Bluffs, was to be the judge. The expense of transporting the cattle to Dawsonville, Missouri, where Mr. Bilby resided, was to be paid by plaintiffs; but if Mr. Bilby should pay any of that expense, he was to be repaid with ten per cent interest upon his money on final settlement.

There is also evidence to show that Mr. Bilby was a man of means, owning extensive lands in the neighborhood of Dawsonville, and accustomed to the business of feeding cattle; and the agreement was that the cattle should be weighed at Dawsonville, or the nearest scales thereto, upon their arrival, under circumstances minutely provided for, and that Bilby contracted "to take the cattle and winter them well on hay, straw and stalk fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after

which date, on each and every day, they shall be fed all the corn they will eat until delivered to J. Teal & Company;" and that the cattle were to be re-delivered to the plaintiff between the 15th day of October and the 1st day of December, 1881, by giving ten days' notice. Bilby was also to be responsible for all cattle lost, strayed, or stolen, and for any dying through his neglect or carelessness; but if any died through causes which were unavoidable, the loss of such cattle was to be borne by Teal & Company, and the loss of the feed by Bilby.

Another provision to which some importance is attached is in the following language: "If any steers die John S. Bilby shall preserve the hides as evidence of death, and the ears if there are any ear-marks."

It is agreed that 268 of these cattle were not recovered by plaintiffs under the writ of replevin, nor were they tendered by Bilby under the tender which he sets up in his answer; nor did the weight of the cattle at the time Bilby was ready to deliver them, or offered to deliver them, or at the time they were replevied, come up to that which was required to make the increase of 450 pounds each on an average. It is on the ground of this failure to bring the cattle up to the contract weight, alleging that it was the fault of Bilby in not giving sufficient care and attention to them, as well as want of proper feed according to the contract, by reason of which a part of the 268 died and were lost, that the plaintiffs assume that they have a right to recover possession of the property without making any compensation to Bilby for his services.

A large amount of testimony was submitted to the jury on both sides with regard to this question of proper feeding, care, and attention, without objection apparently by either party, as well as instructions asked of the court to the jury upon these subjects, and the consequences of the supposed failure on the part of Bilby to comply with his contract. The exceptions taken to the general charge of the judge are also numerous, and many of them too unimportant to receive special notice at our hands.

A principal question, and the most important one in the

case, arises out of the fact that Bilby gave testimony of a subsequent oral agreement changing very materially the terms of the written contract. The bill of exceptions which relates to the evidence introduced on this subject reads as follows:

"The defendant introduced evidence tending to show that the appearance of the cattle when they were delivered to him by the plaintiffs would not disclose the treatment they had received previously, and that it required time to develop the evil effects of such treatment; that although the cattle might appear to be very thin and weak, yet it would not be apparent that they were diseased; on the contrary, experienced cattle men might well suppose that they would, upon the treatment provided for in the contract, soon recover their flesh and strength.

"He also introduced testimony tending to show, not only the death of two hundred and sixty eight of the cattle as aforesaid, but that as to many of the others that survived the winter of 1880 and 1881, although they were fed upon corn, all they could eat during the winter, they always presented a scabby appearance and did not thrive from their food, and that when the spring came they were placed upon grass. They did not shed their hair, but were, in the language of a number of the witnesses, 'stuck cattle.'

"And that upon an examination of the cattle, it was considered by said Coleman and defendant that the cattle could not be wintered on hay, straw, and stalk fields, and it was a few days thereafter finally agreed upon between Coleman and defendant that defendant should let the cattle into corn, and whatever time they went into corn that winter should be deducted off of the corn feed next year at the end of the next grain feeding, and that defendant should also be released from the stipulation of the written contract requiring him to increase the average weight of the cattle four hundred and fifty pounds per head."

While this testimony does not seem to have been objected to at the time it was offered and permitted to go to the jury, the counsel of plaintiffs in error, in several prayers for instructions to the jury, and in objections made to what the court said

to the jury, set forth the proposition, that this being an attempt to substitute a verbal contract, or change of contract, for a written one, it must be made clear that, so far as it changed the obligation of Bilby, it was made upon a good consideration; and they in various ways object to the rights of the parties being governed by this supposed change in the contract. It is an answer to a very large amount of what is said on this subject that the testimony in regard to it was permitted to go to the jury, as given by Bilby on the stand. Coleman, one of the plaintiffs, also testified in regard to this, and denied that the agreement was as stated by Bilby; and a third witness was introduced on this subject, who was present at the conversations in which the change in the agreement is said to have been made. The whole testimony upon this subject was, therefore, before the jury without objection.

It further appears that Coleman, whose interest in the cattle was as large as any of the plaintiffs', substantially remained with them during the whole period from the time they were delivered to Bilby until their replevin. Part of this time he was at Bilby's house, and the remainder somewhere in the neighborhood, giving his attention closely to the cattle, as one of the plaintiffs, who were the real owners.

It is also manifest, from the testimony offered, that the cattle were not in good condition to go through the winter without other food than the hay, straw, and stalk fields, which was all that Bilby was bound to furnish them, until grass came in the spring, but that some other kind of food was necessary to prepare them for this. Of this Coleman, who was present superintending them and had a right to control the matter, was the best judge, and the most interested. It must also have been apparent to Bilby, that, if the cattle entered upon the grass in the spring in an enfeebled condition, or if many of them died during the winter, he would not be able to return them in October or December with an average increase of 450 pounds, according to the contract. It was, therefore, to the mutual interest of the parties to make some different arrangements, by which Bilby should furnish the cattle more nutritious food during the autumn and winter, and that he should

also, in consideration of that change, be relieved of his obligation to bring them up to an average increase of 450 pounds.

It is hardly pretended by counsel for plaintiffs that it was not competent, after the written contract was made and signed by the parties, for them to make another verbal contract in regard to some parts of it, which to that extent should be a substitute for the first one. There is nothing in the nature of the contract itself requiring it to be in writing, nor is there any principle making it necessary that the new one should be reduced to writing because the first was written. 1 Greenleaf on Evidence, § 303; *Goss* v. *Nugent*, 5 B. & Ad. 58; *Lattimore* v. *Harsen*, 14 Johns. 330; *Munroe* v. *Perkins*, 9 Pick. 298.

What the judge said to the jury on the subject of the modification of the contract is in substance as follows: that it was set up by Bilby, and he was bound to prove it; that the written contract must prevail unless a change or modification of its terms is proved to your satisfaction; you should inquire whether there was a reason or necessity for the change; the parties alike interested in preserving the cattle were upon the ground; the cattle were dying in large numbers from some cause; would a change of food suggest itself to meet the contingency? If so, there would be a reason and a motive for that change. He then recites what Bilby says about the contract, and Coleman's denial of it, and that an unimpeached witness was called by Bilby to whom Bilby had repeated the agreement in the presence of Coleman; that a number of witnesses testify the cattle were put upon corn about the time that the change was claimed to have been made in the contract; and other testimony was given of the acts, conversations, and admissions of the parties, both for and against the change. From all this, he says, you must determine whether there was any change, and if you find that there was, what it was; if you find, however, that there was no modification or change, then the written contract remained in full force.

We are of opinion that this charge, the substance of which only is given by us, fairly placed before the jury the law which governed the proof and effect of that contract in the case, and that no other instructions upon that subject were necessary to

enable them to arrive at a just verdict, so far as that was affected by the supposed change of contract.

Another error is alleged in regard to the charge of the court, and its refusal to grant prayers for instructions by the plaintiff relative to the conclusiveness of Bass' action in passing upon the cattle as they arrived at Council Bluffs, as being average lots with the train load which had already arrived and been seen by Mr. Bilby. A portion of the testimony which we have already cited tended to show that, when the cattle were delivered to Bilby by the plaintiffs, their appearance would not disclose the bad treatment they had previously received, but that it required time to develop the evil effects of such treatment. Much other testimony was introduced on the same subject tending to show that Bass was misled as to the real condition of the cattle when he inspected them, and also that he was influenced by partiality toward plaintiffs, who employed him, not only in regard to the cattle now in controversy, but other cattle, as a broker or agent.

To the reception of all this testimony there is no exception, and it affords sufficient reason, in our opinion, why the court should not have charged peremptorily, as requested by plaintiffs, that Bass' examination of these cattle and passing them was conclusive that they were in proper condition and came up to the requirements of the contract. We think it was a question for the jury, under all the circumstances, to decide whether they were equal to the lot first examined by Bilby.

On that subject the judge said to the jury:

"It is only in case Bass was himself deceived by plaintiffs, in not putting him, Bass, in full possession of the knowledge possessed by them, and necessary for proper discharge of his, Bass', duties as arbitrator, that you can go behind Bass' acts. Then, if the cattle of the Teal herd were infected by a disease incurred by careless handling, want of sufficient or proper food or water, and such disease could not be discovered by a careful examination, which Bass is presumed to have made, in such a case the plaintiffs were bound, if they knew of such disease, to disclose it to Bass or Bilby, and their failure to do so was a fraud upon Bilby; and if damages have resulted to him, Bilby, in consequence, he is entitled to recover them in this action."

We see no objection to this charge, which is the one complained of by plaintiffs in error.

A third question, to which some importance is attached, arises out of the language of the contract, and the action of Bilby under it, in regard to the hides of the cattle which should die while they were under his control. This language, which immediately succeeds the agreement as to the responsibility for cattle lost, strayed or stolen, or dying through the neglect or carelessness of Bilby, is as follows: "If any steers shall die, John S. Bilby shall preserve the hides as evidence of death, and the ears if there are any ear-marks." Of the 268 steers not on hand at the time, Bilby proposed to deliver the remainder of the cattle to the plaintiffs, the hides were not produced. It is insisted by plaintiffs that the failure to produce these hides makes him responsible for the value of the steers. Evidence, however, was offered by Bilby tending to show that during the winter in which these cattle died he had produced the hides to Coleman, counted them to him, and requested him to accept the delivery of them. There was also testimony to prove that during the succeeding summer the hides decayed and became offensive, and could not be produced at the time the cattle were to be delivered.

The question of these hides is considered in two aspects by the court in its charge to the jury, and in both we think it is justly treated. The first charge, which related to the evidence of the hides as tending to show the loss of the cattle which Bilby was otherwise bound to account for, is in the following language:

"Bilby, under the written contract, was to preserve the hides of the cattle which died and the ears of any which had ear-marks. Under this provision Bilby was bound to preserve the hides of all the cattle which died; and unless he has done so, he is bound to account for the whole of the 1500 cattle, less such as he has preserved the hides of, or the preservation of them was agreed to be waived.

"There is testimony showing the number of hides preserved by Bilby, and as to an agreement with plaintiff Coleman waiving the preserving of some of them. If the whole of

the steers which are claimed to have died have thus been accounted for to your satisfaction, Bilby cannot be held responsible, provided they all died through unavoidable causes, and not through the neglect or carelessness of Bilby, as already instructed. The offer to count the hides claimed by Bilby to have been made to Coleman, if made as claimed, and the count actually made as testified to, if satisfactorily proven, may be taken by you as showing that Bilby had the number of hides claimed. There are no provisions in the contract where the hides of cattle which had died should be counted, and the reasonable construction thereupon is, that the hides preserved should be counted at the time, and with a view of making the hides themselves available for use or sale."

In charging the jury in reference to the damages which the plaintiffs might recover, he afterwards said: "Under the written contract, the plaintiffs are entitled to the hides of the cattle which unavoidably died. Unless you find that a tender of these was made by defendant to plaintiffs, in which latter case the defendant would not be liable for them, there is no proof before you as to the value of the hides, and in order to recover their value the plaintiffs would have to show it; the hides seem to be out of the question even if defendant's tender was invalid."

It is seriously urged in argument by counsel that this latter charge concerning the value of the hides was misleading, as tending to divert the jury from the consideration of the failure to produce the hides as evidence of the death and loss of the cattle, and exempting Bilby from responsibility for these cattle. But it is too clear for argument, that, in that part of the charge first cited, he points their attention to that aspect of the failure to produce the hides, and to the considerations which should govern the jury in that respect, in charging Bilby or in releasing him from responsibility for their loss; while in the second and later part of the charge, he is considering the mere moneyed value of the hides, and charges the jury that the plaintiffs cannot recover for that, because they have made no proof of such value.

While there are other assignments of error that have been

examined by us, we do not perceive that any of them are well founded, nor do we think that they are worthy of an extended inquiry. As these, to which we have adverted, are the most important, and as we see no error in what the court charged or refused to charge the jury on these subjects, and as we have already said there is no exception to the introduction of testimony, we see no error in the record, and the judgment of the court below is, in each case,

Affirmed.

HAILES *v.* ALBANY STOVE COMPANY.

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

Argued November 28, 1887. — Decided December 12, 1887.

Under the patent laws a disclaimer cannot be used to materially alter the character of the patented invention, or to effect such a change in it as calls for further description or specification in order to make it intelligible: but its proper office is in the surrender either of a separate claim, or of some distinct and separable matter, which can be exscinded without mutilating or changing what is left.

The drawings cannot be used on a disclaimer to show that the patent, as changed by the disclaimer, embraces a different invention from that described in the specification.

Sections 4917 and 4922 of the Revised Statutes are parts of one law, having one general purpose, and both relate to the case in which a patentee, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, has included in his claims and in his patent inventions to which he is not entitled, and which are clearly distinguishable from those to which he is entitled; the purpose of § 4917 being to authorize him in such case to file a disclaimer of the part to which he is not entitled, and the purpose of § 4922 being to legalize the suits on the patent mentioned in that section, and to the extent to which the patentee can rightfully claim the patented invention.

Bill in Equity to restrain alleged infringement of letters-patent, and for an accounting. The Circuit Court dismissed the bill; from which decree the complainants took this appeal. The case is stated in the opinion of the court.

Opinion of the Court.

Mr. Andrew J. Todd for appellants.

Mr. Esek Cowen for appellee.

Mr. Justice Bradley delivered the opinion of the court.

This is a suit on a patent, in which the court below decided adversely to the complainants. The patent sued on was granted to Lewis Rathbone and William Hailes, November 21st, 1865. It was for an alleged improvement in coal stoves, of the class known as "cannon" or circular stoves, so called in consequence of their consisting of one cylinder or cannon, without flues or separate fire chambers. The patentees in their specification allege that such stoves have generally been constructed with a contracted outlet, and with provision for admitting air above the fire. This, they say, they desire to obviate, having found that a much more perfect combustion can be maintained by enlarging the outlet for the smoke, and admitting air through the sides of a suspended fire-pot, at all points, and thus facilitating combustion by supplying oxygen to the burning coals beneath the surface of the fire-pot. Another object, they say, is to construct an open, circular fire-pot, which can be applied to or removed from the stove at pleasure, with a grate in its bottom, said grate being so applied that it can be moved for shaking the ashes from the fire-pot when desired.

They then proceed to describe their improved fire-pot, referring to accompanying drawings. They say:

"The fire-pot is made of cast iron of a flaring form and of such diameter as to leave a free space, *d*, all around it when arranged within the stove. It extends from the enlarged fire chamber C down into the ash chamber B, and it is made with vertical openings through its sides for the admission of air into the body of coal within it.

"The bottom of this fire-pot is an open grate, G, which may be so applied that it can be moved around a central pin, *e*, or turned upon a horizontal bar, *g*, or both of these movements may be provided for.

"It will then be seen that the fire-pot and its grate are united together, so that both can be removed from the stove together.

"By thus connecting the grate and fire-pot together and arranging them within the stove, so that they are supported or suspended by means above mentioned, they can be removed very readily from the stove when it is necessary to renew them.

"At the junction of the body of the stove with the ash-pit section B is a ledge, *h*, extending entirely around the top of said section, as shown in figure 3. This ledge is perforated at regular intervals, and it is covered by means of a marble ring plate, *i*, which is also perforated in a manner corresponding to the perforations through the ledge. This ring plate, *i*, being provided with a knob or handle, it constitutes an annular register for regulating the admission of air into the section B of the stove below the point of suspension of the fire-pot, as indicated by the arrows in figure 2.

"The flanges *b* and *c* effectually close the upper portion of the space *d* surrounding the fire-pot, so that no air can pass at this point; the air which enters the smoke chamber above the fire-pot must either be admitted through the register J, in the feed door, or it must pass through the fire-pot.

"Our object is to maintain such an intense heat — in the fire-pot, by the free supply of oxygen to the incandescent coal therein — all around this pot — that there will be little or no smoke formed after the fire is fully started. In this way we obtain a more perfect combustion, and are enabled to burn soft coal and obtain the greatest heating effects therefrom.

"Having thus described our invention, what we claim as new and desire to secure by letters-patent, is —

"1st. Arranging a perforated fire-pot with a grate bottom within a circular stove having provision for the admission of air below the point of suspension of said fire-pot, substantially as described.

"2d. The combination of an annular horizontal register with a suspended fire-pot which has perforated sides, substantially as described."

The drawings and model exhibited at the hearing show that

the fire-pot referred to in the patent was in the form of a basket, with grated bottom, and grated sides, for the admission of air not only through the grated bottom, but through the sides. In the drawing the grated portion of the sides extends from the bottom nearly two-thirds of the way upwards towards the top; but the specification speaks generally of vertical openings through the sides for the admission of air into the body of coal, without calling attention to, or specifying any limitation to the extent of the openings, whether all the way, or only part of the way up the side of the fire-pot; and, as seen, the principal claim is for arranging a perforated fire-pot with a grate bottom within a circular stove, having provision for the admission of air below the point of suspension of said fire-pot.

Now it turns out that, before the issue of the patent sued on, there were already in existence two patents for a fire-pot of precisely the same description; one, an English patent, granted to Robert Russell in July, 1857; and the other, an American patent, granted to Zebulon Hunt on the 14th of June, 1864. The English patent shows two separate devices, one of a tapering fire-pot or basket having grated sides, but without a grate at the bottom. "Another modification consists in constructing the fire-basket with perforated sides all around it by means of tubes." The patentee adds that "solid bars may be used instead of tubes," and, again, "instead of making the fire dishes to turn on a pivot as previously described, I sometimes hang them by a projection or flange formed upon the upper flange of a fire-dish, which flange rests upon a corresponding projection on the inside of the casing." When the latter modification is used the inventor provides for a grated bottom to the fire-dish in the following language: "The lower ring (*f*) may be formed in one piece with the bottom of the fire-basket, and may be made solid or with apertures. . . . Apertures may be formed in the plate (*j*) to correspond to similar holes in the bottom of the fire-basket so as to regulate the admission of air to the fuel."

The Russell stove, therefore, contains all the elements of the first claim of the complainants' patent, the perforated fire-pot

with a grate bottom, suspended by a flange from the body of the stove, projecting into an ash pit or draft chamber, having provision for the admission of air below the point of suspension of the fire-pot.

It is true that the device of Russell is not placed in a circular, or "cannon" stove, consisting of a single cylinder, as defined in the patent of Rathbone & Hailes, the Russell stove being composed of two cylinders, one of which forms the coal magazine or reservoir. But we fail to see that any inventive power was required to apply the same fire-pot to a different kind of circular stove. That no invention was required seems to us too plain for argument. The patent of Zebulon Hunt shows a grated fire-pot of flaring form, suspended within the draft chamber of the stove, and provided with a grated bottom, the fire-pot suspended in precisely the same manner as in the patent in suit, and the ash pit is provided with means for the admission of air below the point of suspension of the fire-pot. Hunt's stove was also a magazine stove.

We have no hesitation in holding that the supposed invention of Rathbone & Hailes, as described and claimed in their patent, was anticipated by the prior patents referred to.

Probably in anticipation or apprehension of this result, the complainants, after the commencement of this suit, on the 30th of October, 1882, filed in the Patent Office a disclaimer, which they suppose has the effect of narrowing their patent, and of obviating the objection of prior discovery. The substantive part of the disclaimer is as follows, to wit:

"Your petitioners, William Hailes, &c., represent that in the matter of certain improvements in coal stoves, for which letters-patent of the United States, No. 51,085, were granted Lewis Rathbone and William Hailes on the 21st day of November, 1865, . . . they have reason to believe that through inadvertence, accident, or mistake, the specification and claims of said letters-patent are too broad, including that of which said patentees were not the first inventors.

"Your petitioners, therefore, hereby enter their disclaimer to so much of the first claim as covers perforations or openings in the sides of a suspended fire-pot extending throughout the

entire depth of sides, and limiting such perforations or openings to substantially the lower half of the fire-pot, the material or substantial part of the thing patented in and by said claim not hereby disclaimed being as follows:

"A fire-pot suspended from its upper edge with substantially the upper half of its sides made solid, and substantially the lower half of its sides containing perforations or openings."

Viewed as a disclaimer, this instrument naturally excites attention. A disclaimer is usually and properly employed for the surrender of a separate claim in a patent, or some other distinct and separable matter, which can be exscinded without mutilating or changing what is left standing. Perhaps it may be used to limit a claim to a particular class of objects, or even to change the form of a claim which is too broad in its terms; but certainly it cannot be used to change the character of the invention. And if it requires an amended specification or supplemental description to make an altered claim intelligible or relevant, whilst it may possibly present a case for a surrender and reissue, it is clearly not adapted to a disclaimer. A man cannot, by merely filing a paper drawn up by his solicitor, make to himself a new patent, or one for a different invention from that which he has described in his specification. That is what has been attempted in this case. There is no word, or hint, in the patent, that the invention claimed was a fire-pot with sides grated only half way, or part of the way, from the bottom towards the top, or that such partially grated sides have any advantage over those grated all the way to the top. The first claim, as modified by the disclaimer, has nothing in the specification to stand upon, nothing to explain it, nothing to furnish a reason for it.

It is contended that the drawings annexed to the patent may be referred to for the purpose of defining the invention and showing what it really was. But the drawings cannot be used, even on an application for a reissue, much less on a disclaimer, to change the patent and make it embrace a different invention from that described in the specification. This is fully and clearly shown in the recent case of *Parker & Whipple Co.* v. *Yale Clock Co.*, *ante*, p. 87.

The counsel for the appellants suggests that there is a difference between §§ 4917 and 4922 of the Revised Statutes, (corresponding respectively to §§ 7 and 9 of the act of 1837,) and that the disclaimer filed in this case satisfies the conditions of the former of these sections. He says: "Evidently there are two sections under which a disclaimer can be made in this country: *First*, under § 4917, where the claim is too broad; that is to say, in the language of the section, where the patentee 'has claimed more than that of which he was the original and first inventor or discoverer;'—*Second*, under § 4922, where a patentee 'has in his specification claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer;' and it goes on to state that he 'may maintain a suit at law or in equity for the infringement of any part thereof which was *bona fide* his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right.'"

We think that counsel is mistaken in supposing that these sections have reference to different sets of circumstances as grounds for a disclaimer. They both relate to the same condition of things in that regard, namely, to the case in which a patentee, through inadvertence, accident, or mistake, and without any fraudulent intent, has included and claimed more in his patent than he was entitled to, and where the part which is *bona fide* his own is clearly distinguishable from the part claimed without right. In every such case he is authorized by § 4917 to file a disclaimer of the part to which he is not entitled; and that is the only section which gives him this right. The object of the other section (4922) is to legalize and uphold suits brought on such patents as are mentioned in § 4917, to the extent that the patentees are entitled to claim the inventions therein patented; but no costs are allowed to the plaintiffs in such suits unless the proper disclaimer has been entered at the Patent Office before the commencement thereof; and no patentee is entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer.

Syllabus.

We do not see how it is possible to misunderstand the two sections when read together, as it is necessary to read them. One section authorizes a disclaimer to be filed in certain cases; the other enables patentees to maintain suits in those cases, provided a disclaimer is filed without unreasonable delay. They are parts of one law, having one general purpose, and that purpose is to obviate the inconvenience and hardship of the common law, which made a patent wholly void if any part of the invention was wrongfully claimed by the patentee, and which made such a defect in a patent an effectual bar to a suit brought upon it.

There is no such difference in the phraseology of the two sections as to make them apply to different classes of cases. They refer to the same class, and, being read together, throw mutual light on each other. And viewed in that mutual light, we think it clear that there is no authority for amending a patent by means of a disclaimer in the manner in which the appellants have attempted to amend their patent in the present case.

The decree of the Circuit Court is affirmed.

CRAWFORD *v.* HEYSINGER.

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

Argued November 29, 1887. — Decided December 12, 1887.

Assuming that claims 1 and 2 of reissued letters-patent No. 9803, granted July 12, 1881, to George W. Heyl, assignee of Henry R. Heyl, the inventor, for an "improvement in devices for inserting metallic staples," are valid, they are not infringed by the "Victor tool," made under and in accordance with letters-patent No. 218,227, granted to William J. Brown, Jr., August 5, 1879, and a second patent, No. 260,365, granted to the same person, July 4, 1882.

As to claims 1 and 2 of that reissue, namely, "1. The combination of the stationary staple-support or anvil A′, and the sliding staple-guide B, with the reciprocating slotted or recessed hammer, operating to insert a staple

through layers of stock to be united, and simultaneously bend over its projecting ends, substantially as and for the purpose set forth. 2. In a device for inserting metallic staples, the combination of the staple-guide B, anvil A′, spring D, and reciprocating driver, provided with the knob G, the whole arranged to operate substantially as and for the purpose set forth," it must, in view of the language of the claims, and of the state of the art, and of the limitations imposed by the Patent Office, in allowing those claims, be held, that the staple-support or anvil is required to be stationary, and the slotted or recessed hammer or driver to be reciprocating.

In the "Victor tool" the anvil is movable and the hammer or driver is stationary.

Bill in Equity to restrain alleged infringement of letters-patent, and for an accounting. Decree for complainants. Respondent appealed. The case is stated in the opinion of the court.

Mr. Hector T. Fenton for appellant.

Mr. Joshua Pusey for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is a bill in equity filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, by Isaac W. Heysinger, Christian H. Hershey, and J. Loren Heysinger, against James P. Crawford, founded on the alleged infringement of reissued letters-patent No. 9803, granted July 12, 1881, to George W. Heyl, assignee of Henry R. Heyl, the inventor, for an "improvement in devices for inserting metallic staples," the application for the reissue having been filed May 10, 1881, and the original patent, No. 195,603, having been granted to Henry R. Heyl, September 25, 1877, on an application filed September 20, 1877. Henry R. Heyl assigned the original patent to George W. Heyl, March 20, 1878, and George W. Heyl assigned the reissued patent to the plaintiffs, November 23, 1881. This bill was filed June 9, 1883. The answer of the defendant sets up as defences the invalidity of the reissue, want of novelty, and non-infringement. After issue joined, proofs were taken, and the Circuit Court, in November, 1883, entered

an interlocutory decree, adjudging the reissued patent to be valid as respects claims 1 and 2, and that those claims had been infringed by the defendant, and awarding a perpetual injunction, and referring it to a master to take an account of profits and damages. On his report, a final decree was entered, in May, 1884, in favor of the plaintiffs, for $225.75 damages and for costs.

In order to consider any question involved as to the reissue, it is necessary to compare the specifications of the original and reissued patents. They are here placed in parallel columns, the parts of each which are not found in the other being in italics, the drawings in the two being substantially alike, with only immaterial differences in the lettering:

Original.

"To all whom it may concern: Be it known that I, Henry R. Heyl, of the city and county of Philadelphia and State of Pennsylvania, have invented a new and useful improvement in paper-fasteners, which improvement is fully set forth in the following specification and accompanying drawings, in which Figures 1 and 5 are side elevations of the fastener embodying my invention. Fig. 2 is a vertical section in line *x x*, Fig. 1. Fig. 3 is a side elevation, partly sectional. Fig. 4 is a horizontal section in line *y y*, Fig. 1. Similar letters of reference indicate corresponding parts in the several figures.

"My invention consists of an implement of the form of

Reissue.

"To all whom it may concern: Be it known that I, Henry R. Heyl, of the city and county of Philadelphia and State of Pennsylvania, have invented a new and useful improvement in paper-fasteners, which improvement is fully set forth in the following specification and accompanying drawings, in which Figures 1 and 5 are side elevations of the fastener embodying my invention. Fig. 2 is a vertical section in line *x x*, Fig. 1. Fig. 3 is a side elevation, partly sectional. Fig. 4 is a horizontal section in line *y y*, Fig. 1. Similar letters of reference indicate corresponding parts in the several figures.

"My invention consists of an implement of the form of

Fig.1.

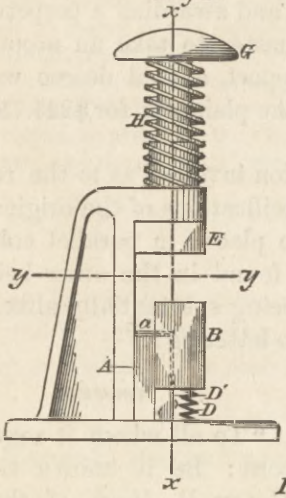


Fig.2.

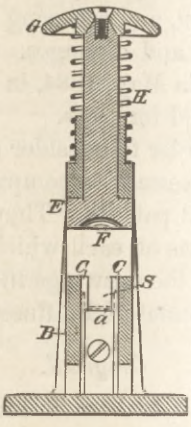


Fig.4.

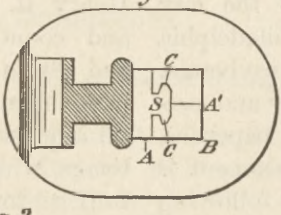


Fig.3.

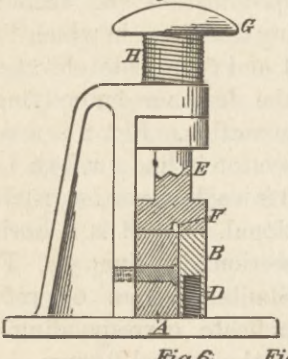


Fig.5.

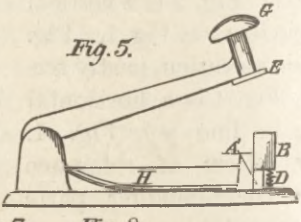


Fig.6.

Fig.7.

Fig.8.

a hand-stamp, by which metallic staples may be forced through sheets of paper documents, and secured by clinching the legs on the reverse side.

"Referring to the drawings, A represents a stationary anvil, which is secured to or formed with an arm rising from a suitable stand of convenient form for use upon a writing-desk; and B represents a sliding guide-block fitted to the anvil A by a sliding joint, and having grooves C C, which match with the tongue of the anvil, the upper face of the block being flat. The normal position of the guide B is elevated, and, in order to keep it in this position, or from dropping prematurely, I employ a spring, D, which may press up under the guide, or a spring, D', which may press against it, and thus produce the necessary friction. E represents a reciprocating driver, whose under face is flat, and in the same is a concave recess, F, said driver having a knob, G, for receiving the blows of the hand, and provided with a spring, H, for causing the return or elevation of the driver.

a hand-stamp, by which metallic staples may be forced through sheets of paper *or* documents, and secured by clinching the legs on the reverse side.

"Referring to the drawings, A' represents a stationary anvil, which is secured to or formed with an arm rising from a suitable stand of convenient form for use upon a writing-desk; and B represents a sliding guide-block fitted to the anvil A' by a sliding joint, and having grooves C C, which match with the tongue of the anvil, the upper face of the block being flat. The normal position of the guide B is elevated, and, in order to keep it in this position, or from dropping prematurely, I employ a spring, D, which may press up under the guide, or a spring, D', which may press against it, and thus produce the necessary friction. E represents a reciprocating driver, whose under face is flat, and in the same is a concave recess, F, said driver having a knob, G, for receiving the blows of the hand, and provided with a spring, H, for causing the return or elevation of the driver.

"The operation is as follows: A staple is placed within the grooves C C, with its crown resting on the anvil A, the points thus being *upward.* The papers to be united are now placed *upon the face of the guide B over the staple-points,* and, by a sharp blow of the hand upon the knob G, the driver is forced downward upon the papers. *The guide B gives way, and* the staple-legs come *up* through the papers into the recess F, where they are bent over *preparatory to the final clinching. The hand is now released from the knob of the driver, the latter then rising, and the papers are drawn somewhat forward, until the staple-crown rests upon the face of the guide B, when another blow is imparted to the driver, and the flat portion of its face descends forcibly on the staple-legs, so as to bend the latter close to the paper, thus completing the operation.*

"It will be seen that the grooves C C serve to support and guide the staple-legs during their penetration through the papers, and the recess F is so shaped that, as the staple-legs enter thereinto, they will strike the concave or slanting

"The operation is as follows: A staple is placed within the grooves C C, with its crown resting on the anvil A′, the points thus being *turned toward the bending recess F.* The papers to be united are now placed *beneath the driver,* and, by a sharp blow of the hand upon the knob G, the driver is forced downward upon the papers. The staple-legs come through the papers into the recess F, where they are bent over *by the slanting ends thereof.*

"It will be seen that the grooves C C serve to support and guide the staple-legs during their penetration through the papers, and the recess F is so shaped that, as the staple-legs enter thereinto, they will strike the concave or slanting

walls of said recess, and thus be bent inward toward each other *sufficiently to insure their being bent down properly when again struck between the faces of the guide B and driver E.* A plate, *a*, may be advantageously employed to overlap the staple-crown, for preventing the latter from *binding* while the legs are being forced through the papers.

walls of said recess, and thus be bent inward toward each other, *as shown in Figs. 2 and 3.* A plate, *a*, may be advantageously employed to overlap the staple-crown, for preventing the latter from *bending* while the legs are being forced through the papers.

"*It will be seen that the staple-support or anvil* A', *with the slotted or recessed hammer, operates to insert a staple through layers of stock to be united, and simultaneously bends over its projecting ends.*

"*In my original specification I described the further separate operation of completely flattening down the ends of the staple thus bent over, by a second blow between the upper and lower jaw of the implement, believing that the same was new; but I have since learned that the same result was obtained by devices described in previous letters-patent of the United States. Should the legs of the staple, when bent over by the same blow which drives the same, as is hereinabove described, be found not to lie sufficiently close to the surface of the*

paper, the same may be further flattened down by a second blow between flat surfaces in front of the staple-channel and bending recess, respectively provided therefor.

"*Figs. 1, 2, and 3 show a hand-stamp embodying my invention, in which the driver reciprocates in a fixed head in the manner of a plunger, while Fig. 5 shows the same invention embodied in a hand-stamp, in which the driver is mounted at the end of a vibrating arm pivoted at its rear extremity to the base, which rests upon the table. It will be seen that the devices which constitute my invention are to be found in both these modifications, and that both operate in precisely the same manner, to insert by a blow upon the knob G of the hand-stamp, the staple through layers of stock to be united, and simultaneously bend over the projecting ends in the opposite bending recess provided therefor.*

"Having thus described my invention, what I claim as new, and desire to secure by letters-patent, is —

"*1. The reciprocating driver E, constructed with a flat face recessed, substantially as described, whereby the projecting*

"Having thus described my invention, what I claim as new, and desire to secure by letters-patent, is —

"*1. The combination of the stationary staple-support or anvil A', and the sliding staple-guide B, with the reciprocat-*

ends of staples may be first bent over by entering the recess and then flattened down by pressure from the flat face.

"*2. The self-adjusting guide-block B, having staple-guiding grooves C C and a flat face, upon which to complete the clinching of the staple, substantially as and for the purpose set forth.*

"*3. The combination of the stationary staple-support or anvil A with the sliding guide B, grooved to partially embrace and guide the staple-legs, substantially as and for the purpose set forth.*

"*4. The combination of the stationary staple-support or anvil A with the reciprocating slotted or recessed hammer, operating to insert a staple through layers of stock to be united, and simultaneously bend over its projecting ends, substantially as and for the purpose set forth.*

"*2. In a device for inserting metallic staples, the combination of the staple-guide B, anvil A', spring D, and reciprocating driver, provided with the knob G, the whole arranged to operate substantially as and for the purpose set forth.*

"*3. A staple-inserting implement having two opposite jaws arranged with relation to each other, substantially as shown, one of which is provided with a recess, the other with a vertically channelled staple-guide, an anvil, and a spring, so that, when the jaws are separated, after driving a staple, the guide will be open for the reception of the succeeding staple, substantially as described.*

"*4. An implement for inserting metallic staples, consisting of two opposite jaws, one of which is provided with a staple-bending recess, and the other with staple-guiding grooves and an anvil fitted thereto, in combination with a knob to receive the blow of the hand and insert*

purpose set forth."

a staple by a sudden percussion, substantially as described.

"*5. In a staple-inserting machine constructed to operate substantially as described, the staple-guiding block B, having staple-holding grooves CC, forming side extensions of the vertical slot S, substantially as shown and described.*

"*6. An implement for inserting metallic staples, consisting of two opposite jaws, one of which is provided with a staple-bending recess, and the other with staple-guiding grooves and an anvil fitted therein, the said jaws being arranged to be separated and stand apart, to admit the requisite manipulation for conveniently placing a staple in the open end of the staple-guiding grooves, substantially as set forth.*

"*7. The combination of the stationary staple-support or anvil A' with the sliding-guide B, grooved to partially embrace and guide the staple-legs, substantially as and for the purpose set forth.*

"*8. In an implement for inserting metallic staples, a reciprocating driver provided with a knob to receive the blow of the hand, in combination with a grooved staple-guiding block and an anvil attached to*

a stand of convenient form for use upon a writing-desk, the said stand having an arm arising therefrom, and over and above it a guide for the purpose of guiding the said driver to the said anvil, substantially as and for the purpose set forth."

The differences which thus appear in the descriptive parts of the specification are these:

In the original, in stating the operation of the machine, it is said that the points of the staple point "upward" when the staple is within the grooves. In the reissue, it is stated that those points are "turned toward the bending recess F."

In the original, it is said that the papers to be united are "placed upon the face of the guide B over the staple-points." In the reissue, it is said that the papers to be united are placed "beneath the driver."

In the original, it is said that "the guide B gives way, and the staple-legs come up through the papers into the recess F, where they are bent over preparatory to the final clinching." In the reissue, it is said that "the staple-legs come through the papers into the recess F, where they are bent over by the slanting ends thereof."

The original then contains the following statement, which is wholly omitted in the reissue: "The hand is now released from the knob of the driver, the latter then rising, and the papers are drawn somewhat forward, until the staple-crown rests upon the face of the guide B, when another blow is imparted to the driver, and the flat portion of its face descends forcibly on the staple-legs, so as to bend the latter close to the paper, thus completing the operation."

The reissue omits the statement of the original, that, as the staple-legs strike the slanting walls of the recess, they will be bent inward toward each other sufficiently to insure their being bent down properly when again struck between the faces of

the guide B and driver E, and substitutes the statement, that, when the staple-legs strike the slanting walls of the recess they will be bent inward toward each other, as shown in Figures 2 and 3.

The following sentence, not in the original, is found in the reissue: "It will be seen that the staple-support or anvil A', with the slotted or recessed hammer, operates to insert a staple through layers of stock to be united, and simultaneously bends over its projecting ends."

The specification of the reissue then states that the separate operation described in the original, of flattening down by a second blow the ends of the staple when bent over, was not new, but that the legs of the staple, if not laid sufficiently close to the surface of the paper, when bent over by the driving blow, may be further flattened down by a second blow between flat surfaces.

Figure 5 of the drawings, though contained in the drawings of the original patent, was not described or referred to in the original specification, but the reissued specification speaks of Figures 1, 2, and 3 as showing a hand-stamp in which the driver reciprocates in a fixed head in the manner of a plunger, while Figure 5 shows a hand-stamp in which the driver is mounted at the end of a vibrating arm, pivoted at its rear extremity to the base which rests upon the table; that the devices which constitute the invention are found in both of these modifications; and that both operate to insert, by a blow upon the knob G of the hand-stamp, a staple through layers of stock to be united, and to simultaneously bend over the projecting ends in the opposite bending recess provided therefor.

On the question of novelty, the alleged prior invention principally relied upon is a patent of the United States, No. 187,189, granted to George L. Ward and Orianna S. Smyth, assignees of James C. Smyth, February 6, 1877, for an "improvement in machines for stitching books with staples."

The Circuit Court, in its opinion, accompanying the record, held that the patented invention was not anticipated by that of Smyth; that claims 1 and 2 of the reissue were substantially the same as claim 4 of the original patent, when the

latter claim was read in the light of the specification; and that the defendant's device infringed claims 1 and 2 of the reissue.

Claim 1 of the reissue is for a combination of (1) the stationary staple-support or anvil; (2) the sliding staple-guide; and (3) the reciprocating slotted or recessed hammer or driver; the conjoined operation of the three being to insert a staple through layers of stock to be united, and to simultaneously bend over its projecting ends. Claim 2 of the reissue is for a combination with the same three elements, of (4) the spring D, and (5) the knob G. Claim 4 of the original patent was for a combination of only two of these elements, namely, (1) the stationary staple-support or anvil and (2) the reciprocating slotted or recessed hammer or driver. It left out the sliding staple-guide, and yet the claim stated that the combination of the two elements, without the staple-guide, would operate to insert the staple and simultaneously bend over its projecting ends. It would, however, wholly fail to so operate without the use of the sliding staple-guide. The use and operation of the sliding staple-guide, its arrangement so as to slide, the use of the spring D to keep it in its normal elevated position, so that it will not drop prematurely, and the use of the knob G, with which to impel the driver, are fully set forth in the original specification, and described as necessary, in combination with the stationary staple-support and the reciprocating slotted or recessed hammer, to insert a staple through layers of stock and simultaneously bend over its projecting ends; and the invention is stated, in the original specification, to consist in a hand-stamp by which metallic staples may be forced through sheets of "paper documents" and secured by clinching the legs on the reverse side. We do not find it necessary, however, to decide whether the reissue is to be considered a proper one, so far as claims 1 and 2, rightly construed, are concerned, on the view that it was an inadvertence, accident, or mistake to have left out of claim 4 of the original the elements which, by the description in the original specification, were made necessary to the performance of the operation specified in that claim. We dispose of the case on the assumption that the reissued patent is valid as respects claims 1 and 2.

What is the proper construction of those claims? In claim 1, the staple-support or anvil is described as being "stationary," and the slotted or recessed hammer or driver as being "reciprocating." In claim 2, the anvil must be regarded as a "stationary" anvil, and the hammer or driver is expressly stated to be "reciprocating." In claim 4 of the original, the staple-support or anvil is said to be "stationary," and the slotted or recessed hammer to be "reciprocating." So in claim 1 of the original, the driver is said to be "reciprocating," and in claim 3 of the original the staple-support or anvil is said to be "stationary." In the description in the original specification, the anvil is described as being "a stationary anvil," and the hammer or driver as being "a reciprocating driver." In the specification of the reissue, the staple-support is described as being "a stationary anvil," and the driver or hammer as being "a reciprocating driver."

The file-wrapper and contents in the matter of the reissue are part of the evidence in the case, and throw light upon what should be the proper construction of claims 1 and 2. The application for the reissue was filed May 10, 1881. In the application as then presented eleven claims were proposed, the first and ninth of which were as follows:

"1. The staple-guide B, driving head A', operating therein, recessed bending block E, spring D, and knob G, combined and operating substantially as and for the purpose set forth."

"9. The combination of the anvil or driving head A' with the reciprocating slotted or recessed hammer, operating to insert a staple through layers of stock to be united, and simultaneously bend over the projecting ends, substantially as and for the purpose set forth."

On the 12th of May, 1881, the applicant cancelled claims 1 and 9, and converted claim 9 into a new claim 1, and claim 1 into a new claim 2, as follows:

"1. The combination of the stationary staple-support or anvil A' with the reciprocating slotted or recessed hammer, operating to insert a staple through layers of stock to be united, and simultaneously bend over its projecting ends, substantially as and for the purpose set forth.

"2. In a device for inserting metallic staples, the combination of the staple-guide B, anvil A′, operating therein, spring D, recess F, and knob G, the whole arranged to operate substantially as and for the purpose described."

On the 14th of May, 1881, the examiner notified the applicant as follows: "Upon further consideration of this matter, in connection with amended specification, applicant is advised that the 1st clause of claim does not present an operative combination of mechanical devices for the purpose stated. It is obvious that without a staple-holding device the parts enumerated would be inoperative, in view of which a staple-holding device should be included. In reference to the 2d and 3d clauses of claim, the statement that the anvil operates in the guide-block is unwarranted, inasmuch as the anvil is stationary and the guide-block slides up and down upon the anvil. With proper correction as to this point, the 2d and 3d clauses of claim may be allowed."

On the 31st of May, 1881, the applicant adopted the suggestions of the examiner and amended claim 1 by inserting after the words "stationary staple-support or anvil A′," the words "and the sliding staple-guide B," and amended claim 2 by cancelling the words "operating therein," so that claims 1 and 2 then read as follows:

"1. The combination of the stationary staple-support or anvil A′ and the sliding staple-guide B with the reciprocating slotted or recessed hammer, operating to insert a staple through layers of stock to be united, and simultaneously bend over its projecting ends, substantially as and for the purpose set forth.

"2. In a device for inserting metallic staples, the combination of the staple-guide B, anvil A′, spring D, recess F, and knob G, the whole arranged to operate substantially as and for the purpose described."

On the 4th of June, 1881, the examiner notified the applicant as follows: "Upon further consideration of this matter, in connection with the last amendment, it is obvious that the 'recess F' should not form an element of the mechanical combination, as such recess is a provision of the 'hammer' referred to in the first clause of claim, and such recess is not an operative element independent of such hammer."

On the 14th of June, 1881, the applicant made further amendments, leaving claim 1 as last recited, and as it is found in the reissued patent, and amending claim 2, as last recited, by striking out the words "recess F," so that it read as follows:

"2. In a device for inserting metallic staples, the combination of the staple-guide B, anvil A', spring D, and knob G, the whole arranged to operate substantially as and for the purpose described."

On the 15th of June, 1881, the examiner notified the applicant as follows: "Upon further consideration of this matter, with a view to final action, the 2d clause of claim is found defective, in the absence of any mechanical combination between the 'knob G' and the other elements included in the combination. To obviate this objection a 'reciprocating driver' should be added to the combination."

On the 18th of June, 1881, the applicant amended claim 2 by substituting for the words "and knob G" the words "and reciprocating driver provided with the knob G," so that the claim, as thus amended, read as follows, the same as claim 2 in the reissued patent:

"2. In a device for inserting metallic staples, the combination of the staple-guide B, anvil A', spring D, and reciprocating driver provided with the knob G, the whole arranged to operate substantially as and for the purpose set forth."

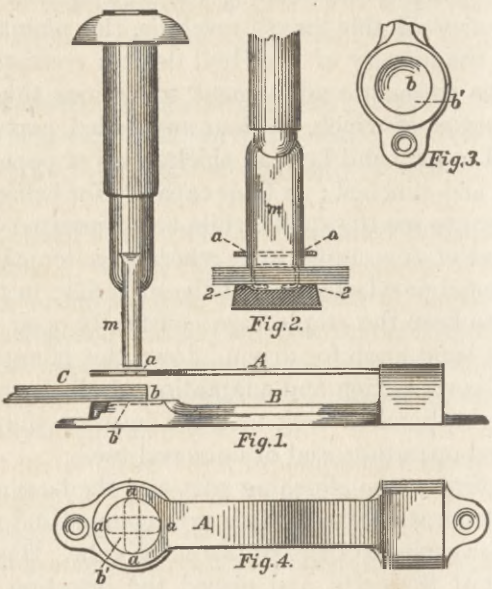
From these proceedings in the Patent Office, in regard to the allowance of claims 1 and 2 of the reissued patent, it is apparent that the applicant carefully limited himself, in those claims, to a stationary staple-support or anvil and a reciprocating slotted or recessed hammer or driver. This result must also follow in view of the devices existing in the various prior patents introduced in evidence, showing the state of the art. The various elements entering into the combinations of claims 1 and 2 of the reissue were old, considered singly. The recessed clinching base was old; the driver in the staple case was old; the combination of those two devices in a power machine was old. The J. C. Smyth machine was a hand-lever machine, and contained in combination all the elements of the Heyl device,

though differently arranged. In both the Smyth and the Heyl devices there are means of forcing out a staple from a case by a contained plunger, and bending the legs against a concave recess. In view of this Smyth machine, the plaintiffs' expert stated that the novelty of the Heyl devices consisted particularly "in the automatic adjustment to various thicknesses of paper, by means of which, without any added parts, the jaws are adapted to grip and hold all thicknesses of paper while being stapled and clinched; in their capacity for being opened to allow the eye to see the staple while being inserted by hand at the open end of the staple case, whereby a length of staple may be adapted or selected to suit the material; in the retracting spring to keep the staple case constantly open for a new staple; in a hand knob for driving down the plunger; and in the general construction and adaptation of all the parts to be used as a light, portable desk tool, low in price, simple in construction and operation, and of universal use."

In prior devices, the clinching part was the base and the inserting device was above it. This arrangement did not permit of the proper support of the staple in the tube. Heyl reversed the position of the parts, and placed the inserting device on the base, so that the staple could be inserted by hand into the open mouth of the tube, and be supported, until it should be driven, by the tube and its contained driver, this reversal of the parts necessitating the use of a spring underneath, to support the tube and keep it above the end of the driving blade, or of a spring at the side to press against the guide and keep it in place by friction. Claims 1 and 2 of the reissued patent must, therefore, be limited to the specific combinations and arrangements of parts described and shown in the specification and drawings, and enumerated in those claims. The staple-support or anvil must be stationary, and the slotted or recessed hammer or driver must be reciprocating.

In the defendant's device, called the "Victor tool," the anvil or staple blade is movable, and the recessed clinching base is fixed or stationary. It is a device constructed under and in accordance with letters-patent No. 218,227, granted to William J. Brown, Jr., August 5, 1879, and a second patent,

No. 260,365, granted to the same person July 4, 1882. The drawings of No 260,365 are as follows:



An expert for the plaintiffs testifies, that he regards the lower part of the defendant's device, which is fixed or stationary and contains the clinching cavity, and resists the driving and clinching blow of the hand from the opposite part of the tool, as the equivalent for the "reciprocating driver provided with the knob G," mentioned in claim 2 of the reissue. As the defendant's tool is constructed with the stationary recessed clinching base made to rest upon a table, and to receive the impact from above of the detached driving tool, it is a misnomer to say that such stationary base is the mechanical equivalent of the reciprocating driver E of the Heyl patent. The patentee having imposed words of limitation upon himself in his claims, especially when so required by the Patent Office in taking out his reissue, is bound by such limitations, in subsequent suits on the reissued patent. Such have been the uniform decisions of this court, in like cases. *Leggett* v. *Avery*, 101 U. S. 256; *Goodyear Dental Vulcanite Co.* v.

Davis, 102 U. S. 222, 228; *Fay* v. *Cordesman*, 109 U. S. 408; *Mahn* v. *Harwood*, 112 U. S. 354, 359; *Cartridge Co.* v. *Cartridge Co.*, 112 U. S. 624, 644; *Sargent* v. *Hall Safe & Lock Co.*, 114 U. S. 63; *Shepard* v. *Carrigan*, 116 U. S. 593; *White* v. *Dunbar*, 119 U. S. 47; *Sutter* v. *Robinson*, 119 U. S. 530; *Bragg* v. *Fitch*, 121 U. S. 478; *Snow* v. *Lake Shore Railway Co.*, 121 U. S. 617.

Assuming, therefore, that claims 1 and 2 of the reissued patent are valid, they are to be construed as covering only the precise combinations enumerated in them and described in the specification and shown in the drawings; and they do not cover the defendant's device, which has a stationary recessed clincher and a movable detached staple-inserting tool, because claims 1 and 2 of the reissued patent expressly call for a reciprocating clincher and a stationary staple-supporting anvil. Those elements, in those forms, in claims 1 and 2, were made necessary by the requirements of the Patent Office, before it would grant the reissue, and the applicant, having voluntarily made the limitations, is bound by them.

Although, in the proofs, the plaintiffs undertook to show that three other claims of the reissued patent, in addition to claims 1 and 2, were infringed by the "Victor tool," the Circuit Court, in its interlocutory decree, states that it considered only claims 1 and 2; and, as the decree holds those claims alone to be valid and to have been infringed, and the master's report and the final decree apply only to those claims, and the counsel for the plaintiffs does not contend, in his brief, that any other claim is infringed, we necessarily have confined our consideration of the case to those two claims, leaving all questions as to every other claim of the reissued patent entirely open for consideration in a case which may involve them.

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.

Syllabus.

WILSON *v.* RIDDLE.

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

Argued November 30, December 1, 1887. — Decided December 12, 1887.

In April, 1853, R. made a deed to himself, as trustee, of land in Georgia, for the benefit of his wife and their children, during the life of the wife, and, after her death, of such children, which deed was recorded in May, 1853, in the office of the clerk of the Superior Court of the county in which R. resided. In May, 1870, R. mortgaged to W. the trust land and other land. W. foreclosed the mortgage, and on a sale, in 1876, bid in the mortgaged lands, and obtained from the sheriff a deed of them and took possession of them. In 1881, the beneficiaries under the trust deed brought a bill in equity in the Circuit Court of the United States, against W., to have the trust established. Among the defences set up by W., he alleged that the trust deed was fabricated after the mortgage was made, and was antedated, and that he had no notice of the existence of the trust deed at or before the execution of the mortgage of May, 1870, or before the sheriff's sale in 1876. The Circuit Court, without making any previous order for the trial of issues of fact by a jury, had a trial by jury of the two questions above mentioned. The jury found in favor of the plaintiffs on both questions. The defendant had bills of exceptions signed to the rejection of evidence and to the instructions to the jury. The suit in equity was heard by the same judge who presided at the jury trial. No motion was made for a new trial. The decree was for the plaintiffs, on the same proofs which were before the jury. On appeal by the defendant, *Held:*

(1) No previous order for a jury trial was necessary, nor any certificate to the chancellor of the findings;

(2) The submission to the jury of the particular issues was not an unlawful exercise of the discretion of the Circuit Court;

(3) The formal exceptions taken on the jury trial will not be considered by this court;

(4) The decree was correct, on the facts;

(5) The voluntary settlement was authorized by the statute law of Georgia in force at the time it was made, it having been recorded within three months, and was good against W., under such statute law, because of the notice of its existence, which he so had.

In equity. Decree in favor of plaintiffs. Defendant appealed. The case is stated in the opinion of the court.

Mr. Clifford Anderson for appellant.

Mr. George A. Mercer for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, in the Circuit Court of the United States for the Southern District of Georgia, originally brought as an action of ejectment, by the wife of William C. Riddle, four of their married daughters, an unmarried daughter, three sons, and two daughters of a deceased daughter, against J. Ben. Wilson, in the Superior Court of the county of Washington, in the State of Georgia, in August, 1881, to recover the possession of 1500 acres of land, and the mesne profits thereof, alleged to be of the yearly value of $1300, since the 1st of January, 1877.

The original petition, by which the suit was brought, alleged that in the year 1853 the said William C. Riddle, then being the owner of the 1500 acres of land, conveyed the same, by deed of trust, to himself, as trustee for the petitioners, and that, although the defendant was in possession of the land, setting up a claim of title adverse to the title of the trustee and of the petitioners, Riddle, in violation of his trust, refused to bring suit for the recovery of the land or to collect the rents and profits.

In March, 1882, J. Ben. Wilson appeared and disclaimed all title to the land in dispute, and averred that he had never received any of the rents or profits thereof. At the same time, Benjamin J. Wilson, his father, appeared and asked to be made a party to the suit, claiming to be the owner of the land in dispute, and was, by an order of the court, made a party defendant. He being an alien, and the petitioners being citizens of Georgia, the suit was removed by him into the Circuit Court of the United States for the Southern District of Georgia, under the act of March 3, 1875. After the removal of the cause, the original petition or declaration was amended by adding, as parties plaintiff, William C. Riddle and the husbands of the four married daughters. The Circuit Court then, by an order, placed the case on the equity docket,

and directed that the plaintiffs reform their pleading, so as to present their cause of action in an equitable shape.

In December, 1882, all of the above named plaintiffs filed in the Circuit Court a bill in equity against Benjamin J. Wilson, making the following averments: On the 23d of April, 1853, William C. Riddle, in consideration of natural love and affection for his wife and children, conveyed to himself, as trustee, for the use, benefit, and advantage of his wife and their children, for and during the natural life of the wife, "and, on her decease, to such child or children, or representative of child or children, as she might leave in life," two tracts of land in the county of Washington, one of 1000 acres, known as the Brantley Mill place, and the other of 500 acres, known as the Brown place, to be held forever free from the debts, liabilities, and contracts of Riddle and all other persons. The trust deed was duly recorded, on the 26th of May, 1853, in the office of the clerk of the Superior Court of the county of Washington. Riddle, after the conveyance, held the lands as trustee for his wife and children only, and under the terms of the trust deed. In 1866, Riddle was engaged in planting operations, and, in order to raise money, applied to the firm of Wilkinson & Wilson, doing business in Savannah, of which the defendant was a member. That firm, in consideration of consignments of cotton to be sent to them by Riddle, advanced to him, on his own account and not for the trust estate, large sums of money. The defendant was obliged to raise the money so supplied on the credit of his firm, and to furnish to parties advancing the money to his firm planters' notes and mortgages and other collateral security. On his request, Riddle gave a mortgage lien, for a large amount, upon lands owned by him in his own right, and in that mortgage included the lands embraced in the trust deed. Riddle, at the time he created such mortgage lien, notified the defendant that part of the lands was trust property, but the defendant replied that it did not matter, as he only wished to use the lien as collateral. The defendant took the lien with full notice that it included the trust estate, as well as the individual property of Riddle. In 1870, the first mortgage was cancelled and a new mortgage lien was

given to the defendant, at his request, which lien was taken by him with full notice that the trust estate was included in the lien. The defendant, with such knowledge, caused the lien to be foreclosed, and, in 1877, bid in all the lands covered by it, including the trust estate, and caused a deed of the lands to be made to him by the sheriff of the county, and took possession of the trust estate with full notice of the rights of the plaintiffs. An answer on oath is waived, and the prayer of the bill is for a decree for the restoration to the plaintiffs of the trust lands and the recovery of the mesne profits; that the defendant be adjudged to hold the lands only as trustee for the plaintiffs, and be required to convey them to Riddle, or some other person, as trustee, on the uses and trusts contained in the deed; that the mortgage lien and the deed to the defendant under the foreclosure be declared null and void as to the trust estate, and reformed or cancelled, so as to remove the cloud upon the title of the plaintiffs; and for general relief.

The answer of the defendant to the bill, filed in February, 1883, raises an issue as to the making and recording of the deed of trust. It avers, that, after the date of the deed, Riddle continued in possession of the land as before, claiming and using it, and paying taxes on it as owner, in his individual capacity, and not as trustee. It admits that the firm of Wilkinson & Wilson furnished money and plantation supplies to Riddle, from 1866 to 1870, on consignments by him of cotton to that firm. It avers that, at the close of the transactions, Riddle owed the firm over $80,000; that he gave no notice of any trust; that he gave a mortgage, as security for such indebtedness, covering his entire plantation and embracing the lands in controversy, with others; that he did not, before or at the time of the execution of the mortgage, notify the defendant that part of the lands was trust property; that he was then in possession of the premises, using them as his own; that the first mortgage was superseded by a second one, which was also taken without notice and under like circumstances of possession and use by Riddle; that money and supplies were advanced on the faith of the second mortgage; that, after its foreclosure, the whole mortgaged premises, except 3000 acres,

were sold at sheriff's sale under the mortgage *fi. fa.*, and the defendant became the purchaser; that at the sale no distinct notice was given of the trust claim or any particular claim, nor was any specific portion of the premises sold designated as the subject of an adverse title; that something was said to the effect that whoever bought would have trouble, but the warning, such as it was, applied alike to all the premises sold, and there was nothing to restrict it to the land in controversy or any other definite part; that the defendant heard nothing then about any trust; that the 3000 acres not sold had been claimed, in the mode applicable to claims under the laws of Georgia, by Mrs. Riddle, and so could not be sold at that time; that she suffered the property now in controversy to be sold, without interposing any claim to it, although it was embraced in the same levy with the 3000 acres which she did claim; that it is not true that the defendant knew that the mortgage deed included any trust land when he caused the mortgage to be foreclosed, nor did he know that the lands now in controversy were trust lands when he purchased them at the sale and took the sheriff's deed for them, nor did he have notice of the alleged right of the plaintiffs when he took possession of his purchase, unless what was so said at the sale, as above set forth, amounted to such notice; and that, even if it did, the right of the defendant could not be affected by notice, as he and his firm were innocent mortgagees for value, and had no notice at the time they gave credit and took the security. In April, 1883, the answer was amended by averring that the trust deed was not executed, signed, or delivered, nor even written, at the time it bears date, nor until within the last few years; that it is a much younger instrument than the mortgage under which the defendant claims title; and that it was fabricated and antedated, and not recorded, and could not have been recorded, at the time the certificate of record entered on it represents it to have been recorded.

Issue being joined, the proofs on both sides were taken by depositions, according to the usual practice in equity cases. In December, 1883, a jury trial was had. The record does not disclose any order of court for the trial of feigned issues, or

of issues of fact, by a jury, but merely states, that, on the 5th of December, 1883, a jury was empanelled to try certain issues of fact, and gives the names of the jurors, and states the appearance of the respective parties at the trial, and the result, as follows:

"To the first issue of fact submitted by the court, to wit, 'Is the deed of trust presented a true, valid, and authentic instrument executed at the time it purports to be?'

"We, the jury, find that the deed of trust presented is a true, valid, and authentic instrument executed at the time it purports to be."

"To the second issue of fact submitted by the court, to wit, 'Did the defendant, B. J. Wilson, have notice of the existence of this trust deed at or before the execution of mortgage by plaintiff to defendant, May 5, 1870, or before the sheriff's sale in 1876?'

"We, the jury, find that the defendant, B. J. Wilson, had notice of the existence of this trust deed at or before the execution of the mortgage by plaintiff to defendant, May 5, 1870, and before the sheriff's sale in 1876."

There are eight bills of exceptions found in the record. One of them sets forth an exception by the defendant to the submission to a jury of the issues of fact arising in the case; four of them contain exceptions by the defendant to the rejection of evidence; and three of them contain exceptions to instructions given to the jury.

On the 6th of December, 1883, the Circuit Court made a final decree, which contains no reference to the jury trial, but states that the cause came on to be heard and was argued by counsel, and that the court, upon the proof submitted, finds and decrees that the deed of trust "is a true, valid, and authentic instrument, executed at the time it purports to be;" and "that the defendant, B. J. Wilson, had notice of the existence of this trust deed at or before the execution of the mortgage by the complainant, William C. Riddle, to defendant, May 5, 1870, and before the sheriff's sale in 1876." These findings are in the exact language of the findings of the jury. The decree then proceeds to adjudge that the defendant

acquired no valid title to the lands embraced in the trust deed by virtue of the sheriff's deed made to him in 1876; that the 1500 acres of land embraced in the trust deed are the property of the wife of Riddle and her children and grandchildren, under the terms and provisions of the trust deed; that the decree, by its own force and effect, establishes in and confirms to Riddle, trustee, and his successors in the trust, his right and title to the land, with the appurtenances and the rents and profits, upon the uses and trusts set forth in the deed, with full right to the possession, use, and control of the same; that the defendant, by the 1st of January, 1884, do restore the possession, use, and control of the trust estate to Riddle, trustee, and his successors in the trust; that the mortgage lien created by Riddle, May 5, 1870, to the defendant, and the deed executed and delivered to the defendant by the sheriff of the county of Washington in 1876, are null, void, and of no effect, as to the land and appurtenances embraced in the trust deed; and that the plaintiffs are entitled to $3166.50 for the rents and mesne profits of the land, from the period when the defendant first took possession and control of it to the date of the decree, to be recovered by Riddle, trustee, or his successors in the trust; that process of execution for the recovery of the same issue against the property of the defendant; and that the plaintiffs recover from him the costs of the suit. From this decree the defendant has appealed to this court.

The defendant objects to the submission to the jury of the issues of fact, on the ground that the chancellor should have first made an order directing a trial by a jury, at law, on issues framed; that the verdict of the jury on such issues should have been duly certified to the chancellor; that, on the contrary, a jury was called into the court of chancery and issues were submitted to it by the chancellor; that the findings of the jury were not properly before the chancellor, and he should have given no weight to them; and that no weight should be given to them by this court.

But we are of opinion that there is no force in this objection. It appears by the record that the same judge before whom the jury trial was had, acted as chancellor in making the decree in

the suit in equity; and that the proofs taken and relied upon on the hearing in the suit in equity were the same proofs which were before the jury on the trial of the issues of fact. Under these circumstances, a previous order for the trial by jury, and any certificate of the result, by the judge presiding on the trial, to himself as chancellor, were unnecessary, although it would have been more formal if the court in equity had ordered a jury to be empanelled on the law side of the court, and the verdict had been certified by the clerk to the equity side, as was done in *Kerr* v. *South Park Commissioners*, 117 U. S. 379.

As to the objection to the submission to the jury of the issues passed upon by them, it is sufficient to say that the question of such submission was one for the discretion of the Circuit Court, and that it seems to have been not an unlawful exercise of such discretion to submit to the jury the particular issues upon which they passed.

The defendant assigns for error the rejections of evidence set forth in the bills of exceptions, and the instructions to the jury which were excepted to. No motion for a new trial was made in the Circuit Court. The submission of the issues to the jury was for the information of the conscience of the chancellor. It is evident, from the terms of the decree, that the chancellor adopted the findings of the jury as being satisfactory to him upon the whole testimony in the case, for the decree states that the court makes its finding "upon the proof submitted." Under such circumstances, it is not the practice of an appellate court to consider formal exceptions to rulings in the course of the trial of the issues before the jury. *Brockett* v. *Brockett*, 3 How. 691; *Johnson* v. *Harmon*, 94 U. S. 371; *Watt* v. *Starke*, 101 U. S. 247.

On the two issues submitted to the jury, we concur with the Circuit Court in its conclusions stated in the decree, which were in accordance with the findings of the jury, and in its other conclusions stated in the decree. We understand the finding of the decree to be, that the defendant had actual, and not merely constructive, notice of the existence of the trust deed, at or before the execution of the mortgage to him in

1870, and before the sheriff's sale in 1876; and we concur in that finding. It is not necessary to discuss the evidence.

Nor do we consider it necessary to pass upon the question of the effect, as constructive notice to the defendant, of the recording of the trust deed in the office of the clerk of the Superior Court of Washington County, in May, 1853, in view of the destruction of the records of deeds in that office by fire in 1864.

The defendant had no dealings, as a creditor, with Riddle, until the fall of 1866, but nevertheless he contends, that a voluntary deed of trust, such as that in the present case, was not good as against him, as a *bona fide* purchaser or mortgagee for value, even though he had actual notice of the voluntary deed at the time of the purchase or mortgage. We understand the law of Georgia to have been otherwise. A voluntary settlement such as was made in this case was authorized by the statute law of Georgia in force at the time, provided the conveyance was recorded in the office of the clerk of the Superior Court of the county of the residence of the husband, within three months after its execution. That was done in the present case, as the proof shows.

Section 1776 of the Code of Georgia, in force at the time the deed was made, provided that a husband might, at any time during coverture, either through trustees, or directly to his wife, convey any property, subject to the rights of prior purchasers or creditors without notice. Such a conveyance for the benefit of the children and grandchildren of the grantor, was also valid, if he was solvent, and if the provision was a proper one and free from fraud. Section 1778 of the Code, enacted in 1847, provided that every voluntary settlement made by the husband on the wife should be recorded in the office of the Superior Court of the county of the residence of the husband within three months after the execution thereof; and that, on failure to comply with this provision, such settlement should not be of any force or effect against a purchaser, or creditor, or surety, who *bona fide* and without notice, might become such before the actual recording of the same. Section 2305 provides that a trust estate may be created for the use of

Counsel for Parties.

some other person than the grantee; that no formal words are necessary to create such an estate; and that, whenever a manifest intention is exhibited that another person shall have the benefit of the property, the grantee shall be declared a trustee. Section 2632 provides that every voluntary deed shall be void as against subsequent *bona fide* purchasers for value without notice of such voluntary conveyance. It follows, from these provisions, that as the deed in this case was recorded in due time, it was valid as against the defendant, who had notice of it before the mortgage to him of May, 1870, was executed, and before the sheriff's sale in 1876. This result is in accordance with the decisions of the Supreme Court of Georgia. *Gordon* v. *Green*, 10 Geo. 534, 543; *Horn* v. *Ross*, 20 Geo. 210, 223; *Cummins* v. *Boston*, 25 Geo. 277, 283; *Brown* v. *Spivey*, 53 Geo. 155; *Adair* v. *Davis*, 71 Geo. 769.

The decree of the Circuit Court is

Affirmed.

ZECKENDORF *v.* JOHNSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Submitted November 21, 1887. — Decided December 12, 1887.

The value of the matter in dispute is to be determined by the amount due at the time of the judgment of the court below, which is brought here for review, including interest up to the time of the judgment of the Appellate Court, if the appeal is from an Appellate Court, and the judgment which is taken to the Appellate Court bears interest.

Findings of fact in the court below are conclusive, and cannot be reëxamined here.

This was a motion to dismiss, with which was united a motion to affirm. The case is stated in the opinion of the court.

Mr. Van H. Manning and *Mr. J. B. Edmonds* for the motions.

Mr. E. M. Marble, opposing.

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

A judgment was rendered September 28, 1885, by the District Court of Arizona, in and for the county of Pima, against L. Zeckendorf & Co., the appellants, and in favor of Johnson, the appellee, for $4304.93, "with interest on $2800 of said sum, at the rate of two per cent per month from the date hereof until paid, and interest on $1504.33, at the rate of ten per cent per annum from the date hereof until paid." This judgment was affirmed by the Supreme Court of the Territory, on appeal, November 8, 1886. From that judgment of affirmance this appeal was taken, which the appellee moves to dismiss, on the ground that the value of the matter in dispute does not exceed $5000, as now required by law. Act of March 3, 1885, c. 355, 23 Stat. 443.

The value of the matter in dispute is to be determined by the amount due at the time of the judgment brought here for review, to wit, the judgment of the Supreme Court of the Territory, and not at the time of the judgment of the District Court. Adding the interest to the judgment of the District Court until the date of that of the Supreme Court, as we must for the purpose of determining our jurisdiction, *The Patapsco*, 12 Wall. 451; *N. Y. Elevated Railroad* v. *Fifth National Bank*, 118 U. S. 608, we find that the amount due at the time of the judgment of the Supreme Court was considerably more than $5000. The motion to dismiss is, therefore, denied.

But, on looking into the record, we discover that the errors assigned relate only to the sufficiency of the evidence to support the findings. These we cannot consider. The findings of fact by the court below are conclusive, and cannot be reexamined here. *The Abbotsford*, 98 U. S. 440, and cases there cited. Upon the facts as found there can be no doubt of the correctness of the judgment. It is apparent if the case is kept here longer it will be for delay only. For that reason the motion to affirm is granted.

Affirmed.

BOND *v.* DAVENPORT.

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

Submitted December 8, 1887. — Decided December 12, 1887.

On the stipulation of such of the parties as are before this court, the decree of the court below is reversed without costs, and the cause is remanded with instructions to proceed in accordance with the stipulation, but without prejudice to the rights of other parties to the suit who were not before this court on the appeal.

Motion by complainant below and appellant here, for an order reversing the decree of the court below, and to remand the cause. The motion was supported by a stipulation authorizing it. The case is stated in the opinion of the court.

Mr. Henry Jayne for the motion.

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

This is an appeal by the complainant below from the following part of the decree in the cause:

"It is further ordered, adjudged, and decreed that the said respondent, Sarah G. Davenport, pay to the complainant the sum of five hundred and sixteen and $\frac{77}{100}$ dollars, with interest at the rate of six per cent per annum from the 10th day of May, 1883, the same being the amount, with interest, which the undivided half of the south half of block fifty-nine (59) which descended to, and has become vested in, the said Sarah G. Davenport as the mother, and an heir-at-law of the said George A. Davenport, deceased, is chargeable for and on account of taxes on said block fifty-nine (59), which were paid and discharged out of the money advanced by the said Equitable Trust Company on the 28th of June, 1875; and that on failure to pay the said sum within the time herein limited the said master sell, at public sale, so much of the said Sarah G.

Davenport's undivided half of the south half of said block fifty-nine (59) as shall be necessary to pay the same.

"Such sale to be made at the same place and in the same manner, and in all respects as is herein prescribed for the sale of the property of the said George A. Davenport, and with like effect. It is further ordered, adjudged, and decreed that upon payment by the said Sarah G. Davenport of the said sum of five hundred and sixteen and $\frac{77}{100}$ dollars to the said complainant, complainant's bill be dismissed as to the undivided one-half of the south half of said block fifty-nine (59), which vested in, and to which the said Sarah G. has become entitled, as the mother and heir-at-law of the said George A. Davenport, deceased. And it is further ordered, adjudged, and decreed that, as between the complainant and the said Sarah G. Davenport, the said Sarah G. Davenport recover of complainant the costs of this suit, so far as made, in trying the issue of the sanity of said George A. Davenport at the time of the making and delivery of said mortgage set up in complainant's original bill."

The only parties to the suit who are before this court are Henry R. Bond, trustee, complainant below and appellant, and Sarah G. Davenport. These parties have filed in this court the following stipulation:

"In the Supreme Court of the United States.

"Henry R. Bond, Trustee, Appellant,
v.
Sarah G. Davenport, Appellee.

"Appeal from the Circuit Court of the United States for the Southern District of Iowa.

"In the before mentioned suit it is stipulated by and between Henry R. Bond, trustee, complainant and appellant, The Equitable Trust Company of New London, Connecticut, the holder of the bonds secured by the mortgage sought to be enforced, and Sarah G. Davenport, appellee, being the sole parties in interest, as follows, to wit:

"1. Said Sarah G. Davenport hereby withdraws the answer and cross-petition filed by her in said suit, and all evidence

offered and introduced by her in said Circuit Court, and consents and agrees that the same shall not be considered as part of the record.

"2. It is agreed that a decree shall be entered by the Supreme Court in said suit, reversing the decision and decree of the said Circuit Court, in so far as said court found in favor of said Sarah G. Davenport, and in so far as said court by its decree denied to complainant the relief by him prayed, as against the undivided half of the south half of block fifty-nine (59), in the city of Davenport, Iowa, claimed by Sarah G. Davenport, as mother and heir-at-law of George A. Davenport, deceased, and in so far as said court, by its said decree, undertook to dismiss complainant's bill as against said property, and tax certain costs to complainant, and that this cause be remanded to said Circuit Court, with instructions to enter a decree in complainant's favor, declaring the sums owing upon said bonds, secured by said mortgage, to be a lien upon the premises in said mortgage, described as of the date of said mortgage, and directing sale of sufficient of said premises to pay the same, and further directing that the receiver heretofore appointed in said cause shall turn over to the complainant all the funds in his hands arising from the rentals of said premises, the same to be credited upon the amount found to be owing upon said bonds secured by said mortgage before sale of said premises, and further directing that the complainant be permitted to further plead and bring in new parties if so advised.

"3. The complainant and appellant is excused from printing the record in this suit, save and except such portions thereof as to him shall seem material to enable the court to dispose of said suit under this stipulation.

"4. The attorney or solicitor who has entered his appearance in this suit is authorized to consent to such demand or requirement of the complainant, or the said court, as shall enable the complainant to have the said decree of the Circuit Court reversed, said cause remanded, and a final decree entered in the Circuit Court in complainant's favor, and for that purpose is hereby authorized to appear in said Circuit Court to any pleading filed by the complainant.

"5. No personal judgment shall be entered against the said Sarah G. Davenport in said suit, or any costs taxed either against her or in her favor.

"November 16, 1887.

"HENRY R. BOND, Trustee,
"By JAYNE & HOFFMAN, Attorneys.
"SARAH G. DAVENPORT. [SEAL.]
"THE EQUITABLE TRUST COMPANY,
"By JAYNE & HOFFMAN, Attorneys.
"W. F. BRANNAN,
"Of Counsel for Complainant.
"GEO. E. HUBBELL,
"Attorney for Sarah G. Davenport."

The appellant now moves that the foregoing part of the decree, from which the appeal was taken, be reversed in accordance with the stipulation of the parties, and that the cause be remanded with instructions to enter a decree in favor of the complainant as agreed.

This motion is granted and the decree reversed without costs; and the cause is remanded with instructions to proceed in accordance with the foregoing stipulation of the parties to this appeal, but without prejudice to the rights of the other parties to the suit.

MUGLER *v.* KANSAS.

SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Argued April 11, 1887. — Decided December 5, 1887.

KANSAS *v.* ZIEBOLD.

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

Argued October 11, 1887. — Decided December 5, 1887.

State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States, or by the Amendments thereto.

The prohibition by the State of Kansas, in its Constitution and laws, of the manufacture or sale within the limits of the State of intoxicating liquors for general use there as a beverage, is fairly adapted to the end of protecting the community against the evils which result from excessive use of ardent spirits; and is not subject to the objection that, under the guise of police regulations, the State is aiming to deprive the citizen of his constitutional rights.

Lawful state legislation, in the exercise of the police powers of the State, to prohibit the manufacture and sale within the State of spirituous, malt, vinous, fermented, or other intoxicating liquors, to be used as a beverage, may be enforced against persons who, at the time, happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments.

A prohibition upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community, is not an appropriation of property for the public benefit, in the sense in which a taking of property by the exercise of the State's power of eminent domain is such a taking or appropriation.

The destruction, in the exercise of the police power of the State of property used, in violation of law, in maintaining a public nuisance, is not a taking of property for public use, and does not deprive the owner of it without due process of law.

A State has constitutional power to declare that any place kept and main-

tained for the illegal manufacture and sale of intoxicating liquors shall be deemed a common nuisance, and be abated; and at the same time to provide for the indictment and trial of the offender.

There is nothing in the provisions of § 13 of the statute of the State of Kansas of March 7, 1885, amendatory of the act of February 19, 1881, so far as they apply to the proceedings reviewed in these cases, which is inconsistent with the constitutional guarantees of liberty and property; and the equity power conferred by it to abate a public nuisance without a trial by jury is in harmony with settled principles of equity jurisprudence.

If the provision that in a prosecution by indictment or otherwise the State need not, in the first instance, prove that the defendant has not the permit required by the statute has any application to the proceeding in equity authorized by the statute of Kansas of 1881, as amended in 1885, it does not deprive him of the presumption that he is innocent of any violation of law; and does him no injury, as, if he has such permit, he can produce it.

The record does not present a case which requires the court to decide whether the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported or carried to other States; or whether they are repugnant upon that ground to the clause of the Constitution of the United States giving Congress power to regulate commerce with foreign nations and among the several States.

The constitution of the State of Kansas contains the following article, being art. 15 of § 10, which was adopted by the people November 2, 1880:

"The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes."

The legislature of Kansas enacted a statute to carry this into effect, the provisions of which are set forth by the court in its opinion in this case, to which reference is made. This statute took effect on the 1st of May, 1881.

The plaintiff in error, Mugler, the proprietor of a brewery in Saline County, Kansas, was indicted in the District Court in that county in November, 1881, for offences against this statute.

The first indictment against him contained five counts charging that he, on five different specified days in November, 1881, in the county of Saline "unlawfully did sell, barter, and give away spirituous, malt, vinous, fermented, and other intoxicating liquors," he "not having a permit to sell intoxicating liquors,

as provided by law, contrary to the statutes," &c.; and a sixth count charging that in Saline County, at a time named in that month, he "did unlawfully keep and maintain a certain common nuisance, to wit:" his brewery, then and there "kept and used for the illegal selling, bartering, and giving away, and illegal keeping for sale, barter, and use of intoxicating liquors, in violation of the provisions of an act," &c.

The parties made an agreed statement of facts, which was all the evidence introduced in the case, and which was as follows:

"It is hereby stipulated and agreed that the facts in the above-entitled case are, and that the evidence would prove them to be, as follows:

"That the defendant, Peter Mugler, has been a resident of the State of Kansas continually since the year 1872; that, being foreign born, he in that year declared his intention to become a citizen of the United States, and always since that time intending to become such citizen, he did, in the month of June, 1881, by the judgment of the District Court of Wyandotte County, Kansas, become a full citizen of the United States, and since that time has been a citizen of the United States and of the State of Kansas.

"That in the year 1877 said defendant erected and furnished a brewery on lots Nos. 152 and 154 on Third Street, in the city of Salina, Saline County, Kansas, for use in the manufacture of a malt liquor commonly known as beer; that such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the purposes for which it was designed and intended after its completion in 1877 and up to May 1, 1881.

"That of the beer so manufactured and on hand prior to February 19, 1881, said defendant made one sale since May 1, 1881, which is the sale charged in the first count of the indictment, said sale being made on the above-described premises; that the beer so sold was in the original packages in which it was placed after its manufacture, and was not sold for use nor used on said premises, and that at the time of such sale said

defendant had no permit to sell intoxicating liquors, as provided by chapter 128 of Laws of 1881."

Mugler was adjudged to be guilty, and was sentenced to pay a fine of one hundred dollars and costs, and motions for a new trial and in arrest of judgment were overruled. This judgment being affirmed by the Supreme Court of the State on appeal, the cause was brought here by writ of error on his motion.

The indictment in the second case charged that, on the first day of November, 1881, in Saline County he "did unlawfully manufacture, and aid, assist, and abet in the manufacture of vinous, spirituous, malt, fermented, and other intoxicating liquors, in violation of the provisions of an act," &c., he then and there "not having taken out and not having a permit to manufacture intoxicating liquors as provided by law, contrary to the statutes," &c.

The parties made the following agreed statement of facts which was all the evidence introduced in the case.

"It is hereby stipulated and agreed that the facts in the above-entitled case are, and that the evidence would prove them to be, as follows:

"That the defendant, Peter Mugler, has been a resident of the State of Kansas continually since the year 1872; that, being foreign born, he in that year declared his intention to become a citizen of the United States, and always since that time intending to become such citizen, he did, in the month of June, 1881, by the judgment of the District Court of Wyandotte County, Kansas, become a full citizen of the United States and of the State of Kansas.

"That in the year 1877 said defendant erected and furnished a brewery on lots Nos. 152 and 154 on Third Street, in the city of Salina, Saline County, Kansas, for use in the manufacture of an intoxicating malt liquor commonly known as beer.

"That such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the purposes for which it was designed and

intended after its completion in 1877 and up to May 1st, 1881. That said brewery was at all times after its completion and on May 1, 1881, worth the sum of ten thousand dollars for use in the manufacture of said beer, and is not worth to exceed the sum of twenty-five hundred dollars for any other purpose. That said defendant, since October 1, 1881, has used said brewery in the manner and for the purpose for which it was constructed and adapted by the manufacturing therein of such intoxicating malt liquors, and at the time of such manufacture of said malt liquors said defendant had no permit to manufacture the same for medical, scientific, or mechanical purposes, as provided by chapter 128 of Laws of 1881."

The defendant was adjudged to be guilty, and was fined one hundred dollars and costs, and, as in the other case, motions for a new trial and in arrest of judgment were overruled, and the judgment being affirmed by the Supreme Court of the State of Kansas on appeal, the defendant sued out a writ of error to review it.

The assignment of errors in the first of these cases was as follows:

"*First.* Said court erred in affirming the judgment of the district court of Saline County, Kansas, that the defendant, Mugler, pay a fine of one hundred dollars for the alleged violation of a statute of said State, prohibiting the sale or barter of spirituous or malt liquors, except for medical, scientific, and mechanical purposes; said statute being in violation of Article 14 of the Constitution of the United States, which provides that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.'

"*Second.* Said court erred in affirming the judgment of the district court of Saline County, Kansas, overruling the motions of defendant, Mugler, for a new trial, and in arrest of judgment, which motions should have been sustained."

In the second case the assignment was as follows:

"*First.* Said court erred in affirming the judgment of the

district court of Saline County, Kansas, that defendant Mugler, pay a fine of one hundred dollars for the alleged violation of a statute of Kansas, prohibiting the manufacture of spirituous or malt liquors by any person without having a permit to manufacture such liquors for medical, scientific, and mechanical purposes; said statute being in violation of Article 14 of the Constitution of the United States, which provides that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.'

"*Second.* Said court erred in affirming the judgment of the district court of Saline County, Kansas, overruling the motions of defendant, Mugler, for a new trial and in arrest of judgment, which motions should have been sustained, the statute under which said defendant was convicted being unconstitutional in that it attempts to deprive said defendant of the right to manufacture beer even for his own use, or for storage or transportation out of the State of Kansas, and also deprives defendant of his right to use his property for the manufacture of beer, without due process of law."

The causes were argued and submitted together at October Term, 1886.

Mr. George G. Vest, for plaintiff in error.

I. The statute of Kansas is in conflict with the 14th Amendment to the Constitution, where it declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The defendant was indicted for manufacturing beer, without having a license to manufacture for "medical, scientific, and mechanical purposes." There was no allegation in the indictment, and no proof or attempt to prove, that the beer was manufactured for sale or barter.

Mr. Vest's Argument for Mugler.

The naked proposition contained in the Kansas constitution and statute, is, that no citizen shall manufacture even for his own use, or for exportation, any intoxicating liquors.

The State has unquestionably the power to prohibit the manufacture, for sale or barter, of intoxicating liquors within its limits; it has the power to prohibit the manufacture of explosive substances, such as dynamite or nitro-glycerine, which from their nature are dangerous to the lives or property of others, but no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others.

In the implied compact between the State and citizen, certain rights are reserved by the latter, with which the State cannot interfere. These rights are guaranteed by the Federal and State Constitutions in the provisions of those instruments which protect "life, liberty, and property."

The doctrines of the Commune give to the State the right to control the tastes, appetites, and habits of the citizen: his dress, food, drink, domestic relations are controlled and regulated by the State. "The State is everything, the individual nothing." In order to make him a useful citizen and tax-payer, the State exercises a surveillance over all that he is and has.

On the other hand, our system of government, based upon the individuality and intelligence of the people, does not claim to control the citizen, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

The right to manufacture for his own use either food or drink is certainly an absolute or natural right, reserved to every citizen — one guaranteed by the Fourteenth Amendment, and when, under the laws of Kansas he is punished for manufacturing beer, it "abridges his privileges as a citizen of the United States," it "deprives him of liberty and property without due process of law," and it denies him "the equal protection of the laws."

Civil liberty is defined by Blackstone to be "that of a member of society, and is no other than *natural liberty* so far re-

strained by human laws (and no further) as is necessary and expedient for the general advantage of the public."

If the constitution and prohibitory statute of Kansas leave any residuum of *natural liberty* remaining anywhere, it will require microscopical inquiry to find it. If a State convention or legislature can punish a citizen for manufacturing beer, or wine, or bread, not to be sold or bartered or even given away, but for his own use, then instead of civil liberty, we are living under the most unlimited and brutal despotism known in history.

If a convention or legislature can enter into every man's house, and prescribe what he shall or shall not manufacture, ignoring entirely the question of whether he proposes to dispose of the article manufactured to others, or whether its manufacture is dangerous in the process of manufacturing to the lives or property of others, then it follows logically that the same power can prescribe the tastes, habits, and expenditure of every citizen.

In the *Slaughter-House Cases*, 16 Wall. 36, Mr. Justice Miller, in delivering the majority opinion, quotes approvingly Chancellor Kent's definition of the police power of the States. See also the opinions of Justices Bradley and Field, in *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Commonwealth* v. *Alger*, 7 Cush. 53.

Broad and comprehensive as this power is, it cannot extend to the individual tastes and habits of the citizen, which are confined entirely to himself and have no effect upon others. *License Cases*, 5 How. 504, 583. Whatever may be the injurious results from the intemperate use of beer, or whatever the difference of opinion as to its sanitary qualities, it cannot be contended that there is anything in the process of manufacturing it which endangers the lives or property of others. *Corfield* v. *Coryell*, 4 Wash. C. C. 371. The constitution and statute of Kansas can only be defended on the ground that the State can take possession of the persons and property of its citizens absolutely, and so regulate and reform them as to produce the ideal father, husband, and tax-payer of the Commune.

Mr. Vest's Argument for Mugler.

Without entering into the questions so fully discussed in the Slaughter-House Cases as to the proper construction of the first clause of the Fourteenth Article of Amendment, the plaintiff in error confidently submits his case upon the contention that the prohibition statute of Kansas deprives him of "liberty and property without due process of law."

If we are right in the assumption that the citizen stands before the law in a dual character, both as an individual and a member of society; that in the former status he has certain natural rights not surrendered to society, but reserved to himself and necessary to his pursuit of happiness, and which the law cannot take away; that his right to manufacture any article of food or drink or apparel, provided the process of manufacturing does not endanger the lives or property of others, is one of these reserved or natural rights, then the statute of Kansas now in question is not "due process of law." As to what is "due process of law" see Cooley's Constitutional Limitations, 356; *Wynehamer* v. *People*, 13 N. Y. 378; *State* v. *Allen*, 2 McCord, Law, 55; *Sears* v. *Cottrell*, 5 Mich. 251; *Taylor* v. *Porter*, 4 Hill, 140; *S. C.* 11 Am. Dec. 274; *Hoke* v. *Henderson*, 4 Dev. 1; *S. C.* 25 Am. Dec. 677; *Janes* v. *Reynolds*, 2 Texas, 251; *Kennard* v. *Louisiana*, 92 U. S. 480; *Murray* v. *Hoboken Co.*, 18 How. 272; Mr. Webster's argument in *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Brown* v. *Hummell*, 6 Penn. St. 86; *Norman* v. *Heist*, 5 W. & S. 171; *S. C.* 40 Am. Dec. 493.

The general laws governing society guarantee to the citizen his right to manufacture beer, and until he attempts to sell or barter he cannot be punished. In this case the State of Kansas, by a legislative enactment, deprives the citizen of a right existing in all free governments, and only denied in unlimited despotisms. This cannot be "due process of law."

If it be said that the citizen is indicted, arrested, and tried by jury, before conviction, and that this constitutes "due process of law," our reply is that this is the mere machinery to enforce an unconstitutional statute. The mandate of the legislature is imperative, and robs the citizen of a privilege which, in a free government, cannot be denied. No discretion

is given the courts, but the constitution of Kansas, and the statute made to furnish the means for enforcing it are absolute and mandatory. They declare that "the manufacture of intoxicating liquors shall be forever prohibited in the State, except for medical, scientific, and mechanical purposes."

Under the humane and just laws which obtain in all free governments, every reasonable intendment is made in favor of the accused, and the burden of proving his guilt rests upon the State. If all that is charged in the indictment be granted, what offence has been committed under the laws of any free people? For all that appears in the case the plaintiff in error manufactured the beer for his own use, or to be exported, or for storage. There is no evidence that he intended to sell or barter, or give to any citizen of Kansas. What right, then, or power existed in the authorities of that State to inflict punishment?

There has never been, and can never be, any question more important or more vital to the existence of civil liberty than that involved in this case. It is the question of the centuries, over and about which men have fought and suffered and died, until out of the dark and dreary struggle the great truth has been established that "the only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, mental, or spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest." John Stuart Mill "On Liberty," 28, 29. See *Calder* v. *Bull*, 3 Dall. 386; *Fletcher* v. *Peck*, 6 Cranch, 87, 135; *Dash* v. *Van Kleeck*, 7 Johns. 477; *S. C.* 5 Am. Dec. 291; *Taylor* v. *Porter*, above cited; *Goshen* v. *Stonington*, 4 Conn. 209, 225; *S. C.* 10 Am. Dec. 121.

The claim that any legislative body in this country can absolutely destroy private rights and personal liberty, as in this case, is a monstrous assumption, at war with the established and axiomatic principles of free government.

No protest is made by the plaintiff in error against the

exercise of its constitutional discretion by the legislature. The courts are not asked to invade the legitimate province of the legislative department in its exercise of the police power. No claim of visionary and speculative natural rights outside of the written constitution is set up. Our contention is simply that no legislature has, under our form of government, the power to prohibit the citizen from manufacturing beer, unless that manufacture be for sale or barter to others, and when the citizen is deprived of such right by a mere legislative enactment it is not "due process of law."

II. The prohibition statute of Kansas deprives the plaintiff in error, directly and absolutely, of his property, without "due process of law." His brewery was built in 1877, for the purpose of manufacturing beer to be used as a beverage, a legitimate industry, then under the protection of law. By the statutory enactment of 1881 this property, worth $10,000 for the purpose to which it was adapted, is reduced to $2500 in value, not indirectly, or consequentially, but by direct prohibition of the real and primary use of the property. This question has never been directly adjudicated by this court. In *Bartemeyer* v. *Iowa*, 18 Wall. 129, an attempt was made to secure a ruling, but the court declined to consider the question.

Prior to the constitutional amendment, and prior to May, 1881, when the prohibition law took effect, Mugler had the right to manufacture beer without restriction as to the purpose for which it was to be sold or used. After that date the manufacture was forbidden, except for specified purposes, and the manufacturer was required to obtain a permit. It is admitted that he had no such permit, when he made beer after May 1, 1881. Had the legislature the constitutional power to take from him without compensation the use of his property, except for certain limited and specified purposes?

The majority of the Supreme Court of Kansas seem to have been impressed with the idea that so long as he was permitted to use his brewery for any purpose, no matter how restricted, he was not deprived of his property. This is a singular position. Every fair and candid mind will admit that the ordi-

nary, usual, and principal use of beer is as a beverage, and that its use for medical, scientific, or mechanical purposes is exceptional and rare. See *Wynhamer* v. *People*, above cited.

As well might it be claimed, that a hotel-keeper, who has constructed a valuable building for the entertainment of the public, is not deprived of his property, or its use, when forbidden by the legislature to entertain any guest unless an invalid. Such cavils are unworthy the importance of the question. Every intelligent observer knows that the statute of Kansas was enacted simply and solely to destroy the use of beer as a beverage, and for its supporters to take refuge behind the pretext that there was any other purpose, is an unfair and unworthy subterfuge. There is no pretence or claim that the legislature has not the right to prohibit the sale of beer, or its manufacture for sale or barter in the future, but that is very different from the question here presented, as to the power of the legislature to destroy the value of vested rights by legislative enactment without compensation, and without "due process of law."

Not satisfied with legislating for the future, the Kansas legislature has attempted to destroy property rights already vested, and created under laws enacted by the same authority. "That government can scarcely be deemed to be free where the rights of property are left wholly dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." *Wilkinson* v. *Leland*, 2 Pet. 627. See also Mr. Justice Field's opinion in *Munn* v. *Illinois*, 94 U. S. 113; Mr. Justice Bradley's concurring opinion in *Bartemeyer* v. *Iowa*, above cited; *Beer Company* v. *Massachusetts*, 97 U. S. 25.

That private property cannot be taken for public purposes, without just compensation to the owner, needs no argument or array of authorities. It is a fundamental maxim of all free governments, and essentially so of ours, that whenever the necessities of the public require that the property of a citizen shall be taken or destroyed, compensation must be made for the loss. The very nature of a government based upon the

idea that its citizens are equal participants in all its benefits and burdens implies this great truth.

The question was effectually disposed of by this court in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.

The Supreme Court of Kansas, or a majority of the court, came to the conclusion that the damages to plaintiff in error were so consequential and remote that the case came within the class of cases described by Justice Strong in *Transportation Co.* v. *Chicago*, 99 U. S. 635.

In the work of Judge Cooley the result of all the authority, *pro* and *con*, is stated by him, as follows: "Any proper exercise of the powers of government which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation."

There is no disposition to controvert this rule, and it is evident that it does not affect the case now before the court. The property of plaintiff was neither taken under a proper exercise of governmental power, or indirectly. The right of plaintiff to manufacture beer as a beverage, vested in him by existing law, is taken away directly and absolutely by legislative enactment. Whilst he is left in possession of his brewery he is forbidden to use it for the principal, and in fact the only, purpose for which it was erected. By a simple act of the legislature, without judicial proceedings, he is deprived of three-fourths the value of his property, and is told by the State which invited him, with the pretext of equal and just laws, that the industry in which he has invested the savings of a life is illegal and immoral. There is no question here of consequential and remote damages. Nothing in the shape of legislation can be more direct or even brutal than the law of Kansas. It gives no time for preparation — no day in court — but sweeps away his right to manufacture by one single enactment.

It is deemed unnecessary to discuss further the meaning of the term "due process of law." That has been done in the first part of this argument, and nothing can be added to what is so forcibly expressed by Judge Brewer. That the questions

presented are of the gravest nature, and that great difference of opinion has arisen in regard to them admit of no doubt. Even so eminent and experienced a jurist as Judge Cooley, says: "Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in and by an enactment based on general principles of public utility annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that for the purpose of sale becomes a criminal offence, and without any change whatever in his own conduct or employment the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business, which to that moment was lawful, becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit, but whether satisfactory or not they address themselves exclusively to the legislative wisdom."

The high character of the writer of the above as a jurist and commentator forbids the suspicion that he meant to declare that the legislature could so exercise the police power as to destroy vested rights of property without compensation, and that the citizen is left without redress in the courts. It is true that the legislature may, in its discretion, enact such laws as it may deem proper, but its power is limited by constitutional provisions, and there are personal and property rights beyond and above its control.

It is not claimed that the plaintiff in error, in the language of the learned judge who delivered the opinion of the Supreme Court of Kansas, "could go on with or without legislation, and with or without a license, manufacturing beer forever," or that, "he founds his right to continue to manufacture beer solely and exclusively upon his supposed vested right to oper-

ate his brewery in undisturbed tranquillity forever." No such claim has ever existed, except in the judicial imagination. But the plaintiff does claim, most earnestly and confidently, that his right to operate his brewery as vested in him by the laws of Kansas, cannot be taken away by the State without just compensation. For an exhaustive discussion of the question, see *Wynehamer* v. *People*, above cited; *Beebe* v. *State*, 6 Ind. 501; *S. C.* 63 Am. Dec. 391; *In the matter of Jacobs (Tenement House Cigar Case)*, 98 N. Y. 98.

Mr. B. S. Bradford, Attorney General of the State of Kansas, *Mr. George R. Peck*, *Mr. J. B. Johnson*, and *Mr. George J. Barker* for defendant in error, submitted on their brief.

On the 7th March, 1885, the legislature of Kansas passed an act "amendatory of and supplemental to" the act of 1881. Among other changes made, § 13 was amended so as to read as shown in the footnote.[1]

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[1] For convenience this section is reprinted here, although it will be found *infra*, in the opinion of the court.

"SEC. 13. All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances, and upon the judgment of any court having jurisdiction finding such a place to be a nuisance under this section, the sheriff, his deputy, or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. The attorney general, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceeding, shall be punished as for contempt, by a fine of not less than

Mr. Choate's Argument for Ziebold.

On the 13th August, 1886, there was filed in the office of the District Court for the County of Atchison, Kansas, an information against Ziebold and his partner, who were proprietors of a brewery there. The information prayed that the brewery might be adjudged to be a common nuisance; that it be ordered to be shut up and abated; that the defendants be enjoined from using or permitting to be used the premises as a place where intoxicating liquors were sold, bartered, or given away, or were kept for barter, sale, or gift, otherwise than by authority of law; and that the defendants might be enjoined from keeping the brewery open, and from selling, bartering, or giving away, or keeping for sale, barter, gift, or use in or about the premises, or manufacturing for barter, sale, or gift in the State of Kansas, any malt, vinous, spirituous, fermented, or other intoxicating liquors, and from permitting such liquors to be sold, &c., or kept for sale, &c., or manufactured for sale, &c., in the State of Kansas. On the defendants' motion this case was removed to the Circuit Court of the United States, where an amended bill in equity was filed, praying for the relief asked for in the state court. After joinder of issue and hearing the Circuit Court dismissed the bill, from which decree the State appealed.

Mr. S. B. Bradford, Attorney General of the State of Kansas, *Mr. Edwin A. Austin*, Assistant Attorney General of that State, and *Mr. J. F. Tufts*, Assistant Attorney General for Atchison County, Kansas, for appellant submitted on their brief. October 25, 1887, *Mr. Bradford* moved the court to reopen the cause and reassign it for argument. October 26, 1887, the court denied the motion.

Mr. Joseph H. Choate for appellee. *Mr. Robert M. Eaton* and *Mr. John C. Tomlinson* were with him on his brief.

I. The entire scheme of the thirteenth section which attempts by mere legislative enactment to convert the building

one hundred nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment, in the discretion of the court."

and machinery of the appellees into a common nuisance, and to compass their destruction, and also attempts to execute the criminal law against the persons of the appellees, by equitable proceedings instead of a common law trial, is an attempt to deprive these persons of their property and their liberty without "due process of law," and is therefore absolutely void; and the Circuit Judge was right in refusing to exercise the equity powers vested in the Circuit Court for either of such purposes.

A careful examination of the thirteenth section, in connection with the rest of the act, discloses that it is a distinct legislative scheme, additional to the ordinary methods of trial, conviction and punishment, provided by the other sections of the act, and strikes by novel methods at the property of those engaged in the manufacture, thus presenting a question which, so far as we can find, has never been considered by this court.

By this section the legislature, finding a brewery within the State in actual operation, —which up to the time of the passage of the act was a lawful and protected industry, — instantly, without notice, trial or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and then prescribes the consequences which are to follow inevitably by judicial mandate commanded by the statute, and involving and permitting the exercise of no judicial discretion or judgment. The brewery being found in operation, the court is not to *determine* whether it is a common nuisance, but under the strict behest of the statute is to *find it* to be one. It is not the liquor made or the making of it which is thus enacted to be a common nuisance, but the place itself, including all the property used in keeping and maintaining the common nuisance — embracing the building, machinery, instruments and material without distinction. The judge having thus signed without inquiry — and it may be against the fact and against his own judgment — the edict of the legislature, the court is commanded, by its officers, to take possession of the place and shut it up; and, lest the possession of the court and the closing of the establishment should not be sufficient security against the continuance of the business, the abatement of the

nuisance is to be completed by the destruction, by the marshal, of all the property; and he has no discretion but to destroy the whole. He cannot stop short at the liquor, or the glasses, or the kegs, but must demolish all property used in keeping and maintaining the nuisance. Nor is all this destruction of property, by legislative edict, to be made as a forfeiture consequent upon conviction of any offence, but without the intervention of any real judicial action, and merely because the legislature so commands.

So much of the scheme of the section is directed against the property of the brewers, but what follows, directed against their personal liberty, is equally extraordinary.

By the 7th, 8th and 9th sections of the act, complete provision is made for the punishment *after conviction* of all who shall either manufacture or sell without a permit, or, having a permit, shall sell for any but the excepted purposes. But the thirteenth section provides that in an *equitable* action, commenced for the abatement of the nuisance, which may be instituted by the Attorney General, county attorney, or any citizen of the county where the nuisance exists, an *injunction* shall issue at the commencement of the action, which of course can only be an injunction against the *crimes* of manufacturing and selling; and as all liquors that are manufactured or sold must be manufactured or sold in some place, it may apply to any offenders. And for a violation of the *injunction*, that is, for the *crime* of manufacturing or selling, punishment as for *contempt*, by the process of a court of *equity*, is to follow, which *may be a much more severe penalty than is prescribed as the penalty upon trial and conviction* for keeping or maintaining the nuisance, for the latter may be a fine of five hundred dollars and imprisonment in the county jail, not more than *ninety days*, while the former may be an *equal fine* and imprisonment for *six months*.

The act does not make the trial and conviction for keeping and maintaining the nuisance a condition precedent to its abatement, or to the suit in equity in which these penalties may be inflicted; but, as in the case of these appellees, *equity is invoked at the outset*, to register the edict of the legislature,

that the place is a common nuisance, to take possession of the property and destroy it, and *to punish the criminals* by fine and imprisonment.

As to the proceedings *in rem* for the condemnation, forfeiture, and destruction of the property as a punishment for the *crime* of using it for the manufacture of beer, if the legislature really intended to accomplish that purpose, as the present case assumes, without any conviction first had, or any trial in a form known to the law, by the intervention of a *court of equity*, in a bill filed against the owners, we submit that it is a clear case of depriving the owners of their property without due process of law; and this, assuming that it is within the proper province of the legislature to prohibit within the State all traffic in intoxicating liquors, and to declare the manufacture and sale of them to be nuisances.

In connection with § 13, and as regulating the proceedings which are provided by it, to culminate in the confiscation and destruction of the property, it is to be especially noted that § 14, amending original § 21, expressly provides for all cases that "it shall not be necessary in the first instance for the State to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes;" *i.e.*, that the State shall not be required to prove the one fact which constitutes the offence intended to be punished by the act by loss of liberty and of property; and the presumption of innocence is thus taken away from the party charged.

In *Fisher* v. *McGirr*, 1 Gray, 1, *S. C.* 61 Am. Dec. 381, which brought under review the prohibitory act of Massachusetts of 1852, principles are laid down in the unanimous opinion of the Court, delivered by Shaw, C. J., which are entirely applicable to the case at bar.

And *there* the only attempt of the legislature was to .confiscate and destroy the property as a forfeiture and penalty by way of punishment, after trial and conviction of the owner. *Here* the proposition is, that, *without any proceeding at common law* to charge the owner or keeper with a violation of the statute, in a proceeding begun by a *bill in equity*, in which it shall not be necessary to allege, or on the trial *in equity* to

prove, the *one indispensable fact* constituting the offence to be punished, viz.: "That the party charged did not have the permit to sell intoxicating liquors for the excepted purposes," the punishment of forfeiture and destruction of property may be inflicted by the decree of a court of *equity*.

Surely this is a novel mode of administering *criminal law*. And that it is *criminal law* that is here being administered there can be no doubt. See also *Greene* v. *Briggs*, 1 Curtis, 311, 328; *Hibbard* v. *The People*, 4 Mich. 126, 129; *Neitzell* v. *Concordia*, 14 Kansas, 443; *Boyd* v. *United States*, 116 U. S. 616.

We submit, therefore, that it was not within the power of the legislation of Kansas, by resorting to the device of *enacting* a brewery in operation to be a nuisance, to enable a court of equity by its decree to convict a citizen of a crime, and to punish him by the confiscation and destruction of his property. Rights of property cannot be in this way "arbitrarily or capriciously destroyed or injured." *Yates* v. *Milwaukee*, 10 Wall. 497, 504, 505; *Hutton* v. *Camden*, 39 N. J. Law (10 Vroom), 122, 129, 130; Cooley on Const. Lim. (5th ed.), p. 110, and cases cited. *Lowrey* v. *Rainwater*, 3 Missouri App., 563; *S. C.* 70 Missouri, 152; *Ieck* v. *Anderson*, 57 Cal. 251.

Such a legislative determination would also be void, because, where the *fact* of injury to public health or morals did not exist, as here, it would be an interference with the absolute right of every American citizen to adopt and follow such pursuit as he sees fit, provided it be *not, in fact*, "*injurious to the community*." *People* v. *Marx*, 99 N. Y. 377, 386, and cases cited.

Here, the legislative edict is to be carried out, not through the instrumentality or machinery of a municipal government, but through the agency of a court of equity, which is to act, *not as a court of justice*, but simply as a legislative agent, to register the decrees of a legislative body. Such legislation has been held to be unconstitutional. *Quintini* v. *St. Louis*, 1 Southern Rep. 625.

As to the proceedings against the *person*, the provisions of the thirteenth section are in equally flagrant violation of the

constitutional mandate that no State shall "deprive any person of life, liberty or property *without due process of law*." They are simply a method contrived to punish *crime, without a trial*, by the intervention of a *court of equity*.

It is a clear case of fine and imprisonment inflicted by statute for crime committed, but all safeguards known to the common law for the protection of innocence denied, and the office of imposing it conferred upon a *court of equity*, so as to avoid a trial by jury. As well might the State assume to treat and punish any other crime in the same fashion; and what would be thought of an act of the state legislature authorizing a court of equity to issue an injunction against theft or burglary and to punish the offence, when committed as a contempt, by fine and imprisonment, the amount and term of which was measured out by the statute?

As applicable both to proceedings against the property and to those against the person, under this thirteenth section, it may be stated as a general proposition, requiring little argument for its support, that the criminal law cannot be administered by or through courts of equity. The jurisdiction of a court of equity in cases of public nuisance, properly so called, is exceptional, and extremely limited in its application. Even in cases where the jurisdiction can be invoked "the question of *nuisance or not* must, in cases of doubt, be *tried by a jury*; and the injunction will be granted or not *as that fact is decided*." 2 Story's Eq. Jur. § 923. In practice, this jurisdiction is applied almost exclusively to nuisances in the nature of *purprestures* upon public rights and property, as, for instance, encroachments upon highways, public rivers, streets, squares, bridges, docks and other public accommodations, and is exercised chiefly through an information at the suit of the Attorney General. 2 Story's Eq. Jur. §§ 921–924. But this jurisdiction is not exercised on any idea that the nuisance in question is a *crime*, or with a view of preventing or punishing a criminal act. 1 Bish. Crim. Proc. § 1417. And this is so for the very reason that, as Lord Eldon said, *a court of equity "has no jurisdiction in matters of crime."* *Lawrence* v. *Smith*, Jacob, 471, 473. See also *Hudson* v. *Thorne*, 7 Paige, 261; *Davis* v. *American Society, &c.*, 75 N. Y. 362.

With these general principles in mind as constituting "*the settled course of judicial proceedings*," that is, "due process of law," *Murray* v. *Hoboken Co.*, 18 How. 272, 280; *Walker* v. *Sauvinet*, 92 U. S. 90, 93, the Fourteenth Amendment to the Federal Constitution was adopted, providing that no State shall "deprive any person of life, liberty or property without *due process of law*." "On principle, therefore," as Bishop says, "*this provision secures jury trial* in the States in all cases in which at the time of its adoption such trial was deemed a fundamental right." 1 Bish. Crim. Proc. § 891.

Accepting in its narrowest sense this court's definition of "due process of law" in *Walker* v. *Sauvinet*, 92 U. S. above cited, we find that it was settled in Kansas when these proceedings were commenced that "the settled course of judicial proceedings" involved the right to a trial by jury in every criminal case. Such a trial was provided for in the constitution of the State, §§ 5 and 10 of the Bill of Rights, and the Supreme Court of that State has held that no legislation is valid which conflicts with those provisions. *Atchison Street Railway* v. *Missouri Pacific Railway*, 31 Kansas, 660.

It is also firmly established in that State, as elsewhere, that these provisions mean that "A jury trial is preserved in *all cases in which it existed prior to the adoption of the constitution.* It does not extend the trial by jury, it simply *preserves* it. It remains inviolate; that is, not disturbed or limited." *In re Rolf's Petitioner*, 30 Kansas, 758, 762; *Kimball* v. *Connor*, 3 Kansas, 414, 432; *Ross* v. *Commissioners*, 16 Kansas, 411, 418; and that a prosecution for a matter made penal by the laws of the State, as *for selling liquor without a license*, is "*unquestionably a criminal action.*" *Neitzell* v. *Concordia*, 14 Kansas, 446; *In re Rolf*, above cited.

It would seem that nothing more need be said. If the legislature cannot accomplish *indirectly* what it cannot do directly, how is it possible for it to deprive a party of his right to a jury trial simply by authorizing a court of equity to take jurisdiction of the particular case? It is submitted, therefore, that there is not the slightest doubt that, by the statute in question, the legislature of Kansas has violated fundamen-

tal principles, the "settled course of judicial proceedings," and the law of the land, and that the statute is therefore unconstitutional and void.

If the propositions already expressed should meet with the approval of the court, they would necessarily be decisive of the case, and require the affirmance of the decree appealed from. As a law of criminal procedure applied to the punishment of offenders against its provisions, it would be held to be a fatal departure from "due process of law," and therefore void.

And, upon the one point, that the provision of the fourteenth section, which "in all cases" dispenses with proof in the first instance on the part of the State, that the party charged did not have a permit, which is "the one indispensable fact" constituting crime under the act, thereby taking away the presumption of innocence, which is the fundamental right of every person charged with crime, not only is the thirteenth section unconstitutional and void, but all other parts of the act are equally so.

II. Within the meaning of the Fourteenth Amendment this act deprived the appellees of their liberty and property without due process of law, and abridged the privileges and immunities of the appellees as citizens of the United States.

We claim also as part of this proposition, and in support of it, that at the time of the passage of the act, it was one of the fundamental rights of the appellees as citizens to pursue their calling of manufacturing beer and to use their brewery for that purpose, and that the State could only restrain the exercise of this right by virtue of the police power; that that power could only be exercised to the extent reasonable and necessary for the promotion of the object for which it was exercised, viz., the preservation and promotion of the morals and the health of the people of Kansas; that this act goes far beyond what is so necessary and reasonable, and that in such excess it invades the rights of the appellees and deprives them of their property; that it destroys their property for the public use other than for police purposes; that it does this without compensation; that such destruction, not demanded by any legitimate exercise of

the police power, is depriving them of their property without due process of law.

At the outset, it should be borne in mind that "constitutional provisions for the security of person and property should be liberally construed." It is the duty of the courts to be watchful of constitutional rights and "against any stealthy encroachments thereon." *Boyd* v. *United States*, 116 U. S. 635. As to the general intent of the Fourteenth Amendment, "that there should be no *arbitrary deprivation* of life or liberty, or *arbitrary spoliation* of property," see *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Assuming the question presented in this case to be wholly open, we submit with deference that the only principle that saves from condemnation, as abridging the privileges and immunities of citizens of the United States, or depriving persons of their property without due process of law, state statutes which invade the peaceful occupations of citizens and the use by them of their property for purposes theretofore permitted and lawful, is the proper exercise of the police power by *legitimate and constitutional methods;* that, so far as such statutes do go beyond such proper exercise and outside of such *methods*, at any rate, they do still violate the Fourteenth Amendment, and entitle citizens, whose privileges are thereby abridged, to protection; that, when citizens are thereby deprived of their property, they are still deprived of it *without due process of law*, even though the power working that deprivation be called the *police power;* and that the present statute of Kansas, so far, at any rate, as it prohibits the use by the appellees of their brewery for the manufacture of beer, and enacts their building and machinery to be a public nuisance, and dooms it to *destruction* by the mere *fiat* of the legislature, does transcend any legitimate exercise of the police power in regulating or prohibiting the *traffic* in intoxicating liquors, and is therefore void.

That there is a limit to the exercise of the police power in invading business and property in any given case, and that that limit is found in what is necessary and reasonable for guarding against the evil which injures or threatens the public welfare in the given case, and that the legislature cannot,

under the guise or pretext of a police regulation, go beyond that limit, and strike down innocent occupations and invade private property, the destruction and invasion of which are not reasonably necessary to accomplish the needed relief or the needed reform, are propositions sustained by abundant authority; and this, though allowing the legislature to be in each case the judge of the extent to which the existing evil is to be regulated or prohibited.

Now, allowing the legislature of Kansas to be the sole judge of how far they shall go in reforming the morals and the habits and regulating the appetites and prescribing the food and the drink of the people of Kansas, they certainly are not to be permitted to regulate the morals and the habits or the food and drink of the rest of the people of the United States, or the rest of mankind; and when, under guise of a liquor law for their own people, they strike down occupations and deprive persons of property, which have no tendency even to affect the temperance of the inhabitants of Kansas, they do exceed their recognized powers, and come in conflict with the Fourteenth Amendment.

Where the occupation or property is *in itself* immoral or noxious to health or to safety, we make no question of the power of the legislature to lay its hand upon them, and even in a proper case, to put them out of the way, and, where necessary, to destroy them.

Nor do we need to gainsay any of the familiar propositions of law cited, and relied upon in the brief on the part of the State.

But, in the light of the decisions in *Fletcher* v. *Peck*, 6 Cranch, 87, 135; *Calder* v. *Bull*, 3 Dall. 386; *Lake View* v. *Rose Hill Cemetery Co.*, 70 Ill. 191; *Railway Co.* v. *Jacksonville*, 67 Ill. 37; Brewer, J., in *Intoxicating Liquor Cases*, 25 Kansas, 751, 765; *Tenement House Cigar Case*, 98 N. Y. 98; and *People* v. *Marx*, above cited, we respectfully insist that the prohibitory statute of Kansas, so far as it goes beyond everything that can fairly tend to protect the morals and the habits of the people of Kansas, and absolutely prohibits the appellees from *manufacturing* beer at their brewery for sale

in other States and countries, and especially so far as it enacts their buildings and machinery to be a common nuisance, and condemns them to *confiscation and destruction*, exceeds the bounds of any proper exercise of the police power, and has gone beyond the utmost verge of constitutional power, and to that extent, at least, deprives the appellees of their property without "due process of law," and abridges their rightful privileges and immunities as citizens.

It will not be pretended that the mere existence of the brewery in operation, or the mere existence of beer therein in the vats or in the original packages, not intended for sale or consumption *in the State*, is in any way detrimental to the safety, the health, or the morals of the people of Kansas, or tends in the remotest degree in that direction; or that its destination to the *other markets* of the country, or the world, is not entirely consistent with the complete and perfect prevention of its sale and consumption *within the State*.

Nor is there anything in the conduct of the business of brewing, or the presence of the beer in vats, or in the original packages in the brewery, not intended for sale or consumption *within the State*, which is in the least akin to the unwholesome trades and occupations cited by Chancellor Kent in the passage so often referred to; nor can it be said that there is anything immoral in the business of brewing, or in its product. On the contrary, the legislature of Massachusetts in June, 1789, passed "*An act to encourage the manufacture and consumption of strong beer, ale, and other malt liquors.*"

There can be no doubt that the absolute prohibition by statute of the use of the appellee's brewery, which was owned by them before the enactment, does in the sense of the law actually deprive them of their property as completely as if the fee in nine-tenths of it were destroyed and blotted out of existence by the same enactment. The proofs show this, and it is practically conceded by the brief on the part of the State. It destroys fifty-five thousand dollars out of their sixty thousand of property.

This can hardly be an open question in this court since its decision in the case of *Pumpelly* v. *Green Bay Company*, 13

Wall. 166, 177, where the question of what amounts to "depriving a person of property" was plumply decided.

In that case, it was held that the flooding of the plaintiff's lands by a dam erected by the defendant company, was in effect and in law, a *taking* of his property. And though there may be a great difference between "taking property" without compensation, and "depriving a person of his property without due process of law," in many points of view there can be no doubt that "taking a man's property" is "depriving him of it," and that the same language must have been used by the court and the same result reached if it had been applying the constitutional provision against the latter wrong as it did use in applying that provision against the former. See also *Munn* v. *Illinois*, 94 U. S. 113, 141; *Babcock* v. *Buffalo*, 56 N. Y. 268; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178, 189.

If, then, we have established that the act, so far as it exceeds the legitimate and necessary exercise of the police power, by prohibiting the use of the defendants' brewery for the manufacture of beer to be sold without the State, is unconstitutional, because it deprives the appellees of their previously acquired property without due process of law, it must follow that the entire prohibitions of the act, as against manufacture, are invalid because it makes no distinction between the prohibition which it is within the power of the State to impose, and that which is in excess of its lawful authority. The courts cannot be left to determine in each case whether the implicated brewer or brewery is within the intent of the act, or make guilt or innocence depend upon an intent on which the act does not itself make it dependent, viz., the intent to sell the beer within or without the State.

The case is not one where the part of the statute as to manufacture which is constitutional can operate independently of that part which is unconstitutional. But a vital part of the prohibition of the act being unconstitutional, and the act itself affording no means of discriminating them from the rest, the whole must fall together. See *Wynehamer* v. *People*, 13 N. Y. (3 Kern.) 378.

III. But if the power and authority of the state legislature

to prohibit the manufacture of beer, whether for sale outside of the State, or within it, shall be held to be absolute and unlimited, then we submit, upon the doctrines maintained by the Court of Appeals of New York in the case of *Wynehamer* v. *People*, *supra*, and by the Circuit Judge below, that in its application to the appellees' brewery, owned, possessed and used by them when the act took effect, the statute of Kansas violates the Fourteenth Amendment, because it deprives them of their property "without due process of law."

Assuming the act to be an absolute prohibition of brewing, and upholding it as such at the moment of its passage, it did deprive the appellees of their property by destroying the only use for which it was designed, and of which it was capable, which was as complete a deprivation as if the fee itself had been forfeited to the State. By the immediate operation of the statute, without any act committed by the appellees in violation of its provisions, the legal existence which the law and the Constitution designate as property is destroyed, and the private injury is as completely effected as if the thing itself were physically taken away.

When this law was passed, the brewery, and its use for the only purpose of which it was susceptible, was property in the most absolute and unqualified sense of the term, and as such as much entitled to the protection of the Constitution as lands, houses, or chattels of any description. The Constitution makes no discrimination between different kinds of property, and if protected by the Constitution from such legislation as we are now considering, it is protected because it is property innocently acquired under existing laws, and not upon any theory of its comparative utility.

If the good of the community requires the owner to be deprived of it for any purpose of public benefit, no matter what, common justice requires that compensation should be made for it, and any statute which does directly take it away from the owner for the uses of the public without compensation, deprives him of it without due process of law.

What Sir William Blackstone wrote a century ago is certainly as applicable now to property which exists under the

protection of this constitutional provision as it was then to property in England, which had no such shield against legislative encroachment: "So great is the regard of the law for private property that it will not authorize the least violation of it; no, *not even for the general good of the whole community.* In vain may it be urged that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man or even any public tribunal to be the judge of this common good and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights as modelled by the municipal law. The legislature alone can and frequently does interfere and compel the individual to acquiesce. But how does it interpose and compel? *Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnity and equivalent for the injury thereby sustained.*" (1 Bl. Com. 139.)

For all the purposes of the present argument the act should be construed as if it read: "To enable the State to administer and enforce its other laws against the use of intoxicating liquors, every brewery in the State from and after the date when this act takes effect shall be at once and forever closed." From the moment the act took effect the brewery of the appellees could not be kept open for a single instant with a view to its use for any purpose except the practically impossible one of a brewing for medical, scientific, or mechanical purposes. *De minimis non curat lex.* The infinitesimal exception establishes the sweeping universality of the prohibition of the act.

The effect of the statute attempted in New York on manufactured liquor existing at the time of its passage, all right of sale or use of which was taken away, although the title and possession was left with and in the owner, was demonstrated by Judge Comstock in his opinion to be depriving the owner of his property "without due process of law," and no successful answer has ever been made, nor can any as we believe be made to this argument. His definition of "due process of law," as used in the Constitution and as applicable to such cases, has never been surpassed. 13 N. Y. (3 Kern.) p. 392.

See also *Norman* v. *Heist*, 3 W. & S. 171; *Taylor* v. *Porter*, 4 Hill. 140; *S. C.* 11 Am. Dec. 274; *Hoke* v. *Henderson*, 4 Devereaux Law, 1; *S. C.* 25 Am. Dec. 677.

Tested by these authoritative definitions the statute of Kansas, as it operates upon the appellees' brewery without awaiting any act or violation of law on their part, cannot itself be set up as "due process of law." By the mere operation of the law itself, without anything more, the actual and commercial value of the property is annihilated. It cannot be *used;* it is made unlawful to use it; for a single moment's use attempted after the act takes effect all legal protection is withdrawn from it; it becomes a public nuisance and is doomed to actual destruction.

According to the doctrine so emphatically laid down by this entire court in the *Pumpelly* case, and repeated in substance by Mr. Justice Field in the case of *Munn* v. *Illinois* — all that is beneficial in property is the use and enjoyment of it; the use is the property, and if that is taken away, it matters not that the empty husks of title and possession are left with him who was once the owner.

Mr. George G. Vest for appellees, in addition to the points made by him in *Mugler's Case*, contended as follows: If the constitutional amendment and statutes of Kansas prohibit the manufacture of beer, for exportation or storage or personal use, they violate the Federal Constitution by denying rights which belong to every citizen as a citizen of the United States.

It will not do for opposing counsel to say that "if the property used by the defendants is of undiminished value if used for the purpose of manufacturing for barter, sale, and gift in other parts of the sovereignty of the United States, and if, by these proceedings, the defendants are not restricted in the use and enjoyment of these premises for such purposes, then they are not deprived of their property or of the use of it or of any value within the guarantee of the Fourteenth Amendment."

The constitutional amendment and statutes of Kansas, which constitute the basis of this action, and without which it cannot exist, do not stop at prohibiting the manufacture of beer for

barter and sale in Kansas, but they absolutely prohibit the manufacture in the State except for three specified objects, in which the manufacture for sale and barter in other States is not included.

These enactments must stand or fall upon their own legal effect, and not upon the changing and uncertain pleadings of prosecuting officers.

We concede freely that the Fourteenth Article of the Federal Constitution is intended to protect the rights of individuals as citizens of the United States, but no State has the power to deprive any such citizen of the right to manufacture any article, unless its manufacture endangers or injures the lives or property of others.

The police power is given the States to protect the health and morals of its citizens; but no convention or legislature can, under the guise of exercising this power, take from the citizen his right to manufacture beer, unless the process of its manufacture or the existence of the beer afterwards injuriously affects others. It is not pretended that these effects follow; and, without them, the power does not exist.

Mr. Justice Harlan delivered the opinion of the court.

These cases involve an inquiry into the validity of certain statutes of Kansas relating to the manufacture and sale of intoxicating liquors.

The first two are indictments, charging Mugler, the plaintiff in error, in one case, with having sold, and in the other, with having manufactured, spirituous, vinous, malt, fermented, and other intoxicating liquors, in Saline County, Kansas, without having the license or permit required by the statute. The defendant, having been found guilty, was fined, in each case, one hundred dollars, and ordered to be committed to the county jail until the fine was paid. Each judgment was affirmed by the Supreme Court of Kansas, and thereby, it is contended, the defendant was denied rights, privileges, and immunities guaranteed by the Constitution of the United States.

Opinion of the Court.

The third case — *Kansas* v. *Ziebold & Hagelin* — was commenced by petition filed in one of the courts of the State. The relief sought is: 1. That the group of buildings in Atchison County, Kansas, constituting the brewery of the defendants, partners as Ziebold & Hagelin, be adjudged a common nuisance, and the sheriff or other proper officer directed to shut up and abate the same. 2. That the defendants be enjoined from using, or permitting to be used, the said premises as a place where intoxicating liquors may be sold, bartered, or given away, or kept for barter, sale, or gift, otherwise than by authority of law.

The defendants answered, denying the allegations of the petition, and averring: *First.* That said buildings were erected by them prior to the adoption, by the people of Kansas, of the constitutional amendment prohibiting the manufacture and sale of intoxicating liquors for other than medicinal, scientific, and mechanical purposes, and before the passage of the prohibitory liquor statute of that State. *Second.* That they were erected for the purpose of manufacturing beer, and cannot be put to any other use; and, if not so used, they will be of little value. *Third.* That the statute under which said suit is brought is void under the Fourteenth Amendment of the Constitution of the United States.

Upon the petition and bond of the defendants the cause was removed into the Circuit Court of the United States for the District of Kansas upon the ground that the suit was one arising under the Constitution of the United States. A motion to remand it to the state court was denied. The pleadings were recast so as to conform to the equity practice in the courts of the United States; and, the cause having been heard upon bill and answer, the suit was dismissed. From that decree the State prosecutes an appeal.

By a statute of Kansas, approved March 3, 1868, it was made a misdemeanor, punishable by fine and imprisonment, for any one, directly or indirectly, to sell spirituous, vinous, fermented, or other intoxicating liquors, without having a dram-shop, tavern, or grocery license. It was also enacted, among other things, that every place where intoxicating liquors

were sold in violation of the statute should be taken, held, and deemed to be a common nuisance; and it was required that all rooms, taverns, eating-houses, bazaars, restaurants, groceries, coffee-houses, cellars, or other places of public resort where intoxicating liquors were sold, in violation of law, should be abated as public nuisances. Gen. Stat. Kansas, 1868, c. 35, § 6.

But, in 1880, the people of Kansas adopted a more stringent policy. On the 2d of November of that year, they ratified an amendment to the state constitution, which declared that the manufacture and sale of intoxicating liquors should be forever prohibited in that State, except for medical, scientific, and mechanical purposes.

In order to give effect to that amendment, the legislature repealed the act of 1868, and passed an act, approved February 19, 1881, to take effect May 1, 1881, entitled "An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes." Its first section provides "that any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors shall be guilty of a misdemeanor: *Provided, however*, That such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this act." The second section makes it unlawful for any person to sell or barter for either of such excepted purposes any malt, vinous, spirituous, fermented, or other intoxicating liquors without having procured a druggist's permit therefor, and prescribes the conditions upon which such permit may be granted. The third section relates to the giving by physicians of prescriptions for intoxicating liquors to be used by their patients, and the fourth, to the sale of such liquors by druggists. The fifth section forbids any person from manufacturing or assisting in the manufacture of intoxicating liquors in the State, except for medical, scientific, and mechanical purposes, and makes provision for the granting of licenses to engage in the business of manufacturing liquors for such excepted purposes. The seventh section declares it to be a

misdemeanor for any person, not having the required permit, to sell or barter, directly or indirectly, spirituous, malt, vinous, fermented, or other intoxicating liquors; the punishment prescribed being, for the first offence, a fine not less than one hundred nor more than five hundred dollars, or imprisonment in the county jail not less than twenty nor more than ninety days; for the second offence, a fine of not less than two hundred nor more than five hundred dollars, or imprisonment in the county jail not less than sixty days nor more than six months; and for every subsequent offence, a fine not less than five hundred nor more than one thousand dollars, or imprisonment in the county jail not less than three months nor more than one year, or both such fine and imprisonment, in the discretion of the court. The eighth section provides for similar fines and punishments against persons who manufacture, or aid, assist, or abet the manufacture of any intoxicating liquors without having the required permit. The thirteenth section declares, among other things, all places where intoxicating liquors are manufactured, sold, bartered, or given away, or are kept for sale, barter, or use, in violation of the act, to be common nuisances; and provides that upon the judgment of any court having jurisdiction finding such place to be a nuisance, the proper officer shall be directed to shut up and abate the same.

Under that statute, the prosecutions against Mugler were instituted. It contains other sections in addition to those above referred to; but as they embody merely the details of the general scheme adopted by the State for the prohibition of the manufacture and sale of intoxicating liquors, except for the purposes specified, it is unnecessary to set them out.

On the 7th of March, 1885, the legislature passed an act amendatory and supplementary to that of 1881. The thirteenth section of the former act, being the one upon which the suit against Ziebold & Hagelin is founded, will be given in full in a subsequent part of this opinion.

The facts necessary to a clear understanding of the questions, common to these cases, are the following: Mugler and Ziebold & Hagelin were engaged in manufacturing beer at

their respective establishments, (constructed specially for that purpose,) for several years prior to the adoption of the constitutional amendment of 1880. They continued in such business in defiance of the statute of 1881, and without having the required permit. Nor did Mugler have a license or permit to sell beer. The single sale of which he was found guilty occurred in the State, and after May 1, 1881, that is, after the act of February 19, 1881, took effect, and was of beer manufactured before its passage.

The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be very materially diminished.

The general question in each case is, whether the foregoing statutes of Kansas are in conflict with that clause of the Fourteenth Amendment, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment; to some of which, in view of questions to be presently considered, it will be well to refer.

In the *License Cases*, 5 How. 504, the question was, whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors were repugnant to the Constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did

not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper." (p. 577.) Mr. Justice McLean, among other things, said: "A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the Federal government has no power. . . . The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed." (pp. 588, 589.) Mr. Justice Woodbury observed: "How can they [the States] be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in articles intimately connected either with public morals, or public safety, or the public prosperity?" (p. 628.) Mr. Justice Grier, in still more emphatic language, said: "The true question presented by these cases, and one which I am not disposed to evade, is whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. . . . Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals must come within this category. . . . It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. The

police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority." (pp. 631, 632.)

In *Bartemeyer* v. *Iowa*, 18 Wall. 129, it was said that prior to the adoption of the Fourteenth Amendment, state enactments, regulating or prohibiting the traffic in intoxicating liquors, raised no question under the Constitution of the United States; and that such legislation was left to the discretion of the respective States, subject to no other limitations than those imposed by their own constitutions, or by the general principles supposed to limit all legislative power. Referring to the contention that the right to sell intoxicating liquors was secured by the Fourteenth Amendment, the court said that "so far as such a right exists, it is not one of the rights growing out of citizenship of the United States." In *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33, it was said, that, "as a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States." Finally, in *Foster* v. *Kansas*, 112 U. S. 201, 206, the court said that the question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court. These cases rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States. The power to establish such regulations, as was said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, reaches everything within the territory of a State not surrendered to the national government.

It is, however, contended, that, although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of govern-

ment, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the State and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the State cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn* v. *Illinois*, 94 U. S. 113, 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they

please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases*, 99 U. S. 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. "To what purpose," it was said in *Marbury* v. *Madison*, 1 Cranch, 137, 176, "are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation." The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the

manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs

any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in *Barbier* v. *Connolly*, 113 U. S. 27, 31, that the Fourteenth Amendment had no such effect. After observing, among other things, that that Amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: "But neither the Amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Railroad Co.* v. *Husen*, 95 U. S. 465; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Walling* v. *Michigan*,

116 U. S. 446; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U. S. 455.

Upon this ground — if we do not misapprehend the position of defendants — it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile state legislation, this court in *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 751, said that the State could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals. So, in *Stone* v. *Mississippi*, 101 U. S. 814, 816, where the Constitution was invoked against the repeal by the State of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the court said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. . . . Government is organized

with a view to their preservation, and cannot divest itself of the power to provide for them." Again, in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32; *Commonwealth* v. *Alger*, 7 Cush. 53. An illustration of this doctrine is afforded by *Patterson* v. *Kentucky*, 97 U. S. 501. The question there was as to the validity of a statute of Kentucky, enacted in 1874, imposing a penalty upon any one selling or offering for sale oils and fluids, the product of coal, petroleum, or other bituminous substances, which would burn or ignite at a temperature below 130° Fahrenheit. Patterson having sold, within that commonwealth, a certain oil, for which letters-patent were issued in 1867, but which did not come up to the standard required by said statute, and having been indicted therefor, disputed the State's authority to prevent or obstruct the exercise of that right. This court upheld the legislation of Kentucky, upon the ground, that while the State could not impair the exclusive right of the patentee, or of his assignee, in the discovery described in the letters-patent, the tangible property, the fruit of the discovery, was not beyond control in the exercise of her

police powers. It was said: "By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government. The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential to the protection of the lives and property of citizens." p. 504. Referring to the numerous decisions of this court guarding the power of Congress to regulate commerce against encroachment, under the guise of state regulations, established for the purpose and with the effect of destroying or impairing rights secured by the Constitution, it was further said: "It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." See also *United States* v. *Dewitt*, 9 Wall. 41; *License Tax Cases*, 5 Wall. 462; *Pervear* v. *Commonwealth*, 5 Wall. 475.

Another decision, very much in point upon this branch of the case, is *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667, also decided after the adoption of the Fourteenth Amendment. The court there sustained the validity of an ordinance of the village of Hyde Park, in Cook County, Illinois, passed under legislative authority, forbidding any person from transporting through that village offal or other offensive or unwholesome matter, or from maintaining or carrying on an offensive or unwholesome business or establishment within its limits. The Fertilizing Company had, at large expense, and under authority expressly conferred by its charter, located its works at a particular point in the county. Besides, the charter of the village, at that time, provided that it should not interfere with parties engaged in transporting animal matter from Chicago,

or from manufacturing it into a fertilizer or other chemical product. The enforcement of the ordinance in question operated to destroy the business of the company, and seriously to impair the value of its property. As, however, its business had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people, the court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance. It said: "We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions."

It is supposed by the defendants that the doctrine for which they contend is sustained by *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166. But in that view we do not concur. That was an action for the recovery of damages for the overflowing of the plaintiff's land by water, resulting from the construction of a dam across a river. The defence was that the dam constituted a part of the system adopted by the State for improving the navigation of Fox and Wisconsin rivers; and it was contended that as the damages of which the plaintiff complained were only the result of the improvement, under legislative sanction, of a navigable stream, he was not entitled to compensation from the State or its agents. The case, therefore, involved the question whether the overflowing of the plaintiff's land, to such an extent that it became practically unfit to be used, was a taking of property, within the meaning of the constitution of Wisconsin, providing that "the property of no person shall be taken for public use without just compensation therefor." This court said it would be a very curious and unsatisfactory result, were it held that, "if the government refrains from the absolute conversion of real

property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." pp. 177, 178.

These principles have no application to the case under consideration. The question in *Pumpelly* v. *Green Bay Company* arose under the State's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the State, exerted for the protection of the health, morals, and safety of the people. That case, as this court said in *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642, was an extreme qualification of the doctrine, universally held, that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use," do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him any right of action. It was a case in which there was a "permanent flooding of private property," a "physical invasion of the real estate of the private owner, and a practical ouster of his possession." His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or

an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone* v. *Mississippi*, above cited, the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in *Beer Co.* v. *Massachu-*

setts, 97 U. S. 32: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

It now remains to consider certain questions relating particularly to the thirteenth section of the act of 1885. That section — which takes the place of § 13 of the act of 1881 — is as follows:

"SEC. 13. All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances; and upon the judgment of any court having jurisdiction finding such place to be a nuisance under this section, the sheriff, his deputy, or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance; and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. The attorney general, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceeding, shall be punished as for contempt, by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment, in the discretion of the court."

It is contended by counsel in the case of *Kansas* v. *Ziebold & Hagelin*, that the entire scheme of this section is an attempt to deprive persons who come within its provisions of their property and of their liberty without due process of law; especially, when taken in connection with that clause of § 14 (amendatory of § 21 of the act of 1881) which provides that "in prosecutions under this act, by indictment or otherwise, . . . it shall not be necessary in the first instance for the State to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes."

We are unable to perceive anything in these regulations inconsistent with the constitutional guarantees of liberty and property. The State having authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender.

It is said that by the thirteenth section of the act of 1885, the legislature, finding a brewery within the State in actual operation, without notice, trial, or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and then prescribes the consequences which are to follow inevitably by judicial mandate required by the statute, and involving and permitting the exercise of no judicial discretion or judgment; that the brewery being found in operation, the court is not to *determine* whether it is a common nuisance, but, under the command of the statute, is to *find it* to be one; that it is not the liquor made, or the making of it, which is thus enacted to be a common nuisance, but the place itself, including all the property used in keeping and maintaining the common nuisance; that the judge having thus signed without inquiry — and, it may be, contrary to the fact and against his own judgment — the edict of the legislature, the court is commanded to take possession by its officers of the

place and shut it up; nor is all this destruction of property, by legislative edict, to be made as a forfeiture consequent upon conviction of any offence, but merely because the legislature so commands; and it is done by a *court of equity*, without any previous conviction first had, or any trial known to the law.

This, certainly, is a formidable arraignment of the legislation of Kansas, and if it were founded upon a just interpretation of her statutes, the court would have no difficulty in declaring that they could not be enforced without infringing the constitutional rights of the citizen. But those statutes have no such scope and are attended with no such results as the defendants suppose. The court is not required to give effect to a legislative "decree" or "edict," unless every enactment by the law-making power of a State is to be so characterized. It is not declared that every establishment is to be deemed a common nuisance because it may have been maintained prior to the passage of the statute as a place for manufacturing intoxicating liquors. The statute is prospective in its operation, that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the State to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used, as to make it a common nuisance.

Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. "In regard to public nuisances," Mr. Justice Story says, "the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. . . . In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the

offenders. But an information, also, lies in equity to redress the grievance by way of injunction." 2 Story's Eq. §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. *District Attorney* v. *Lynn and Boston Railroad Co.*, 16 Gray, 242, 245; *Attorney General* v. *New Jersey Railroad*, 2 Green, Ch. 139; *Attorney General* v. *Tudor Ice Co.*, 104 Mass. 239, 244; *State* v. *Mayor*, 5 Porter (Ala.), 279, 294; *Hoole* v. *Attorney General*, 22 Ala. 190, 194; *Attorney General* v. *Hunter*, 1 Dev. Eq. 12; *Attorney General* v. *Forbes*, 2 Myl. & Cr. 123, 129, 133; *Attorney General* v. *Great Northern Railway Co.*, 1 Drew. & Sm. 154, 161; Eden on Injunctions, 259; Kerr on Injunctions (2d ed.), 168.

As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance. The statutory direction that an injunction issue at the commencement of the action is not to be construed as dispensing with such preliminary proof as is necessary to authorize an injunction pending the suit. The court is not to issue an injunction simply because one is asked, or because the charge is made that a common nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. Here the fact to be ascertained was, not whether a place, kept and maintained for

purposes forbidden by the statute, was, *per se*, a nuisance — that fact being conclusively determined by the statute itself — but whether the place in question was so kept and maintained.

If the proof upon that point is not full or sufficient, the court can refuse an injunction, or postpone action until the State first obtains the verdict of a jury in her favor. In this case, it cannot be denied that the defendants kept and maintained a place that is within the statutory definition of a common nuisance. Their petition for the removal of the cause from the state court, and their answer to the bill, admitted every fact necessary to maintain this suit, if the statute, under which it was brought, was constitutional.

Touching the provision that in prosecutions, by indictment or otherwise, the State need not, in the first instance, prove that the defendant has not the permit required by the statute, we may remark that, if it has any application to a proceeding like this, it does not deprive him of the presumption that he is innocent of any violation of law. It is only a declaration that when the State has proven that the place described is kept and maintained for the manufacture or sale of intoxicating liquors — such manufacture or sale being unlawful except for specified purposes, and then only under a permit — the prosecution need not prove a negative, namely, that the defendant has not the required license or permit. If the defendant has such license or permit, he can easily produce it, and thus overthrow the *prima facie* case established by the State.

A portion of the argument in behalf of the defendants is to the effect that the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported, or to be carried to other States, and, upon that ground, are repugnant to the clause of the Constitution of the United States, giving Congress power to regulate commerce with foreign nations and among the several States. We need only say, upon this point, that there is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the State or to foreign countries. And, without expressing an opinion as to whether such facts would have constituted a good defence, we observe that it will be time enough to decide a case of that character when it shall come before us.

Separate Opinion of Mr. Justice Field.

For the reasons stated, we are of opinion that the judgments of the Supreme Court of Kansas have not denied to Mugler, the plaintiff in error, any right, privilege, or immunity secured to him by the Constitution of the United States, and its judgment, in each case, is, accordingly, affirmed. We are, also, of opinion that the Circuit Court of the United States erred in dismissing the bill of the State against Ziebold & Hagelin. The decree in that case is reversed, and the cause remanded, with directions to enter a decree granting to the State such relief as the act of March 7, 1885, authorizes.

Mr. Justice Field delivered the following separate opinion.

I dissent from the judgment in the last case, the one coming from the Circuit Court of the United States.

I agree to so much of the opinion as asserts that there is nothing in the Constitution or laws of the United States affecting the validity of any act of Kansas prohibiting the sale of intoxicating liquors manufactured in the State, except under proper regulations for the protection of the health and morals of the people. But I am not prepared to say that the State can prohibit the manufacture of such liquors within its limits if they are intended for exportation, or forbid their sale within its limits, under like regulations, if Congress has authorized their importation, though the act of Kansas is broad enough to include both such manufacture and sale. The right to import an article of merchandise, recognized as such by the commercial world — whether the right be given by act of Congress or by treaty with a foreign country — would seem necessarily to carry the right to sell the article when imported. In *Brown* v. *Maryland*, 12 Wheat. 447, Chief Justice Marshall, in delivering the opinion of this court, said as follows: "Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing,

then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

If one State can forbid the sale within its limits of an imported article, so may all the States, each selecting a different article. There would then be little uniformity of regulations with respect to articles of foreign commerce imported into different States, and the same may be also said of regulations with respect to articles of interstate commerce. And we know it was one of the objects of the formation of the Federal Constitution to secure uniformity of commercial regulations against discriminating state legislation. The construction of the commercial clause of the Constitution, upon which the License cases in the 7th of Howard were decided, appears to me to have been substantially abandoned in later decisions. *Hall* v. *De Cuir*, 95 U. S. 485; *Welton* v. *State of Missouri*, 91 U. S. 275; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Transportation Co.* v. *Parkersburgh*, 107 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557. I make this reservation that I may not hereafter be deemed concluded by a general concurrence in the opinion of the majority.

I do not agree to what is said with reference to the case from the United States Circuit Court. That was a suit in equity brought for the abatement of the brewery owned by the defendants. It is based upon clauses in the thirteenth section of the act of Kansas, which are as follows:

"All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this act, *are hereby declared to be common nuisances;* and upon the judgment of any court having jurisdiction finding such place to be a nuisance under this section, the sheriff, his deputy, or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut

up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance; and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. The Attorney General, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required."

By a previous section all malt, vinous, and fermented liquors are classed as intoxicating liquors, and their manufacture, barter, and sale are equally prohibited. By the thirteenth section, as is well said by counsel, the legislature, without notice to the owner or hearing of any kind, declares every place where such liquors are sold, bartered, or given away, or kept for sale, barter, or delivery — in this case a brewery, where beer was manufactured and sold, which, up to the passage of the act, was a lawful industry — to be a common nuisance; and then prescribes what shall follow, upon a court having jurisdiction finding one of such places to be what the legislature has already pronounced it. The court is not to determine whether the place is a common nuisance in fact, but is to find it to be so if it comes within the definition of the statute, and, having thus found it, the executive officers of the court are to be directed to shut up and abate the place by taking possession of it; and, as though this were not sufficient security against the continuance of the business, they are to be required to destroy all the liquor found therein, and all other property used in keeping and maintaining the nuisance. It matters not whether they are of such a character as could be used in any other business, or be of value for any other purposes. No discretion is left in the judge or in the officer.

These clauses appear to me to deprive one who owns a brewery and manufactures beer for sale, like the defendants, of property without due process of law. The destruction to be ordered is not as a forfeiture upon conviction of any offence, but merely because the legislature has so commanded. Assuming, which is not conceded, that the legislature, in the exercise of that undefined power of the State, called its police power, may, without compensation to the owner, deprive him of the use of his brewery for the purposes for which it was constructed under the sanction of the law, and for which alone it is valuable, I cannot see upon what principle, after closing the brewery, and thus putting an end to its use in the future for manufacturing spirits, it can order the destruction of the liquor already manufactured, which it admits by its legislation may be valuable for some purposes, and allows to be sold for those purposes. Nor can I see how the protection of the health and morals of the people of the State can require the destruction of property like bottles, glasses, and other utensils, which may be used for many lawful purposes. It has heretofore been supposed to be an established principle, that where there is a power to abate a nuisance, the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of individuals. Thus, if the nuisance consists in the use to which a building is put, the remedy is to stop such use, not to tear down or to demolish the building itself, or to destroy property found within it. *Babcock* v. *City of Buffalo*, 56 N. Y. 268; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178, 189. The decision of the court, as it seems to me, reverses this principle.

It is plain that great wrong will often be done to manufacturers of liquors, if legislation like that embodied in this thirteenth section can be upheld. The Supreme Court of Kansas admits that the legislature of the State, in destroying the values of such kinds of property, may have gone to the utmost verge of constitutional authority. In my opinion it has passed beyond that verge, and crossed the line which separates regulation from confiscation.

SHERMAN *v.* GRINNELL.

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

Submitted November 21, 1887. — Decided December 12, 1887.

If the order to remand a case to a state court was made while the act of March 3, 1875, 18 Stat. 470, was in force, but the writ of error to review it was not brought until after the act of March 3, 1887, 24 Stat. 552, went into effect, this court cannot take jurisdiction on the writ.

THE case is stated in the opinion of the court.

Mr. Roger M. Sherman in person for plaintiff in error.

Mr. Treadwell Cleveland and *Mr. W. M. Evarts*, *Mr. J. H. Choate* and *Mr. C. C. Beaman* for defendants in error.

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

This is a writ of error brought for the review of an order of a Circuit Court, remanding a suit which had been removed from a state court. The suit was begun October 28, 1885; removed October 30, 1885, the state court making an order to that effect on that day; and remanded by the Circuit Court, May 4, 1886. All this was before the act of March 3, 1887, c. 373, 24 Stat. 552, went into effect. The writ of error from this court was not sued out, however, until April 8, 1887, which was after that statute.

The first question which presents itself is, whether we have jurisdiction of the writ. We have already decided, at the present term, in *Morey* v. *Lockhart*, *ante*, 56, that this court cannot review, on appeal or writ of error, the order of a Circuit Court, remanding a suit which had been removed under the act of 1887 and which was begun, removed, and remanded after that act went into effect. Later in the term we decided, *Wilkinson* v. *Nebraska*, *ante*, 286, that we had no jurisdiction when the suit was begun and removed before the act of 1887,

but not remanded until afterwards. In the last case we said that this statute showed "unmistakably an intention on the part of Congress to take away all appeals and writs of error to this court from orders thereafter made by Circuit Courts remanding suits which had been removed from a state court, and this whether the suit was begun and the removal had before or after the act of 1887." That was as far as it was necessary to go in any suit that had come before us down to that time. Here, however, the question reaches one step further, and requires us to determine whether we can take jurisdiction on appeal or writ of error if the order to remand was made whilst the act of March 3, 1875, c. 137, 18 Stat. 470, was in force, but the writ of error was not brought until after that of March 3, 1887, went into effect, and we are of opinion that we cannot. This is the logical result of what has already been decided. Until the act of 1875 there was no such jurisdiction. *Railroad Co.* v. *Wiswall*, 23 Wall. 507. The provision of that act giving the jurisdiction was repealed by the act of 1887 without any reservation as to pending cases, the proviso in the repealing section having reference "only to the jurisdiction of the Circuit Court and the disposition of the suit on its merits." *Wilkinson* v. *Nebraska*, *ubi supra*. As a consequence of this the repeal operated to take away jurisdiction in cases where the order to remand had been made, but no appeal or writ of error taken, because "if a law conferring jurisdiction is repealed without a reservation as to pending cases, all such cases fall with the law." *Railroad Co.* v. *Grant*, 98 U. S. 398, 401, and cases there cited.

It follows that we have no jurisdiction of this writ of error, and it is accordingly

Dismissed.

UNITED STATES *v.* HILL.

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

Submitted November 21, 1887. — Decided December 12, 1887.

On an examination of the face of the record in this case, it appears that the amount due the United States is less than the penalty of the bond, given by defendant in error for the faithful performance of his duties as an officer, viz.: $517.07, and possibly a small amount of interest; and as the jurisdiction of this court in an action on such a bond depends upon the amount due for the breach of the condition, the court is without jurisdiction.

The term "revenue law," when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by the constitution "to lay and collect taxes, duties, imposts, and excises."

Section 844 Rev. Stat., requiring the clerk of a court of the United States to pay into the Treasury any surplus of fees and emoluments which his return shows to exist over and above the compensation and allowances authorized by law to be retained by him, is not a revenue law within the meaning of that clause of § 699 Rev. Stat. which provides for a writ of error without regard to the sum or value in dispute, "upon any final judgment of a Circuit Court . . . in any civil action brought by the United States for the enforcement of any revenue law thereof."

MOTION TO DISMISS, with which was united a motion to affirm. The case is stated in the opinion of the court.

Mr. John Lowell for the motions.

Mr. Attorney General and *Mr. Assistant Attorney General Maury* opposing.

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

This is a suit brought on the official bond of Clement Hugh Hill, as clerk of the District Court of the United States for the District of Massachusetts, for "not properly accounting for all moneys coming into his hands, as required by law, according to the condition of said bond." The bond was in the penal sum of $20,000, and in the original writ the damages were laid at $2000. The bill of exceptions shows that the contro-

versy in the suit was as to the liability of the clerk to account to the United States for moneys received by him in naturalization business. The questions involved are in many respects the same as in *United States* v. *Hill*, 120 U. S. 169, though in some important particulars the two cases differ.

Under the instructions of the court the jury found a verdict for the defendants on the 26th of July, 1887. On the 3d of August, and before judgment, the writ was amended, with leave of the court, by increasing the *ad damnum* from $2000 to $20,000. Then, on the 24th of August, a judgment was entered in due form on the verdict, "that the plaintiff take nothing by the writ." To reverse that judgment this writ of error was brought, which the defendants now move to dismiss, because the value of the matter in dispute does not exceed five thousand dollars. The motion is based upon the following statement which appears as part of the bill of exceptions:

"This is an action upon the official bond of the defendants, given by the defendant Hill as clerk of the District Court for this district. The pleadings are made a part of this bill of exceptions, and may be referred to. The only breach of the bond relied upon was that set out in the declaration of the failure of Hill to account for all moneys received; and, under this assignment of breach, no claim was made that the said Hill had neglected to account for any other sums or moneys than those received by him in naturalization cases. It appeared as a fact that the total amount of naturalization fees received by the defendant Hill since the date of former suit, viz., December 4, 1884, and not accounted for, was as follows:

"July to Dec., 1884	$2720.58
1885	1146.50
1886	2325.00
"Jan. to June, 1887	838.00

"It also appeared that in 1884, adding the naturalization fees to the other fees, the two together exceeded the clerk's maximum allowance by the amount of $517.07, but since then, adding the two together, the clerk has not received the maximum allowed him by law."

Opinion of the Court.

As early as *United States* v. *McDowell*, 4 Cranch, 316, it was decided that in an action on an official bond given for the faithful performance of the duties of an office our jurisdiction would depend on the amount due for the breach of the condition, and not on the penal sum. This is not denied in the argument of the Attorney General submitted in opposition to this motion, but he insists:

1. That it does not appear legitimately on the face of this record that the amount due is less than the penalty of the bond; and,

2. That this is a suit brought for the enforcement of a "revenue law" of the United States, and, therefore, this court has jurisdiction for the review of the judgment under § 699 of the Revised Statutes "without regard to the sum or value in dispute."

In support of the first objection, it is claimed that the foregoing statement as to the amount due from the clerk is not properly a part of the bill of exceptions. We cannot so understand the record, which shows this entry: "The following is the bill of exceptions presented to the plaintiffs and allowed by the court before entry of judgment." Then, evidently as the file mark of the paper, "*Plaintiff's exceptions — Allowed August* 24, 1887."

The paper itself, thus described and identified, began with the statement given above, which was evidently intended as an admission on both sides of the undisputed facts in the case so that the trial might be confined to the real matter in dispute, to wit, the liability of the clerk to account for moneys received in naturalization business as part of his official emoluments. To show this liability, notwithstanding the case of *United States* v. *Hill*, *ubi supra*, which had been decided on an agreed statement of facts, the United States attorney offered to prove that "Hill had received large sums of money as the ordinary and usual fees upon the application of foreigners to be naturalized in the District Court of which he was clerk, and for the issuance of certificates of naturalization and for filing papers and administration of oaths, and for other official acts required by law in the naturalization in due man-

ner of foreigners." In another part of the bill of exceptions it appears that "the attorney for the United States stated that he claimed that the fees received by said Hill in naturalization cases were those specifically provided for by statute for like acts done by the clerk in all cases; that he did not claim to recover for any sums received for services and acts which any unofficial person might do for the court, but for those sums received for acts done as clerk of the District Court, which make the history of the case on the records of the court, and which cannot legally be performed by any other than a clerk of a United States court, and which are done in that capacity." Read in the light of this disclaimer, the offer of proof was no more than that "large sums" of the money, which it was admitted Hill had received in naturalization business, were for fees specifically fixed by statute, and, therefore, to be accounted for. Such being the case, there is nothing inconsistent between the introductory statement and the offer of proof. It is clear, therefore, that the statement was intended to be, and is in fact, a part of the record to be considered by us. Being a part of the record, it shows that the value of the matter in dispute does not exceed $5000, because in no event could there have been a recovery in the action of more than $517.07, and possibly a small amount of interest.

The part of § 699 of the Revised Statutes which is relied on as giving us jurisdiction, notwithstanding the small amount involved, is the second subdivision, which provides for a writ of error without regard to the sum or value in dispute, upon "any final judgment of a Circuit Court . . . in any civil action brought by the United States for the enforcement of any revenue law thereof." The original statute, of which this is a reënactment, was passed May 31, 1844, c. 31, 5 Stat. 658, and is as follows:

"That final judgments in any Circuit Court of the United States, in any civil action brought by the United States for the enforcement of the revenue laws of the United States, or for the collection of duties due, or alleged to be due, on merchandise imported therein, may be reëxamined, and reversed or affirmed, in the Supreme Court of the United States, upon

writs of error, as in other cases, without regard to the sum or value in controversy in such action, at the instance of either party."

Section 823 of the Revised Statutes provides that "the following and no other compensation shall be taxed and allowed to . . . clerks of the Circuit . . . Courts." "The following" here referred to is found in § 828, which prescribes the fees of a clerk. Thus far the legislation has reference only to the compensation to be paid a clerk for his services. But § 839 provides that the clerk shall be allowed to retain of the fees and emoluments of his office, for his personal compensation, a sum not exceeding $3500 a year. Section 833 makes it his duty to report, semiannually, to the Attorney General, all the fees and emoluments of his office, and all necessary expenditures, with vouchers for their payment. Section 844 then requires him to pay into the Treasury any surplus of such fees and emoluments which his return shows to exist over and above the compensation and allowances authorized by law to be retained by him.

The precise question for decision is, whether this section, which provides for the payment by the clerk into the Treasury of the surplus moneys received by him as the fees and emoluments of his office, is a "revenue law," within the meaning of that clause of § 699 which is relied on, and we have no hesitation in saying that it is not. As the provision relates to the jurisdiction of this court for the review of the judgments of the Circuit Courts, it is proper to refer to the statutes giving jurisdiction to those courts to see if there is anything there to show what the term "revenue law," as here used, means. Looking, then, to § 629 of the Revised Statutes, we find that by the fourth subdivision the Circuit Courts have been granted original jurisdiction "of all suits at law or in equity arising under any act providing for revenue from imports or tonnage," and "of all causes arising under any law providing internal revenue." And again, by the twelfth subdivision, "of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him under any law of the United States for the protection or col-

lection of any of the revenues thereof." This clearly implies that the term "revenue law," when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by § 8, Art. I, of the Constitution, "to lay and collect taxes, duties, imposts, and excises." This view is strengthened by the third subdivision of § 699, which gives this court jurisdiction, without reference to the value in dispute, of "any final judgment of a Circuit Court . . . in any civil action against an officer of the revenue, for any act done by him in the performance of his official duty." Certainly it will not be claimed that the clerk of a District Court of the United States is an "officer of the revenue," but there is nothing to indicate that the term revenue has any different signification in this subdivision of the section from that which it has in the other. The clerk of a court of the United States collects his taxable "compensation," not as the revenue of the United States, but as the fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any "revenue law," properly so called, but out of a statute governing an officer of a court of the United States.

It follows that this is a case where our jurisdiction depends on the value of the matter in dispute, and, as that is not sufficient in amount, that the motion to dismiss must be granted. It is, consequently, so ordered.

Dismissed.

Counsel for Parties.

TEXAS & PACIFIC RAILWAY COMPANY *v.* MARLOR.

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

Argued December 5, 6, 1887. — Decided December 19, 1887.

A railroad company, in a bond issued by it, promised to pay the principal at a specified time and place, "with interest thereon at the rate of seven per cent per annum, payable annually on the 1st day of July in each year, as provided in the mortgage hereinafter mentioned." The bond also set forth, that the interest was secured by a mortgage lien on the net income of certain specified lines of road; and that, "in case such net earnings shall not in any one year be sufficient to enable the company to pay seven per cent interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest." A certificate on the bond, by the mortgage trustees, stated that the bond bore "seven per cent interest per annum, payable yearly." The mortgage stated that it was given to secure the payment of the principal and interest of the bonds "according to the tenor thereof." On July 1st, 1882 and 1883, the company neither paid the interest in money nor declared its election to issue scrip for the interest. Shortly after each of those days it notified the bondholders that it was not prepared to pay interest, as the earnings of the railway were not sufficient. It took no action in reference to the issue of scrip until October, 1883. In a suit by a bondholder who refused to receive the scrip, to recover the interest in money: *Held*,

(1) If the company did not pay the interest in money by the interest day, it was bound to exercise, by that day, its option to pay it in scrip, and, if it did not, it became liable to the bondholders to pay the interest in money;

(2) No demand by a bondholder was necessary, in order to entitle him to the payment of the interest in money, on the failure of the company so to exercise such option.

This was an action to recover interest alleged to be due on bonds issued by the plaintiff in error. Judgment for plaintiff, to review which defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. John F. Dillon for plaintiff in error. *Mr. W. S. Pierce, Jr.*, was with him on the brief.

Mr. John R. Dos Passos for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York, brought by the Texas and Pacific Railway Company, a corporation organized and existing under acts of the Congress of the United States, to review a judgment entered against it by that court on the 17th of September, 1884, in favor of Henry S. Marlor, for the sum of $23,204.99.

The suit was commenced in a court of the State of New York, in November, 1883, and was removed into the Circuit Court by the defendant. It was tried by that court, on filing a written waiver of a jury, on an agreed statement of facts, and on the depositions of witnesses. The material facts of the case, as found by the Circuit Court, are as follows: Prior to the first of July, 1883, the plaintiff became the owner of 150 bonds issued by the defendant, and entitled to the interest due thereon on the first days of July in the years 1882 and 1883, according to the terms and conditions of the bonds. Each bond was in the following form:

"THE UNITED STATES OF AMERICA.

"No. —. $1000.

"The Texas and Pacific Railway Company.

"Chartered by act of Congress.

"*Seven Per Cent Income and Land Grant Bond on the Eastern Division.*

"The Texas and Pacific Railway Company hereby acknowledges itself to be indebted to —— ——, of —— ——, or assigns, in the sum of one thousand dollars, lawful money of the United States of America; which sum the said company promises to pay the said —— ——, or assigns, at the office of the company, in the city of New York, on the 1st day of January, A.D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent per annum, payable annually on the 1st day of July in each year, as provided in the mortgage hereinafter mentioned.

"This bond is one of a series of bonds numbered consecutively from one to eight thousand nine hundred and eight, of the denomination of one thousand dollars each, of like tenor and date, the payment whereof is secured by a first mortgage of even date herewith, duly recorded, upon certain lands heretofore granted to the Texas and Pacific Railway Company, by the State of Texas, or in which said company is in any manner interested, being a first lien or charge upon all those sections or fractional sections or square miles of land acquired or to be acquired by said company in constructing its lines of road east of Fort Worth, under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railroad Company, the Memphis, El Paso, and Pacific Railroad Company, or of the several supplements and enactments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas, and applicable to said companies, or either of them, or to the Texas and Pacific Railway Company, the total quantity of land to be acquired in constructing said lines of railway under the several grants being estimated at or about 7,600,000 acres. This bond has also, as security for the interest, a mortgage lien upon the net income of the said Texas and Pacific Railway Company, derived from operating its lines of railway east of Fort Worth, in the State of Texas, after providing for the operating expenses, the current repairs and reconstructions, and the interest upon the first and second mortgage bonds secured upon said lines of railway, the length of which, constructed and to be constructed, is estimated to be 524 miles; and in case such net earnings shall not in any one year be sufficient to enable the company to pay seven per cent interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest, such scrip to be received at par and interest, the same as money, in payment for any of the company's lands acquired as aforesaid in Texas, at the ordinary schedule price, or it may be converted into capital stock of the company, when presented in amounts of $100 or its multiple. The holder of this bond is entitled to the benefit of the additional security of the sinking fund provided

for in said mortgage, consisting of the net proceeds of the sales of the lands aforesaid, which are to be applied from time to time to the purchase of said bonds at their market value, not exceeding par, or to their redemption, as provided in the mortgage aforesaid. This bond will also be received by the company at par and accrued interest, in payment or exchange for any of its lands covered by the mortgage aforesaid, at the current cash price of the same as fixed from time to time.

"In witness whereof, the said The Texas and Pacific Railway Company has caused these presents to be duly executed, sealed with its corporate seal, and attested by the proper signatures of its president or vice-president and secretary, this 15th day of May, A.D. 1875.

"FRANK BOND, *Vice-President.*

"Attest: "C. E. SATTERLEE, *Secretary.*"

Upon each bond was a certificate signed by the trustees in the mortgage mentioned in the bond, in the following form:

"*Certificate of Trustees.*

"This bond is one of a series of bonds, each for the sum of one thousand dollars, lawful money of the United States of America, bearing seven per cent interest per annum, payable yearly, said bonds being numbered consecutively from number one to number eight thousand nine hundred and eight. The said bonds are secured by a first mortgage upon all the lands of the Texas and Pacific Railway Company in the State of Texas, granted in aid of the construction of its lines east of Fort Worth, and also upon the net income of said lines of railway, after deducting current expenses, reconstruction, and repairs, and the interest upon the first and second mortgages on said lines of railway; and they are also receivable, the same as money, in payment or exchange for such lands, at the current price of the same as fixed from time to time.

"W. T. WALTERS,
"GEORGE D. KRUMBHAAR,
Trustees."

Opinion of the Court.

The complaint alleged that the defendant did not exercise the option given to it by the bonds to pay the plaintiff the interest in scrip upon the 150 bonds, which became due and payable on July 1, 1882, or that which became due and payable on July 1, 1883, and demanded judgment for the interest in money, with accrued interest from those days respectively.

There was no formal presentment by the plaintiff of the bonds in suit for the payment of interest on July 1, 1882, or on July 1, 1883, or at any other time. Shortly after each of those days, the treasurer of the defendant, at the defendant's office, notified the holders of the bonds, that it was not prepared to pay interest, as the earnings of the railway were not sufficient; and no action was taken by it in reference to the issue of scrip. Before the commencement of this suit, and induced by the suggestion that suits were about to be brought to recover the interest on the bonds, and on or about October 12, 1883, the executive committee of the defendant's board of directors adopted a resolution providing for the payment of the interest in question in scrip. Notice of this action on the part of the defendant was given to the plaintiff and to the bondholders generally, by publication, before this suit was brought, and the defendant notified the plaintiff of its willingness to deliver to him his scrip for the interest in suit, and tendered it to him at the trial, but he refused to receive it.

On the 29th of March, 1875, the defendant had outstanding 9252 land-grant bonds, secured by a first mortgage upon all the lands in the State of Texas which it had acquired, or might thereafter acquire, by virtue of its consolidation with the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company, or by virtue of its consolidation with, or purchase of, any other railroad company in the State of Texas, under the authority of the acts of Congress of March 3, 1871, and May 2, 1872; also, certain construction bonds, secured by a first mortgage upon its lines of railway and their appurtenances east of Fort Worth in the State of Texas. Those land-grant bonds and construction bonds were fixed obligations, with coupons for semiannual interest, and the mortgages which secured them contained provisions for fore-

closure, in case of default in the payment of such interest. On the 29th of March, 1875, the road of the defendant was only partially completed to Fort Worth, about 325 miles of it being then built and in operation. The defendant had made default in paying the interest on the bonds above mentioned. On that day the stockholders met, and passed the following resolution: "Resolved, That the board of directors shall be, and they are hereby requested and fully authorized and empowered to provide for and to issue eighty-nine hundred and eight (8908) income and land-grant bonds, each for the sum of one thousand dollars, bearing seven per cent interest, the interest and the principal of said bonds to be payable in United States currency, and said bonds to mature in forty years from their date, and to secure the payment of the interest and the principal of said bonds by a first mortgage upon all the lands heretofore granted to this company, or in which this company in said State is in any manner interested, being a first lien or charge upon all those sections or parts of sections or square miles of land acquired by the Texas and Pacific Railroad Company, or to be acquired by said company, in constructing its lines of road east of Fort Worth, under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and amendments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas, and applicable to said companies, or either of them, or to the Texas and Pacific Railway Company, the total quantity of land so to be acquired, in constructing said lines of railway, being estimated at about 7,600,000 acres; and said mortgage or deed of trust shall also include the net income of the company from the operating of its lines east of Fort Worth, after providing for the operating expenses, the current repairs and reconstructions, and the interest on the first and second mortgages hereinbefore provided for; and there shall be included in said mortgage or deed of trust a provision for a sinking fund out of the net proceeds of sales of land, and by the receiving of said bonds in payment for purchases of lands

covered by the mortgage. The bonds thus provided for shall be exchangeable for outstanding land-grant bonds, and used in purchase of material and supplies and for construction work, or may be applied toward the payment of any of the company's indebtedness or obligations."

In pursuance of the authority thus conferred, the board of directors of the defendant issued 8857 income and land-grant bonds, in the form of the one above set forth, and executed a mortgage to secure them, dated May 15, 1875, and a supplemental mortgage dated March 23, 1876, each to Walters and Krumbhaar, as trustees. The mortgage of May 15, 1875, recites the foregoing resolution, and sets out a form of the bond and of the certificate of the trustees, and then states that, "in order to secure the payment of the principal and interest" of the 8908 bonds, "according to the tenor thereof," the company conveys to the trustees "all the lands heretofore granted to this company, or in which this company in the State of Texas is in any manner interested, being all those sections or parts of sections or square miles of land acquired by the Texas and Pacific Railway Company, or to be acquired by said company, in constructing its lines of road east of Fort Worth, in the State of Texas, under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railroad Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and amendments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas, and applicable to said companies or either of them, or to the Texas and Pacific Railway Company, the total quantity of lands so to be acquired in constructing said lines of railway being estimated at about 7,600,000 acres of land; also all the net income of the lines of railway and appurtenances of the said The Texas and Pacific Railway Company east of Fort Worth, in the State of Texas, being five hundred and twenty-four miles of railroad nearly completed, after deducting the expenses of operating and maintaining the same, and the interest and other resources due by reason of previous circumstances thereon, the same being the Texas and

Pacific Railway Company's lines of railway, constructed and to be constructed, from the state line between Louisiana and Texas, westward, through Marshall and Dallas, to Fort Worth, in the State of Texas, and from Texarkana, on the state line between Texas and Arkansas, to a point of junction, via Clarksville, Paris, Bonham, and Sherman, with the line aforesaid at or near Fort Worth, and from Marshall aforesaid, through the town of Jefferson, to a point of junction, at or near Texarkana, with the said line from Texarkana to Fort Worth, together with all the depots, depot grounds, locomotives, rolling-stock of every kind, and every appurtenance of every kind, real or personal, requisite or convenient for the use and operation of said lines of railway, including, also, all the net income rising from the leasehold interest of said company in the line of railroad of the Vicksburg, Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company at the state line between Louisiana and Texas."

The mortgage further provided, that no bonds should be issued until at least $2,254,000 of the outstanding land-grant bonds theretofore issued should be deposited with the trustees and registered in their names, to be held as additional security for the bonds to be issued under the mortgage, until all the land-grant bonds should have been so deposited or retired by the company, and the mortgage under which they were issued satisfied of record, the holders of any outstanding land-grant bonds to have the right, until January 1, 1876, to exchange their bonds, with accrued interest, at par, for the bonds issued under the new mortgage, the bonds so received in exchange to be registered and held by the trustees as additional security, as before provided, and, after January 1, 1876, the remainder of the bonds under the new mortgage to be disposed of as the board of directors might determine. The mortgage also provided for giving to the trustees lists and maps of the lands mortgaged, with minimum prices of sale, to be approved by both parties; and it contained sundry provisions for the sale of the lands, the purchase money to be received by the trus-

tees, subject to the right of purchasers to pay for the lands with the bonds issued under the mortgage. Out of the proceeds of the sales of the lands, the expenses of the land department, and compensation for the services and expenses of the trustees, were to be paid, and the balance was to be appropriated to a sinking fund to redeem the bonds. Provision was made for applying the sinking fund yearly to purchasing the bonds at or less than par, or, if that could not be done, to redeeming bonds designated by lot; also, for the sale of the lands to pay the principal of the bonds, and for the termination of the trust on the payment in full of the bonds and interest. The supplemental mortgage of the 23d of March, 1876, conveyed to the trustees, subject to the trust created by the mortgage of May 15, 1875, "the lines of railway and appurtenances of the said Texas and Pacific Railway Company east of Fort Worth, in the State of Texas, being five hundred and twenty-four miles of railroad nearly completed, after deducting the expenses of operating and maintaining the same, and the interest and other resources due by reason of previous circumstances thereon, the same being the Texas and Pacific Railway Company's lines of railway, constructed and to be constructed, from the state line between Louisiana and Texas, westward, through Marshall and Dallas, to Fort Worth, in the State of Texas, and from Texarkana, on the state line between Texas and Arkansas, to a point of junction, via Clarkesville, Paris, Bonham, and Sherman, with the line aforesaid at or near Fort Worth, and from Marshall aforesaid, through the town of Jefferson, to a point of junction, at or near Texarkana, with the said line from Texarkana to Fort Worth, together with all the depots, depot grounds, locomotives, rolling-stock of every kind, and every appurtenance of every kind, real or personal, requisite or convenient for the use and operation of said lines of railway; including, also, all the net income arising from the leasehold interest of said company in the line of railroad of the Vicksburg, Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company, at the state line between Louisiana and Texas,

under and subject, nevertheless, to the lien and charge of prior encumbrances thereon, and subject to all the trusts, limitations, conditions, and provisions of every kind mentioned and set forth in the deed of trust dated May 15th, 1875, whereto this instrument of writing is supplementary."

Subsequently to January 1, 1876, as of which date the first instalment of the income and land-grant bonds was issued, and in the years or interest periods ending respectively on the first days of July, 1877, 1878, and 1879, the net earnings of the company, as defined in the bonds and mortgage, were insufficient to enable it to pay the interest on the bonds outstanding at those dates, and, throughout those years or interest periods, no interest was paid upon the bonds nor any scrip issued for the interest or any part of it. On the 16th of February, 1880, in pursuance of a resolution of the board of directors, the defendant issued scrip for the interest accumulated during the entire period included between the 1st of January, 1876, and the 1st of July, 1879. The net earnings of the road having been insufficient to enable the defendant to pay the interest on the bonds for the years ending July 1, 1880, and July 1, 1881, it issued scrip for the interest for those years respectively. For the year ending July 1, 1882, there was a deficit of $195,076.17 in the earnings of the road; and for the year ending July 1, 1883, there were surplus earnings of $131,867.90; thus showing a net deficit, for the operations of those two years, of $63,208.27. The fact that the net earnings of those two years were insufficient to enable the defendant to pay the interest on the income and land-grant bonds as provided therein was promptly made known and declared by it to its bondholders, and the plaintiff had due notice thereof.

The income and land-grant bonds are registered obligations. Interest on them is payable only to registered holders, or their assignees by duly executed and acknowledged or authenticated order or assignment, at the office of the defendant, and upon the delivery by such holders, or such assignees, of receipts for the interest, or, in case scrip is issued, of receipts for the scrip. By uniform practice, from the first issue of scrip, the bonds, or such orders or assignments, are presented by the payee or

registered holder, or such assignee, at the office of the defendant, for scrip. When scrip is delivered, no endorsement is made on the bond, but the receipt or voucher for the scrip is signed by the person receiving it, and the defendant cannot know to whom to issue or deliver scrip, or who is entitled thereto, or who will receive the same, until the bonds, or such assignments or orders, are presented at its office and scrip demanded, or unless the registered holder, properly identified, presents himself at the office of the defendant and demands the issue of the scrip. The plaintiff, in respect of the interest sued for in this suit, never presented the bonds and demanded the issue of the scrip for the years 1882 and 1883.

On the foregoing facts, the Circuit Court found, as conclusions of law, that the defendant failed to exercise its option to pay the plaintiff the interest in scrip due on the 1st of July, 1882, and that due on the 1st of July, 1883, on the 150 bonds; and that the plaintiff was entitled to judgment for the two sums of $10,500 each, with interest on one from the 1st of July, 1882, and interest on the other from the 1st of July, 1883.

The opinion of the Circuit Court, which accompanies the record, and is reported in 22 Blatchford, 464, proceeded upon the view, that there was nothing in the language of the mortgage which controlled or qualified the absolute promise in the bond to pay interest in money or in scrip; that the bond contained a promise to pay interest annually; that there was nothing in it to show that the owner was not to have his interest, or scrip instead, at the election of the defendant, if the net earnings of the railway were not sufficient to pay the interest; that the plaintiff was entitled to his money, or the scrip as its substitute, on the day on which, by the terms of the bond, the defendant was to pay the interest or exercise the alternative; that there was no reservation, in terms or by implication, of a right in the defendant to exercise the option after the day of payment; that, that day having elapsed without an election by the defendant, the bondholder was entitled to be paid his interest in money; and that it was not incumbent on the plaintiff to present the bonds for the payment of

interest on the day it fell due, or to then demand the payment of interest, as a prerequisite to his right of action to recover the interest money.

It is contended, for the defendant, that the bond in question is an income bond, in the sense that the interest on it is not payable in money on the first day of July in each year, unless net earnings, as defined in the bond and the mortgage, have been made; that, if sufficient net earnings, as thus defined, have not been acquired during the year, then, unless the company exercises its option to issue scrip, the interest accumulates until it is earned, or until it is paid out of the sinking fund created by the sale of the mortgaged lands, or until the bond with its accrued interest becomes due; that the effect of a failure to exercise the option on the interest day is not to create a present fixed obligation to pay the interest in money; that, in any event, the option to pay in scrip need not be exercised on or by the interest day, but it is sufficient if the scrip is ready for the bondholder when he demands it; and that the effect of any default to pay in scrip is not to make the defendant liable for the full amount of the interest, but only for the value of the scrip at the time of default.

We are of opinion, however, that the Circuit Court was correct in its construction of the contract between the parties. Much stress is laid by the defendant upon the fact that the bond, on its face, is called a "seven per cent income and land-grant bond;" and from this the argument is deduced that the interest is payable only out of income. But the expression "income and land-grant bond" is sufficiently justified and satisfied by the fact that the mortgage states that the principal and interest of the bonds are secured by a mortgage upon the land acquired, or to be acquired by the company, under the statutes specified in the mortgage, and upon the net income of the lines of its railway east of Fort Worth. The mortgage states, that it is given to secure 8908 income and land-grant bonds, each for $1000, bearing seven per cent interest, the interest and the principal of the bonds to be payable in United States currency, (as distinguished from two other classes of bonds authorized at the same time, which

were to be payable in gold coin). The resolution of the stockholders authorizing the issuing of the bonds was to the same effect. The option to pay the interest in scrip was not expressed in the resolution of the stockholders, but the mortgage states that the principal and interest of the bonds are to be paid "according to the tenor thereof." The bond contains a promise to pay the $1000 on the 1st of January, 1915, in lawful money of the United States, "with interest thereon at the rate of seven per cent per annum, payable annually on the first day of July in each year, as provided in the mortgage hereinafter mentioned." The words "as provided in the mortgage hereinafter mentioned" refer to the payment of the principal as well as the interest.

There is thus far an absolute obligation and promise to pay the interest on the first day of July in each year. How is that promise qualified subsequently in the bond? Only by the provision, that, in case the net earnings derived from operating the lines of railway east of Fort Worth shall not in any one year be sufficient to enable the company to pay seven per cent interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest. The only alternative to the payment of the interest in money on the day named is that, if the net earnings in the year shall not be sufficient to enable the company to pay the interest on the outstanding bonds, it may elect to issue scrip for the interest; but the scrip is to be issued, if issued, as and for the unpaid interest; and it is plain that the option of the company to issue the scrip must be exercised at the time when, but for the insufficiency of the net earnings, it would be required to pay the interest in money. If the option be thus exercised, reasonable time may be allowed to prepare the scrip and issue and deliver it; but, as the scrip is to be received at par and interest, the same as money, in payment for the lands, or for conversion into the capital stock of the company, it is necessarily to draw interest from the day on which the interest which it takes the place of was payable.

In the absence of an exercise of the option, on the day the interest was due, to pay it in scrip, the bondholder had an

immediate right of action for the interest money. The security given by the mortgage upon the lands and upon the net income is entirely separate and apart from the obligation of the company to pay the interest in money or in scrip. This last provision is one for the benefit of the company, to enable it to retain in its treasury the net earnings derived from operating its lines east of Fort Worth, if such earnings do not amount in the year to enough to enable it to pay the full interest on the outstanding bonds; but, in such case, it must exercise its option, by the day the interest falls due, to give to its bondholders, for such interest, scrip for the full amount thereof. The contract cannot be construed so as to make it possible for the company to retain all its net earnings, however little under seven per cent on the amount of the outstanding bonds, and yet withhold from the bondholders the scrip, as the representative of the full interest promised to be paid. We do not, however, mean to suggest that the company may not pay the net earnings in money for part of the interest, and pay the rest in scrip.

By the mortgage, all the net income from the lines east of Fort Worth was pledged to secure the payment of the principal and interest of the bonds "according to the tenor thereof;" and the bond states that it is secured by a mortgage lien upon such net income, "as security for the interest." The fact that the bond also states, on its face, that it will be received by the company "at par and accrued interest," in payment or exchange for any lands covered by the mortgage, serves to confirm the construction above given. So, also, the certificate of the trustees on each bond states that the bonds bear seven per cent interest per annum, payable yearly.

It is contended for the defendant, that it cannot ascertain by the interest day whether the net earnings for the year are sufficient to pay the interest in money, and that hence it cannot exercise its option, by the interest day, to pay the interest in scrip. It is a sufficient answer to this position to say that the contract it has made is that it will exercise the option by that day. Furthermore, it is found that the fact that the net earnings of the two years ending July 1st, 1882, and July 1st,

1883, were insufficient to enable the defendant to pay the interest, was promptly made known by it to the bondholders; and it is not found that it could not have sufficiently ascertained such fact by the interest day to enable it to exercise the reserved option.

It is urged for the defendant that, because it did not pay interest or issue scrip therefor, for the interest periods ending July 1, 1877, 1878, and 1879, but issued scrip in February, 1880, for the interest accumulated for the period between January 1, 1876, and July 1, 1879, a practical construction was put by the bondholders upon the contract, which cannot be regarded as merely a forbearance, or a waiver for the time being, of their rights under the contract. But it is also found as a fact, by the Circuit Court, that the net earnings of the road having been insufficient to enable the company to pay the interest on the bonds for the years ending July 1, 1880, and July 1, 1881, it issued scrip for the interest for those years respectively. We see nothing, in all these facts, which amounts to a waiver which can affect or prejudice the right asserted by the present plaintiff in this suit.

We are also of opinion that no demand by the plaintiff was necessary, to entitle him to the payment of the interest in money, on the failure of the defendant to exercise its option, on the day the interest fell due, to issue scrip therefor. It is stated in the findings of the Circuit Court, that shortly after the 1st of July, 1882, and shortly after the 1st of July, 1883, the treasurer of the defendant, at its office, notified the holders of its bonds that it was not prepared to pay the interest, as the earnings of the railway were not sufficient; and no action was taken by it in reference to the issue of scrip. This shows that it did not on the proper days elect to issue scrip. The bond states that the scrip, if issued, is to be issued "for the interest," that is, in place of the interest, and, under the terms of the bond, the company was bound to pay the interest on the day it was due, or else to issue the scrip, on the failure of a sufficiency of net earnings to pay the full interest. There was, therefore, no obligation on the part of the bondholder to demand his interest in money, in order

to perfect his right to recover it, in the absence of the exercise of an option by the company, on the day the interest fell due, to pay it in scrip. He had no right, by the terms of the contract, to demand the scrip. It was for the company to announce its election to pay in scrip, or, as it did, take no action in reference to the issue of scrip. In the absence of an election by the company, on the day the interest fell due, to issue the scrip, the right of action of the plaintiff immediately came into existence, without any demand on his part, to recover the full amount of the interest mentioned in the bond.

The cases cited by the defendant on the question of damages do not apply to an alternative contract like that in the present case. It falls within those cases in which, if the contract be that the promisor shall do one of two things by a certain day, at his election, he cannot exercise his election after the day has passed. This is familiar law, and needs no citation of authorities.

The judgment of the Circuit Court is

Affirmed.

ROBISON *v.* FEMALE ORPHAN ASYLUM OF PORTLAND.

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

Argued December 7, 1887. — Decided December 19, 1887.

In construing doubtful clauses in a will, the court will endeavor to ascertain the testator's intention through their meaning as reasonably interpreted in the particular case, rather than resort to formal rules, or to a consideration of judicial determination in other cases, apparently similar.

The testator in this case provided in his will that his widow should have the income of all his estate, she having the right to spend it, but not to have it accumulate for her heirs; that his two sisters if living at the time of the death of himself and his wife, or the one that might then be living, should "have the income of all my estate as long as they may live, and at their death to be divided in three parts, one-third of the income to go to" a charitable institution, one-third to another institution, and one-third to another. Both sisters died before the testator. *Held*, that the

Statement of the Case.

limitations in the two subdivisions of the will were to be taken, in connection with each other, as a complete disposition, in the mind of the testator, of his estate giving to the widow an estate for life, with an estate over for life to the sisters contingent upon one or the other of them surviving the widow, and with the ultimate remainder to the charitable institutions.

Robert I. Robison, formerly of Portland, in the State of Maine, died on the 13th day of June, 1878, at that time a citizen of the State of New York and resident of Brooklyn, leaving a last will and testament, which was subsequently admitted to probate in the Surrogate's Court of Kings County, New York, and duly recorded on December 27, 1878. Letters testamentary thereon were on the same day issued and granted to Jane S. Robison, his widow, who alone qualified as executrix. The testator at the time of his death was seized of real estate in the city of Portland, and also possessed of a considerable amount of personal property.

The following was a copy of the will:

"I, Robert I. Robison, of Portland, in the State of Maine, being in a sound disposing mind and memory, do make and publish this my last will and testament. And, first, my will is that my executors see that my body be buried in a decent and proper manner in the family vault in the Eastern Cemetery in the city of Portland aforesaid. Secondly, I will that all my just debts be paid in full, and from the balance I will that with whatever property may be standing in my wife's, Jane S. Robison's, name, at the time of my death, that my executors make up said amount to the sum of eight thousand and five hundred dollars, it being the amount, or thereabouts, which she received from her father and mother's estates, it being my will that the principal shall be kept good to her and her heirs, but not the interest. This is to be in full for all claims she may have on my estate arising out of the use of her property. Thirdly, I further will that she may have the income of all my estate, she having the right to spend the same, but not to have it accumulate for her heirs. Fourthly, it is my will that if my sister, Ann Smith, wife of Jacob Smith,

of Bath, in the State of Maine, and Eleonora Cummings Robison, wife of Thomas Weeks Robison, of Kingston, Canada West, be living at the death of myself and wife, Jane S. Robison aforesaid, that they or the one that may be then living shall have the income of all my estate as long as they may live, and at their death to be divided in three parts, one-third part of the income to go to the Portland Female Orphan Asylum, one-third of the income to the Widows' Wood Society, and one-third of the income to the Home for Aged Indigent Women, all of the city of Portland and State of Maine. Lastly, I do nominate and appoint my wife, Jane S. Robison, and John Rand, Esq., to be my executors of this my last will and testament.

"In testimony whereof I have hereunto subscribed my name and affixed my seal this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-two.

"(S'd) Robert I. Robison. [L.S.]

"Signed, sealed, and declared by the said Robert Ilsley Robison to be his last will and testament in the presence of us, who, at his request and in his presence, have subscribed our names as witnesses hereto.

"Charles H. Adams.
"B. F. Harris.
"Jason Berry."

On December 29, 1881, the present bill in equity was filed by Jane S. Robison, as widow and executrix, for the purpose of obtaining a construction of the will, the defendants being charitable institutions named therein, and the only other parties in interest, Ann Smith and Eleonora Cummings Robison, the persons mentioned in the fourth item of the will, having both died before the testator.

It was contended on the part of the complainant that, in consequence of the lapse of the devise and legacy to Ann Smith and Eleonora Cummings Robison, the bequest to the defendants never took effect, and that consequently the complainant was entitled to the estate absolutely, by virtue of the

devise to her, or, in the alternative, because the testator had died intestate as to that part of the estate mentioned in the fourth subdivision of the will. The decree of the Circuit Court, however, was, "that the complainant is entitled only to the income of the estate during her natural life, and that the fourth subdivision of the last will and testament of the testator is operative and valid, and was so at the time the will took effect, and that the defendant corporations acquired by virtue thereof the right, from and after the death of the complainant, to the perpetual income of the said estate." To review that decree the present appeal was brought.

Mr. Samuel B. Clarke for appellant.

Mr. John Rand, for appellee, submitted on his brief.

Mr. Justice Matthews delivered the opinion of the court.

It is now contended in argument on the part of the appellant, 1st, that the language of the third subdivision of the will, considered by itself, is sufficient to give to her the real estate in fee and the personal estate absolutely; 2d, that the bequest in the fourth subdivision of the will to Ann Smith and Eleonora Cummings Robison is contingent on one of them surviving both the testator and the complainant, and, as the event happened, never became vested; 3d, that the bequest to the defendants is dependent upon the vesting of the bequest to Ann Smith and Eleonora Cummings Robison, being affected by the same contingency, namely, one of them surviving the testator and the complainant; and, 4th, that if the interest of the complainant under the third subdivision of the will must be limited to a life estate, as the bequests contained in the fourth subdivision have lapsed, or cannot take effect, the testator died intestate in respect to that portion of his estate.

In support of the proposition that the bequest to the defendants must fall with that to Ann Smith and Eleonora Cummings Robison, counsel for the appellant rely upon the rule laid down by Mr. Jarman in the following language: "When

a contingent particular estate is followed by other limitations, a question frequently arises whether the contingency affects such estate only or extends to the whole series. The rule in these cases seems to be that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and, therefore, appear not reasonably applied to the ulterior limitations. Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event for want of something in the will to authorize a distinction between them." 1 Jarman on Wills, 5th Am. Ed. by Bigelow, *830.

But the rule referred to is one of construction merely, and intended only as a formula for the purpose of classifying cases in which the meaning is gathered from the language of the testator expressing such intention, and is not to be applied to instances in which it appears that the contingency is restricted to the immediate estate. The same author divides those instances into two other classes: "First. Where the words of contingency are referable to and evidently spring from an intention which the testator has expressed in regard to that estate by way of distinction from the others. Secondly. The contingency is restricted to the particular estate with which it stands associated, where the ulterior limitations do not follow such contingent estate in one uninterrupted series in the nature of remainders, but assume the form of substantive independent gifts." Ibid. 831, 832.

Under the second of these classes is ranged the case of *Boosey* v. *Gardener*, 5 De G. M. & G. 122. In that case, the testator bequeathed to his two sisters the interest of his Long Annuities for their lives, and, in case of one or both of their deaths before his, he gave the whole interest in Long Annui-

ties to his brother for life; at his death, (that is, the death of the brother,) the testator gave half of the capital to his niece A., his brother's daughter, to help to bring her up, till she attained the age of twenty-one, then to receive half the capital; likewise, the testator bequeathed to his nephew S., his brother's son, if not further family, his other half, in case of further family, to be divided between them, not dividing the half left to A. It was held by Turner, L. J., that the bequest to the niece and nephew was not contingent upon the death of the sisters in the testator's lifetime, although the preceding estate for life to the brother was.

But little aid, however, in such cases is to be derived from a resort to formal rules or a consideration of judicial determinations in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention.

In applying this principle, the Supreme Judicial Court of Massachusetts, in the case of *Metcalf* v. *Framingham Parish*, 128 Mass. 370, 374, speaking by Gray, C. J., said: "The decision of this question doubtless depends upon the intention of the testator as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared. *Ferson* v. *Dodge*, 23 Pick. 287; *Towns* v. *Wentworth*, 11 Moore P. C. 526; *Abbott* v. *Middleton*, 7 H. L. Cas. 68; *Greenwood* v. *Greenwood*, 5 Ch. D. 954."

Looking into the present will, therefore, for that purpose, we find it evident that the testator did not intend by the third subdivision of his will to give to his widow an interest in his estate beyond her life. This conclusion is not based on any distinction between a bequest of the income of the estate and

a bequest of the body of the estate itself; nor do we lay any stress on the declaration in that clause, "she having the right to spend the same, but not to have it accumulate for her heirs," although that language does afford an indication in support of the conclusion. But whatever force, standing by itself, the third subdivision might have, it is clear that the testator intended, in the event that his sister Ann Smith and Eleonora Cummings Robison should survive both himself and his wife, that they should have an estate for life, beginning at the death of his widow. That would necessarily limit the widow's estate to her own life. But as the estate given by the fourth clause to Ann Smith and Eleonora Cummings Robison for their lives was contingent on the event that one or the other of them should be living at the death of the wife, the question remains whether that contingency also entered into the bequest in remainder to the defendants. The fact that Ann Smith and Eleonora Cummings Robison died before the testator, whereby the legacy to them lapsed altogether, is not material, because if property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift over would, of course, take effect, notwithstanding the failure, by lapse, of the prior gift. And this applies also whether the gift over of the legacy or share is to take effect on the death of the prior legatee generally or on the death under particular circumstances, and whether the legacy be immediate or in remainder. It was so held in *Willing* v. *Baine*, 3 P. Wms. 113, where the bequest was to A, but if he died under twenty-one, to B.

In *Humberstone* v. *Stanton*, 1 Ves. & B. 385, 388, it was said: "It seems formerly to have been a question whether a bequest over, in case of the death of the legatee before a certain period, could take effect where he died during the testator's life, though before the period specified. In the case of *Willing* v. *Baine*, legacies were given to children, payable at their respective ages of twenty-one; and if any of them died before that age, the legacy given to the person so dying to go to the survivors; one having died under twenty-one in the life of the testator, it was contended that his legacy lapsed, and did not go over to the survivors." The argument was that the bequest over could not

take place, as "there can be no legacy unless the legatee survives the testator, the will not speaking until then; wherefore this must only be intended where the legatee survives the testator, so that the legacy vests in him, and then he dies before his age of twenty-one. It was, however, held, and is now settled, that in such a case the bequest over takes place."

It follows, therefore, that unless it appear on the face of the will that the gift to the defendants was not intended to take effect unless the prior gift to Ann Smith and Eleonora Cummings Robison took effect, the former must be considered as taking effect in place of and as a substitute for the prior gift which, by reason of the contingency, has failed.

The scheme and intention, therefore, of the present will seems to us, considering the third and fourth subdivisions together, to be this: An estate for life to the testator's widow; an estate over for life to Ann Smith and Eleonora Cummings Robison, contingent on one of them surviving the widow, with the ultimate remainder in fee as to the real estate and absolutely as to the personalty in the defendants. The language of the contingency in the fourth clause, in our opinion, affects only the intermediate life estate of Ann Smith and Eleonora Cummings Robison, it being, we think, the plain intention of the testator to give to his widow the estate in question only for her life, and not to die intestate as to any portion of the estate, and to limit the contingency only to the gift to Ann Smith and Eleonora Cummings Robison. It is true that the ultimate gift to the defendants is described as commencing "at their death," that is, at the death of Ann Smith and Eleonora Cummings Robison, but that language is evidently used only as indicating the expectation of the testator, which he would naturally indulge, that the beneficiaries named would live to receive the gift intended. Certainly those words are not to be construed so as to require that the gift to the defendants shall take effect at the death of Ann Smith and Eleonora Cummings Robison, irrespectively of the prior decease of the widow. The limitations in the two subdivisions of the will are to be taken in connection with each other as a complete disposition in the mind of the testator of his estate, giving to the widow an

estate for life, with an estate over for life to Ann Smith and Eleonora Cummings Robison, contingent upon one or the other of them surviving the widow, with the ultimate remainder to the defendants.

The decree of the Circuit Court is accordingly

Affirmed.

NORTHERN PACIFIC RAILROAD COMPANY *v.* MARES.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

Argued December 7, 1887. — Decided December 19, 1887.

Accident Ins. Co. v. *Crandal*, 120 U. S. 524, affirmed to the point that 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.

Under all the circumstances set forth in the statement of facts and the opinion of the court, it was for the jury to determine whether the failure on the part of the plaintiff to work with his fellow-servant was, in fact, contributory negligence on his part; and on the whole case it appears that the cause was submitted by the court to the jury fairly, and with an accurate statement of the law applicable to the relation between the parties.

This was an action at law brought by the defendant in error against the Northern Pacific Railroad Company, in the District Court of the Third Judicial District of the Territory of Dakota, to recover damages for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant, by reason of its alleged negligence.

The complaint alleged that on October 31, 1881, the plaintiff was in the employ of the defendant as a brakeman on duty as such in the yard at the city of Fargo, used for the purpose of switching cars to make up trains, in which service a switch-engine was used; that at the time of the injury the engineer of the switch-engine was one Bassett, who, it was alleged, was a man of hasty and excitable disposition and ungoverned, violent, and hasty temper, "and was and had

Statement of the Case.

for a long time been, while in the employ of this defendant as engineer, accustomed to become unduly and dangerously excited and angry, and while under the influence of anger or excitement, and while in the performance of his duty as engineer, was and had been accustomed to act and conduct himself as engineer in a most reckless manner, causing great danger and peril to his fellow-servants, and especially to the brakemen on the train or cars attached to or moved by the engine on which he was engineer;" and that in consequence thereof "the said engineer was, at the time of the injury hereinafter referred to, and for a long time prior thereto had been, negligent, unskilful, unfit, and incompetent to act as engineer of said switch-engine, or of any engine or locomotive; of which facts the defendant had notice and knowledge, and by the use of ordinary diligence defendant would have discovered and learned that he was a negligent and an unfit, unskilful, and unsafe engineer. And this plaintiff had not notice or knowledge prior to the injury to him hereinafter referred to that the said engineer was for any reason or on any account an unfit or unsafe person to act as engineer."

It was further alleged that at the time of the injury the plaintiff "was required, in the performance of his duties as switch-brakeman, to set or fasten, or to loosen the brakes of the cars which were being switched or moved in the said yard, and he was at the time and place aforesaid required to perform the said duty on the cars of the defendant, which were being switched and moved by the engine in which the said Bassett was engineer, and in the moving of cars it was his duty as brakeman to give signals to the said engineer, and of the said engineer to obey such signals; that, at the time and place aforesaid, and while this plaintiff, in the performance of his duties as brakeman as aforesaid, was upon the top of the freight car (part of a train) being removed in the said yard by the engine in which the said Bassett was engineer, and while the said Bassett had control of and was managing said engine, this plaintiff, as it was his duty to do, gave the said engineer a signal to move and 'back' the cars attached to the said switch-engine the length of a certain number of cars

indicated by the signal. And the plaintiff, as he was in duty required to be, was standing on the top of the rear car so being moved backward, and before said cars had been moved backward the distance which they were intended to be removed, and the distance which the signal, given by this plaintiff, required them to be removed, the said engineer unskilfully, negligently, recklessly, and suddenly, and contrary to his duty, stopped and reversed the said switch-engine and the cars attached thereto, and thereby threw the plaintiff off the rear car where he was standing, and where it was his duty to stand, to the ground, and thereupon the said engineer suddenly, negligently, recklessly, and violently and unskilfully, then and there, and before the plaintiff had time to or could move out of the reach of the cars or off the track, moved and pushed the said engine and cars backward upon said track and on to and over the plaintiff, and thereby greatly injured the plaintiff, and crushed and broke both of his legs, so that it then and there became and was necessary to amputate them, and they were then and there, on account of said injuries, amputated," etc.

The answer of the defendant alleged "that the said fall of the plaintiff and his said injuries resulting therefrom were solely caused either by the negligence of the plaintiff himself, or by that of some one or more of the other employés of the defendant engaged at work together with the plaintiff in the defendant's said yard at the time of the happening of the said injuries, and not by any negligence or fault on the part of the defendant."

The cause was tried by a jury, and resulted in a verdict and judgment for the plaintiff of $20,000 and costs. An appeal was taken from the District Court to the Supreme Court of the Territory, where it was heard upon a record containing a statement on motion for a new trial, which it was stipulated might be treated as a bill of exceptions. It embodied all the evidence upon the trial, with the rulings of the court during its progress, and the charge of the court to the jury, with all the exceptions thereto noted. The judgment of the District Court was affirmed. From that judgment the present writ of error was prosecuted.

Opinion of the Court.

Mr. James McNaught for plaintiff in error.

Mr. Thomas Wilson for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

It appears from the bill of exceptions that at the conclusion of the plaintiff's case counsel for the defendant moved for a non-suit, which the court denied, and an exception was taken, which is still insisted on here. The defendant's counsel, however, offered evidence in support of the defence, and thereby waived this exception. *Accident Ins. Co.* v. *Crandal,* 120 U. S. 527. When all the evidence had been submitted on both sides, the defendant by its counsel demurred to the evidence and moved the court to dismiss the action, which the court refused to do; and thereupon the defendant requested the court to direct the jury to find a verdict for the defendant, which request was refused, and an exception taken. The question raised by these rulings, and the exceptions thereto, is whether there was sufficient evidence to justify the court in submitting the cause to the jury.

There was certainly evidence tending to establish the following state of facts: That Bassett had been in the employ of the defendant as engineer in that yard before plaintiff was injured about a year; that during that time he had by his conduct frequently shown his negligence, recklessness, and unfitness for the place; that complaints had at different times been made of his negligent and reckless conduct to the defendant's representatives at Fargo; that, notwithstanding such complaints, he was retained in the same service, except during short intervals when he had been discharged two or three times for misconduct; that the plaintiff at the time of the injury had only been in the employ of the defendant about two weeks, and only about one week of that time with Bassett; that he worked as night brakeman; that on the night of the injury, and about fifteen or twenty minutes before the accident, the yard-master called up the switching crew, who had been asleep for a short time, and ordered plaintiff to direct

Bassett to move his engine so as to commence switching cars at the point named; that they were in haste to get ready for a train soon to come in from the East; that the plaintiff, as directed by the yard-master, urged Bassett to move promptly, on account of which angry words passed between them; that thereafter, while under the direction of the yard-master, they were backing some cars, and while he was standing on top of and near the rear end of the head car, which was the farthest from the engine, the plaintiff gave a signal to the engineer to back seven or eight car lengths; that it was the duty of the plaintiff to give such signals and of the engineer to obey them, and to continue backing until he was signalled to stop; that when he had backed about three car lengths, without any warning to the plaintiff and without any reason or necessity therefor, he very suddenly, recklessly, and negligently reversed his engine without shutting off the steam, giving the train so sudden and violent a jerk as to throw the plaintiff off and inflict the injuries complained of.

Clearly, this made a case for the plaintiff, unless overthrown by a successful defence.

It is claimed, however, by counsel for the defendant below, that there was evidence showing that the plaintiff was guilty of contributory negligence in two particulars, first, that he had knowledge of Bassett's incompetence, and ought, on that account, to have refused to serve with him; and secondly, that he was standing too near the rear of the car without sufficiently guarding himself, by holding on or bracing himself, against the effect of sudden changes of motion which were to be expected in the business of switching. But whether or not the plaintiff was in such fault as materially contributed to the injury in these particulars depended upon a consideration of all the circumstances of the case, and there was evidence sufficient to justify the jury in concluding, as they did, that the plaintiff was not guilty of negligence in these particulars.

At the request of the defendant the court gave to the jury the following instructions:

"In order to recover in this suit, the plaintiff must have established the following propositions, to wit: 1. That the

plaintiff was hurt through the negligence or improper conduct of Arthur D. Bassett. 2. That the defendant neglected to use ordinary care in the selection of Bassett as the employé for running the switch-engine mentioned in the evidence. 3. That the plaintiff was free from negligence on his part which contributed to the injury."

"If the jury believe that the plaintiff failed to use due care, under all the circumstances, in conducting himself while standing on top of the car referred to in the evidence, and that such want of care on his part contributed to produce his fall from the car, then the jury must find for the defendant."

"If the jury believe that the plaintiff failed to use due care, under all the circumstances, in conducting himself while standing on the car referred to in the evidence, and that such want of care on his part contributed to produce his fall from the car, in such case the jury must find for the defendant, although it is of opinion that Bassett was an unfit person to run the engine in question, and was guilty of actual negligence in running it on this occasion."

"In order to charge the defendant in this suit on the ground of Bassett having been an unfit man to run the engine in question, the unfitness must have been of a nature tending to make working with him and his engine unusually perilous."

The court also, among other things not excepted to, instructed the jury as follows:

"The employer is not liable for damages sustained by one employé caused by the negligence of another employé engaged in the same general business, unless the employer is guilty of negligence from which the injury resulted, and it is held that he who engages in the employment of another for the performance of specific duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly. These are perils which the servant is likely to know, and against which he can as effectually guard as the employer; they are perils incident to the services, and which can be as distinctly foreseen and provided for in the rate of compensation as any other."

Also:

"The duties and liabilities of employer and employé to each other are defined by the code or statute of this Territory which must control this case, as follows: 'An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, or in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé.'"

And:

"But, gentlemen, if you find from the evidence that the defendant company was guilty of negligence in not providing a safe and fit man to run that engine, in consequence of which you also find the accident occurred, still, if the plaintiff failed to exercise that prudence, care, and caution which a prudent man, under similar circumstances, ordinarily would exercise, which contributed to the injury, he is not entitled to recover."

The court also instructed the jury as follows:

"It is also true that if the plaintiff had full knowledge of the reckless and careless habits of the engineer Bassett, as complained of by him, or had reason to know of such recklessness and carelessness, he should either have quit the service or reported the facts to the officers of the company having the power to discharge him, and a failure to do so might be negligence on his part; but, gentlemen, it is for you to say, from all the attending circumstances, whether he was neglectful in that regard.

"While this rule of law above stated is generally true, a reasonable view must be taken in its application here. The evidence tends to show that this plaintiff had been at work in this yard but a short time, and only a part of that time with or under this engineer Bassett. Now, had he such knowledge, or had he such an opportunity to know of the careless and reckless habits of Bassett that rendered it dangerous for him to work with him, and made it his duty to have refused to continue in such service, or have reported him to the officers of the company?"

Opinion of the Court.

And also:

"The plaintiff must establish every material fact by a preponderance of evidence; and the defendant having alleged negligence on the part of the plaintiff, denominated contributory negligence, it must be established by a preponderance of evidence to warrant you in finding it, and upon this question you must decide."

The defendant requested the court to give the jury the following instruction:

"If the plaintiff knew, or had the opportunity of knowing, before his fall from the car in question, that Bassett was an unfit or unsafe man to run the engine in question, in that case it was the plaintiff's duty to refuse to work with him any longer, and his failure to do so would prevent him from recovering in this suit."

Which request to give said instruction the court refused, to which ruling the defendant duly excepted.

The defendant, by its counsel, thereupon requested the court to give to the jury the following instruction:

"The evidence adduced on behalf of the plaintiff tended to show that Bassett was guilty of negligence in running his engine during the same night on which the plaintiff was hurt, previous to the accident, and while the plaintiff was working with him. If the jury believe such to have been the fact, it must find for the defendant."

Which request to give said instruction the court refused, to which ruling the defendant, by its counsel, duly excepted.

At the plaintiff's request the court gave the jury the following instructions:

"This plaintiff, when he voluntarily entered into the employ of the defendant, took the risk of dangers ordinarily attending or incident to the business in which he was employed, including the perils arising from carelessness of his fellow-servants."

To which the defendant, by its counsel, duly excepted.

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"But the above rule is subject to the following limitation

or exception, viz.: That the master or employer, whether a natural person or a corporate body, is legally bound to use due care not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master."

To this the defendant, by its counsel, duly excepted.

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"That in this case, while the defendant did not guarantee to its servants, or to this plaintiff, that the engineer on the switch-engine in its yard at Fargo should be careful or skilful or competent, yet it was bound to exercise proper care to get a person in all respects fit for the place, and if after defendant had employed such engineer it learned, or had reason to believe that he was careless, reckless, or incompetent, it was its duty to discharge him."

To this the defendant duly excepted.

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"That if the defendant was careless, either in employing or retaining in its service a reckless, incompetent, or careless engineer on said engine, and on account of the recklessness, incompetence, or carelessness of such engineer the plaintiff was injured, without fault or negligence on his part, then, in such case, the railroad company is liable to him for the damage resulting from such injury." To this the defendant duly excepted.

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"That sound sense and public policy require that railroad companies should not be exempt from liability to their employés for injuries resulting from the incompetency, negligence, or carelessness of co-employés, when, by the exercise of proper diligence, such injuries might be avoided."

To which the defendant, by its counsel, duly excepted.

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"That the plaintiff had a right to suppose and assume that

the railroad company had used proper diligence and care in the employment and retention of an engineer."

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"That what will amount to the proper care and diligence in the selection of a servant for a particular duty or in the retention of such servant will in part depend on the character and responsibility of that duty which said servant is to perform. The greater the danger from the negligence, incompetence, or carelessness, the greater the care should be in his selection or retention; for instance, the same degree of diligence or care which is required in the employment of a locomotive engineer would not be required in the employment of a fireman."

To this the defendant duly excepted.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"If Bassett, the engineer in the yard at Fargo, was careless, reckless, or incompetent, and if such carelessness, incompetency, or recklessness caused the injury to the plaintiff, then if the agents or servants of this defendant, whose duty it was at that time to employ and discharge him if unfit, did not exercise due care in the employment of Bassett, or if after he was employed they in fact knew that he was careless, reckless, or incompetent, or if by the exercise of due care they would have discovered that he was careless, reckless, or incompetent, then the railroad company is liable to the plaintiff for any injury he may have suffered from such carelessness, recklessness, or incompetency of Bassett if the plaintiff himself was not guilty of any negligence which contributed to that injury."

To this the defendant duly excepted.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"Ordinary care or due care in such cases is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless. Ordinary care in the selection or retention of servants in such cases implies that degree of diligence and precaution which

the exigencies of the particular service reasonably require — that is, such care as in view of the consequences that may result from negligence on the part of employés is fairly commensurate with the perils or dangers likely to be encountered."

To this the defendant, by its counsel, duly excepted.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"The jury have not legally a right to find that the plaintiff Mares was guilty of negligence which contributed to his injury, unless the jury finds that that fact is shown by a preponderance of evidence."

And to this the defendant duly excepted.

We think the court was clearly right in refusing to give the peremptory instructions asked for by the defendant, that if the plaintiff knew, or even had the opportunity of knowing, before his fall from the car in question, that Bassett was an unfit or unsafe man to run the engine in question, it was the plaintiff's duty absolutely to refuse to work with him any longer, and that his failure to do so would prevent him from recovering in this suit. The duty of the plaintiff under such circumstances is not to be determined by the single fact of his knowledge of the danger he incurred by continuing to serve with a co-employé known by him to be an unfit and incompetent person. It was enough for the court to say, as it did, that a failure on the part of the plaintiff to refuse to work, in view of that knowledge on his part, might be negligence on his part. The qualification was correct, that it was for the jury to say from all the attending circumstances whether his failure to do so was in fact contributory negligence. A suitable judgment on that question can only be reached by carefully weighing the probable consequences of both courses of conduct, and it might well happen that even at the risk of injury to himself, occasioned by the unskilfulness of his co-employé, the plaintiff might still reasonably be regarded as under a duty not suddenly and instantly to refuse to continue in the conduct of the business of his principal. Many cases might be conceived in which the latter course might even increase the danger to the plaintiff himself and entail great injury and loss to others.

Counsel for the plaintiff in error criticises the language of the court in its instruction to the jury, given at the request of the plaintiff's counsel, "that the plaintiff had a right to suppose and assume that the railroad company had used proper diligence and care in the employment and retention of an engineer," on the ground of vagueness and want of distinctness as to what diligence and care under the circumstances would be proper, but no explanation of the charge was asked for by the counsel for the defendant, nor was any exception taken to the instruction as given.

Objection is also taken to that portion of the charge which says: "And the defendant, having alleged negligence on the part of the plaintiff denominated contributory negligence, it must be established by preponderance of evidence to warrant you in finding it." The objection, as we understand it, is, that it was calculated to mislead the jury by not only putting the burden of proof of the fact on the defendant, but also in assuming that they must look for that proof only to the testimony adduced by the defendant. We do not, however, think it possible that any jury could be misled in that way. The whole effect of the charge is, that the fact in question must be established, from the whole testimony, by a preponderance of evidence in its favor. Where the burden of proof rested was immaterial at that stage of the cause when all the evidence was in, and the jury certainly could not suppose that they were confined, in their examination of that question, to the testimony adduced only on the part of the defendant.

On the whole case it abundantly and satisfactorily appears that the cause was submitted to the jury, upon the charge of the court, fairly, and with an accurate statement of the law applicable to the relation between the parties. We find no error in the record; the judgment is accordingly

Affirmed.

MARQUETTE, HOUGHTON, AND ONTONAGON RAILROAD COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

Argued December 6, 1887. — Decided December 19, 1887.

Construing the clause in the internal revenue act of July 14, 1870, which imposed a tax for the year 1871 of 2½ per cent on all undivided profits of corporations accrued and earned and added to a surplus, contingent, or other fund, in connection with the previous internal revenue statutes, it is plain that it was the intention of Congress not to subject to that tax profits of a railroad corporation during that year, which were not divided, but were used for construction.

ACTION at law to recover an unpaid internal revenue tax. Judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. W. P. Healy for plaintiff in error.

Mr. Solicitor General for defendant in error.

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

The single question in this case is, whether a railroad company is liable, under the act of July 14, 1870, c. 255, § 15, 16 Stat. 260, for a tax of two and one-half per centum on its profits for 1871, not divided, but used for construction during that year.

The section referred to, so far as material, is as follows:

"That there shall be levied and collected for and during the year eighteen hundred and seventy-one a tax of two and one-half per centum . . . on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent, or other fund."

The railroad company of which the Marquette, Houghton and Ontonagon Company is the successor, and for whose debts it is liable, earned, in 1871, $102,738.30, as profits, which were

not divided, but were used during the year in the construction of new works, and in creating new facilities for business. This amount was never in fact placed to the account of any particular fund, but it was taken from the money in the treasury to pay for the new structures and additions as they were made.

The act of 1870 was entitled, "An act to reduce internal taxes, and for other purposes." It is proper, therefore, to construe this particular provision in connection with the provisions of like character in the statutes imposing internal taxes which preceded that of 1870.

By the act of July 1, 1862, c. 119, 12 Stat. 432, which was the first of the series of internal revenue statutes, with which that of 1870 was directly connected, railroad companies were required to pay a tax of three per centum on all payments of interest on their bonded debt, and on all dividends declared due or payable to stockholders "as part of the earnings, profits, or gains of said companies." § 81, p. 469. And by § 82, p. 470, of the same act, banks, trust companies, savings institutions, and insurance companies were required to pay the same tax on all dividends "declared, due, or paid to stockholders, to policy holders, or to depositors, as part of the earnings, profits, or gains of said . . . companies, and on all sums added to their surplus or contingent funds."

Following this was the act of June 30, 1864, c. 173, 13 Stat. 223, which provided (§ 120, p. 283) for a tax of five per centum on the dividends of banks, trust companies, savings institutions, and insurance companies as in the act of 1862, and "on all undistributed sums, or sums made or added during the year to their surplus or contingent funds." As to railroad companies, it was provided (§ 122, p. 284) that they should pay the same tax on the amount of the interest on their bonded debt, on dividends to stockholders "as part of the earnings, profits, income, or gains of such company, and on all profits of such company carried to the account of any fund, *or used for construction*." Sections 120 and 122 were amended in some respects by the act of July 13, 1866, (c. 184, 14 Stat. 98, 138,) but these particular provisions were retained in substantially the same language.

That the tax here levied was not necessarily a tax on all the profits of these companies, but only on such as were used or disposed of in the ways specified, is shown by § 121 of the act of 1864, (13 Stat. 284,) which provided that if any bank legally authorized to issue notes as circulation neglected to "make dividends or additions to its surplus or contingent fund as often as once in six months" the tax should be on "the amount of profits which have accrued or been earned or received by said bank during the six months next preceding the first days of January and July." And that profits "used for construction" were not looked upon as profits "carried to the account of any fund," or "added to any surplus or contingent or other fund," is evident from the fact that it was thought necessary when the taxes were increased in 1864 to make special mention of them as something more than had been already provided for, that is to say, in "profits carried to the account of any fund." When, therefore, profits "used for construction" were left out in the act of 1870, it is evident to our minds that Congress intended to reduce the tax on railroad corporations to that extent. The question is not what would have been the meaning of "profits carried to the account of any fund," or "added to any surplus, contingent, or other fund," if this special provision in respect to profits "used for construction" had never been made, but what the meaning is with that provision left off after it had once been added. This is to be ascertained not by inquiry into the manner of keeping railroad accounts, but by interpreting the language used by Congress at different times to give expression to its will; not by determining whether as matter of book-keeping it is usual to carry undivided profits used for construction to a construction fund, but by studying the several statutes to see if it was intended that, if so used, they should be taxed under the act of 1870. In our opinion it was not, and consequently the current earnings of the company for the year 1871, used as earned in new construction, were not taxable as profits of that year.

The judgment of the Circuit Court is reversed, and the cause remanded with instructions to enter a judgment in favor of the railroad company on the facts found.

RADFORD *v.* FOLSOM.

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

Submitted December 8, 1887. — Decided December 19, 1887.

An appeal allowed in open court is of the date of its allowance, and to be kept in force should reach this court before the end of the term to which it is made returnable.

An appeal being allowed in open court, leaving the amount of the appeal bond to be settled afterwards, the acceptance of a bond by the District Judge after the expiration of the term at which the decree was rendered, and without issue and service of citation, does not operate as a new appeal as of the date of the acceptance of the bond.

The appearance of an appellee by counsel, without citation, at a term after the term at which the appeal is returnable, and a motion to dismiss the appeal for want of filing the transcript of the record during the return term, do not waive the citation.

BILL IN EQUITY to foreclose a mortgage. A motion on behalf of the appellee was made to dismiss the appeal for reasons stated in the opinion of the court.

Mr. H. H. Trimble, *Mr. Joseph G. Anderson*, and *Mr. Frank Hagerman* for the motion.

Mr. W. F. Sapp and *Mr. Walter H. Smith* opposing.

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

This suit was brought to foreclose a mortgage given to secure several alleged debts. On the 2d of April, 1884, the bill was dismissed on its merits as to the principal one of the debts and some others, but as to the rest, and as to matters contained in a cross-bill of the defendants, the cause was referred to a master to find certain facts and state certain accounts. The complainant on the same day prayed an appeal to this court, which was allowed, but never docketed here.

On the 10th of October, 1885, the court, after overruling certain exceptions to the master's report, entered a second and last decree, which was against the complainant, for $14,084.77. At the end of that decree was the following:

"And the complainant prays an appeal from the foregoing decree, which appeal is by the court hereby allowed, and the penalty of the appeal bond, if the same is to operate as a supersedeas, is fixed at dollars, but if the same is not to operate as a supersedeas, then the penalty of the appeal bond is fixed at dollars."

The next term of this court thereafter began October 12, 1885, and the appeal was not docketed here during that term.

On the 8th of February, 1886, there was filed in the office of the clerk of the Circuit Court, an order made by the District Judge at his chambers, and after the term at which the decree was rendered, fixing the amount of the appeal bond at $20,000 if for supersedeas, and at $2000 if for costs only. On the 8th of March the complainant filed a motion to modify the amount of the appeal bond. On the 8th of June, while this motion was pending, the complainant filed with the clerk of the Circuit Court an appeal bond dated March 1, 1886, in the penal sum of $25,000, which had been approved by the District Judge as a supersedeas bond. On the 2d of October the motion to modify the amount of the appeal bond was overruled by the court, "on the ground that the case was then in the Supreme Court of the United States." The case was docketed in this court October 15, 1886. It does not appear that any citation has ever been signed or served.

This motion was made on the 8th of December, 1887, during the present term, to dismiss the case, "because each of said appeals became null and void when the return term of this court passed without a transcript of the record being filed in this court and being docketed herein."

The first appeal taken in open court on the 2d of April, 1884, became inoperative by reason of the failure to docket the same in this court before the end of October Term, 1884. Whether the decree from which that appeal was taken was a final decree, or interlocutory only, it is unnecessary now to

consider. The appeal allowed in open court October 10, 1885, also became inoperative as it was not docketed here before the end of October Term, 1885, and this too whether the bond approved by the District Judge after the term was accepted to perfect that appeal or not. If an appeal at all, it was of the date of its allowance in open court, and to be kept in force it should have reached here before the end of the term to which it was made returnable. *Grisby* v. *Purcell*, 99 U. S. 505, and cases there cited.

The acceptance of the bond by the District Judge cannot be considered as the allowance of a new appeal at that date, because that was after the term at which the decree was rendered and no citation was ever issued or served. *Hewitt* v. *Filbert*, 116 U. S. 142. The appearance of counsel for appellee at the present term on the making of this motion is not a waiver of the citation. It would have been different if there had been a general appearance at the last term, that being the term to which the appeal if it had been properly taken would have been returnable. *United States* v. *Armejo*, decided April 3, 1866, and reported in Book 18, L. C. O. P. Co. ed. U. S. Sup. Ct. Reports, 247.

The motion to dismiss is granted.

NORTH PENNSYLVANIA RAILROAD COMPANY *v.* COMMERCIAL BANK OF CHICAGO.

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

Argued November 22, 23, 1887. — Decided December 19, 1887.

A Circuit Court of the United States may direct a verdict for the plaintiff when it is clear from all the evidence in the case that he is entitled to recover, and no matter affecting his claim is left in doubt to be determined by the jury.

The undertaking of a common carrier to transport live-stock, though differing in some respects from the responsibility assumed in the carriage of ordinary goods, includes the delivery of the live-stock.

Statement of the Case.

When a railroad company receives live-stock for transportation by means of connecting lines to a named consignee or to his order at a destination beyond its terminus, and gives a receipt or bill of lading in accordance therewith, and delivers the property safely to the next connecting line, from which it finally passes into the possession of the connecting company on whose line the point of destination is, the latter company is bound to deliver the property there to the consignee or to his order, if they are made known to it on receiving the freight; and it is not released from that liability by reason of a practice or custom to deliver all such freight to a drove-yard company without requiring the production of the bill of lading or receipt, or other authority of the shipper, knowledge of the practice or custom not being brought home to the holder of such receipt, bill of lading, or other authority.

A railroad company received live-stock to be transported over its line and over connecting lines to a distant point beyond its terminus. It gave the shipper a receipt stating that they were "consigned to order P. M." (who was also shipper and owner), "notify J. B." at the point of destination. The goods were safely transported to that point. The agents of the last transporting line received with the property a way-bill containing the same statements as to the consignee, and as to the party to be notified. *Held*, that knowledge of the destination and the consignee of the goods being thus brought to the notice of the company which carried the goods to their destination, it became its duty to deliver, or to instruct its agents to deliver, the property only to the consignee or his order; and that a delivery of the property to J. B. after such knowledge would not avail as a defence when sued for its value by a bank at the place of shipment, which had discounted a bill drawn by the shipper, and secured by an endorsement of the receipt as collateral.

This was an action brought by the Commercial National Bank of Chicago against the North Pennsylvania Railroad Company to recover the value of 404 head of cattle received by it in November, 1877, to transport to Philadelphia, and not delivered there to the plaintiff, the assignee of the shipper, or to its order. The facts out of which it arose are briefly as follows:

In 1877 one Paris Myrick was engaged at Chicago in the business of buying cattle and forwarding them by railway to Philadelphia. On the 7th of November of that year he bought 202 head of cattle, weighing 240,000 pounds, and on the same day delivered them to the Michigan Central Railroad Company at Chicago, to be transported to Philadelphia. That company is one of several railway carriers forming a

continuous line from Chicago to Philadelphia. On the delivery of the cattle, Myrick took from the company the following receipt:

"MICHIGAN CENTRAL RAILROAD COMPANY,
"CHICAGO STATION, *Nov. 7th*, 1877.

"Received from Paris Myrick in apparent good order. Consigned to order Paris Myrick.

"Notify J. & W. Blaker, Philadelphia, Pa.

Articles.	Marked.	Weight or measure.
"Two hundred & two (202) Cattle.		240,000.

"Advanced charges $12.00.

"Marked and described as above (contents and value otherwise unknown), for transportation by the Michigan Central Railroad Company to the warehouse at * * *

"Notice. — See rules of transportation on the back hereof.

"Use separate receipts for each consignment.

"WM. GROGAN, *Agent.*"

On the margin of the receipt was the following notice:

"This company will not hold itself responsible for the accuracy of these weights as between buyer and seller; the approximate weight having been ascertained by track scales, which is sufficiently accurate for freighting purposes, but may not be strictly correct as between buyer and seller.

"This receipt can be exchanged for a through bill of lading."

On the same day Myrick drew and delivered to the Commercial National Bank of Chicago a draft, of which the following is a copy:

"$12,287.57. CHICAGO, *Nov. 7th*, 1877.

"Pay to the order of George L. Otis, cashier, twelve thousand two hundred and eighty-seven $\frac{57}{100}$ dollars, value received, and charge the same to account of— PARIS MYRICK.

"To J. & W. Blaker, Newtown, Bucks Co., Pa."

As security for the payment of the draft, Myrick indorsed the receipt obtained from the railroad company and delivered

it with the draft to the bank, which thereupon gave him the money.

On the 14th of November, Myrick purchased 202 more head of cattle, weighing 260,000 pounds, and on that day delivered them to the Michigan Central Railroad Company at Chicago, to be transported to Philadelphia, and received from the company a receipt similar to the one taken on the first shipment. On the same day he drew another draft and delivered it to the Commercial National Bank, of which the following is a copy:

"$12,448.12. CHICAGO, *Nov.* 14, 1877.

"Pay to the order of Geo. L. Otis, cashier, twelve thousand four hundred & forty-eight $\frac{12}{100}$ dollars, value received, and charge same to account of — PARIS MYRICK.

"To J. & W. Blaker, Newtown, Bucks Co., Pa."

For the payment of this draft, Myrick indorsed the receipt obtained from the railroad company, and delivered it with the draft to the bank, which thereupon gave him the money. The cattle of both shipments were conveyed on the road of the Michigan Central Railroad Company to Detroit, and thence over the roads of other connecting companies to Philadelphia. The last two carriers were the Lehigh Valley Railroad Company and the North Pennsylvania Railroad Company, whose lines extended between Waverly, Tioga County, N. Y., and Philadelphia. The cattle of both shipments were carried over the roads of these companies from Waverly on their joint way-bills. The thirteen covering the first shipment were dated November 10, 1877, and twelve of them were alike except in the number of cattle carried under them. The following is a copy of one of them:

Statement of the Case.

Form 24—L. *Joint Way-Bill.*

Way-bill of merchandise transported by L. V. R. R. and N. P. R. R., from Waverly to Philad'a, Nov. 10th, 1877.

Kind and number of car.	Consignee or owner's name.	Description of articles.	Weight. 1st class.	Weight. 2d class.	Weight. 3d class.	Weight. 4th class.	Weight. Class A.	Rate.	Prepaid.	Freight.	Expenses.	Consignor.
Erie, 30483...	P. Myrick. Notify J. & W. Blaker.	18 cattle, rec.	20,000	.....	.....	.....	.....	15 75	...	31 50	21 86	Buffalo.

E., 10.93; L. V. & N. P., 15.75. Chicago thro', 58c.

In the thirteenth joint way-bill of the first shipment the words "Notify J. & W. Blaker" were omitted.

The joint way-bills covering the second shipment were dated November 17, 1877, but, like the thirteenth joint way-bill of the first shipment, they did not contain the words "Notify J. & W. Blaker" after the name of the consignee or owner. In other respects, except in the number of cattle carried, they were similar to those covering the first shipment.

The cattle of both shipments arrived in Philadelphia — the first on November 11, and the second on November 18 — and were immediately delivered by the Pennsylvania Railroad Company to the North Philadelphia Drove Yard Company, which was formed for the business of receiving, taking care of, and delivering live-stock to their owners or consignees. This company notified the Blakers of the arrival of the cattle, and delivered them to those parties. The Blakers were dealers in cattle, and had particular pens in the yard assigned to them. The cattle of both shipments were placed in these pens by the agent of the railroad company at the drove-yard station, and he then wrote on the thirteenth joint way-bill of the first shipment, and on all the joint way-bills of the last shipment from Waverly, under the name of the consignee or owner, these words: "Ac. J. & W. Blaker." On the day after they arrived and were placed in these pens, in each case, the Blakers sold the cattle and appropriated the proceeds. The cattle of both shipments were delivered by the railroad company to the drove-yard company without any direction to hold the cattle subject to

the order of the consignee, who was also the owner and shipper, and the cattle were delivered to the Blakers without such order. It does not appear that any demand was made by the railroad company, or by the drove-yard company, for anything to show the right of those parties to receive the cattle.

The bank transmitted the drafts for collection, with the carriers' receipts attached, to its correspondent at Newtown, Pennsylvania. The Blakers were notified of the receipt of the drafts, but failed to accept them, and they were protested for non-acceptance, November 27, 1877. They disposed of the cattle before the arrival of the drafts and carriers' receipts, and soon afterwards failed, and the drafts were not paid.

It appeared in evidence that Myrick had previously made numerous shipments of cattle from Chicago to Philadelphia, and taken similar receipts from the Michigan Central Railroad Company; that these cattle had been received by the North Pennsylvania Railroad Company and delivered by it at Philadelphia to the drove-yard company; that it had been the practice of that railroad company to deliver the cattle to the drove-yard company, and of the latter company to deliver them to the Blakers without the production of the carrier's receipt or any bill of lading, or any order of the shipper for their delivery. It also appeared that there was no knowledge on the part of the Commercial Bank at Chicago, or of its correspondent at Newtown, of any such practice; that drafts of Myrick, cashed by that bank, had accompanied previous shipments of cattle; that such drafts, upon notice to the Blakers of their receipt, had always been promptly paid, and that the bills of lading (the carriers' receipts in question) were not surrendered to the Blakers until such payment.

Upon these facts the Commercial National Bank originally recovered a verdict and judgment against the Michigan Central Railroad Company, the court below holding that the receipts of that company constituted contracts to carry the cattle from Chicago to Philadelphia, and deliver them there to the shipper or to his order; but the judgment was reversed by this court on the ground that a through contract for their carriage was not established by those receipts, and that the

question of whether or not there was such a contract for their carriage should have been submitted to the jury to determine from the circumstances of the case. *Myrick* v. *Michigan Central Railroad Company*, 107 U. S. 102. The present action was subsequently brought against the North Pennsylvania Railroad Company, the last of the series of railroad carriers in the line from Chicago to Philadelphia, for the non-delivery at Philadelphia of the cattle of both shipments to the order of the shipper, as designated in the receipts given to him at Chicago, and in the way-bills given at Waverly, that is, to his assignee, the plaintiff herein. Upon the evidence in the case, which developed the facts substantially as stated, the court directed a verdict for the plaintiff for the amount of its claim. A verdict was accordingly rendered for $34,271.41, which was the amount of the drafts.

Mr. William Rotch Wister and *Mr. George F. Edmunds* for plaintiff in error.

Mr. Wayne McVeagh for defendant in error. *Mr. J. A. Sleeper* filed a brief for same.

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

There is no doubt of the power of the Circuit Court to direct a verdict for the plaintiff upon the evidence presented in a cause, where it is clear that he is entitled to recover, and no matter affecting his claim is left in doubt to be determined by the jury. Such a direction is eminently proper, when it would be the duty of the court to set aside a different verdict, if one were rendered. It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way. *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241.

Upon the evidence presented, and there was no conflict in it, the law was with the plaintiff. The duty of a common carrier is not merely to carry safely the goods intrusted to him,

but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination. There are no conditions which would release him from this duty, except such as would also release him from the safe carriage of the goods. The undertaking of the carrier to transport goods necessarily includes the duty of delivering them. A railroad company, it is true, is not a carrier of live stock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss. But notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or of live-stock, is more strictly enforced. *Forbes* v. *Boston & Lowell Railroad Co.*, 133 Mass. 154; *McEntee* v. *New Jersey Steamboat Co.*, 45 N. Y. 34.

If the consignee is absent from the place of destination, or cannot, after reasonable inquiries, be found, and no one appears to represent him, the carrier may place the goods in a warehouse or store with a responsible person to be kept on account of and at the expense of the owner. He cannot release himself from responsibility by abandoning the goods or turning them over to one not entitled to receive them. *Fisk* v. *Newton*, 1 Denio, 45. If the freight consist, as in this case, of live-stock, the carrier will not, under the circumstances mentioned, that is, when the consignee is absent or cannot after reasonable inquiries be found, and no one appears

to represent him, relieve himself from responsibility by turning the animals loose. He must place them in some suitable quarters where they can be properly fed and sheltered, under the charge of a competent person as his agent, or for account and at the expense of the owner. Turning them loose without a keeper or delivering them to one not entitled to receive them would equally constitute a breach of duty for which he could be held accountable. These principles are firmly established by the adjudged cases, and rest upon obvious grounds of justice. Angell on Carriers, § 291.

The railroad company, defendant below, should, therefore, have given necessary instructions to the drove-yard company, which was its agent for the custody and care of the cattle, respecting their delivery — that it should be made only upon the order of the consignee, who was also the owner and shipper. The joint way-bills given by the two companies at Waverly, equally with the original receipts given at Chicago, disclosed his name. Those joint way-bills were for the guidance of, and were used by, the conductors of both companies.

In the case of *The Thames*, 14 Wall. 98, it appeared that the purchaser of cotton at Savannah delivered it there to a vessel to be carried to New York, taking bills of lading, in which it was stated that the cotton was shipped by one Gilbert Van Pelt, and was to be delivered "unto order or to his or their assigns." Van Pelt was a member of a firm in New York, for which he purchased the cotton. Against the shipment he drew a draft on his firm, payable fifteen days after sight, and delivered it, with the bills of lading, to parties who obtained a discount of the draft from a bank in Atlanta. The draft and bills were at once forwarded to New York to an agent of the bank, to procure their acceptance by the firm. Before the draft became due the vessel arrived at New York and gave notice to the firm of the arrival of the cotton. That vessel had previously brought cotton in the same way for the firm, and the master of the vessel, knowing that the cotton was intended for the firm, and having no information from the bank's agent, or from any other source, of any other consignee or claimant, delivered to it the cotton, taking its receipt.

When the draft became due, two weeks afterwards, and was not paid, the cotton was demanded of the owner of the vessel by the bank's agent. In the action which followed it was contended by the owner that the delivery was justified, and that the vessel had discharged its obligation, but this court held that, though the delivery had been made in ignorance of any outstanding claim to the cotton, it was, nevertheless, a breach of the contract of affreightment, and that the agent of the bank could libel the vessel, which was bound for the proper delivery of the property, for the loss sustained. And the court said: "By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver it to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship. And it is no excuse for a delivery to the wrong persons that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made. Want of notice is excused when the consignee is unknown, or is absent, or cannot be found after diligent search. And if, after inquiry, the consignee or the indorsee of the bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He may thus relieve himself from the carrier's responsibility. He has no right under any circumstances to deliver to a stranger."

The direction on the receipts given at Chicago, and on the way-bills of the first shipment from Waverly, to "notify J. & W. Blaker," in no respect qualified the duty of the carrier to deliver the animals to the order of the consignee. If they were consignees, the direction to notify them would be entirely unnecessary, because the duty of the carrier is to notify the consignee on the arrival of goods at their place of destination. In the case of *Furman* v. *Union Pacific Railway Co.*, recently decided by the Court of Appeals of New York, 106 N. Y. 579, it was held that placing in a bill of lading a direction to notify certain persons is a plain indication in the

absence of further directions, that they are not the consignees. The earlier case of *Bank of Commerce* v. *Bissell*, 72 N. Y. 615, is also in point on this subject. There the action was against the defendants as common carriers upon a bill of lading of a boat-load of wheat shipped at Buffalo for transportation to New York on account and order of the plaintiff. The bill of lading contained this direction: "Notify E. S. Brown, New York," and was given to the bank as security for a draft drawn by the shippers on Brown. With the draft annexed it was forwarded to New York, with an indorsement by the cashier of the bank that the wheat was subject to payment of the draft, and was to be delivered only on such payment. On the arrival of the wheat in New York it was delivered to Brown, and he became insolvent before the draft fell due. It was held that the defendants were not warranted by the bill of lading in delivering the wheat to Brown, and that the discount of the draft and its acceptance did not justify the delivery. It was also held that the fact that the plaintiff did not indorse over the bill of lading to any one in New York authorizing him to receive the wheat, did not relieve the defendants from the duty of holding it as plaintiff's property or subject to its lien; that they could have given notice to Brown, "and if neither he nor any one else came with authority to take delivery, they could, and it was their duty to have put the wheat in store."

It follows from these views that the defendant, the North Pennsylvania Railroad Company, in allowing the cattle to go into the possession of the Blakers, through its agent, the drove-yard company, without the order of the consignee, who, as stated above, was also the owner and shipper, became responsible for their value to the Commercial National Bank, which held his orders indorsed on the receipts for the shipments. It is true that the original receipts only bound the Michigan Central Railroad Company to carry safely the animals on its own road and deliver them safely to the next connecting line to carry on the route beyond. *Myrick* v. *Michigan Central Railroad Co.*, 107 U. S. 102. But the last carrier in the connecting lines was bound to deliver the animals at the place of

destination, and to the consignee there, or to his order, if they were made known to it on receiving the freight from the preceding connecting company. In this case there is no question that the company had such knowledge when the cattle were received. The destination and the name of the consignee appear upon the way-bills given at Waverly. There were only two places at which the cattle were, on their way from Chicago, reshipped, that is, taken from the cars, and, after a short interval of rest, replaced. Waverly was one of these places, and when they were reshipped there these way-bills, with a designation of the destination and consignee of the cattle, were made out.

The indorsement by Myrick to the plaintiff, the Commercial Bank of Chicago, of the receipts, taken on the shipment of the cattle, transferred their title, and gave to the bank the right to their possession, and, if necessary, to sell them for the payment of the drafts. The fact that the railroad company at Philadelphia had been in the habit of delivering cattle, transported by it, to the Blakers through the drove-yard company, without requiring the production of any bill of lading or receipt of the carrier given to the shipper, or any authority of the shipper, in no respect relieved the company from liability for the cattle in this case. It was not shown that the shipper or the bank which took the draft against the shipment, or its correspondent at Newtown in Pennsylvania, had any knowledge of the practice, and, therefore, if any force can be given to such a practice in any case, it cannot be given in this case where the party sought to be affected had no knowledge of its existence. In *Bank of Commerce* v. *Bissell*, cited above, the defendants offered to prove a custom in New York to deliver property under bills of lading to the person who was to have notice of its arrival. The evidence was rejected, and the Court of Appeals held that there was no error in its rejection, stating that if the custom were established it could not subvert a positive, unambiguous contract.

Numerous other assignments of error are presented for which a reversal of the judgment is asked, but the propositions of law embodied in them were not urged in the court

Syllabus.

below, and, therefore, the fact that the court did not rule upon them constitutes no ground for interference with the judgment. The one exception taken was to the direction of the court upon the evidence to find a verdict for the plaintiff for the amount claimed. To that direction the defendant excepted, and it is at liberty to show, either that there was sufficient evidence to go to the jury, or that questions of law apparent upon the record would control the case in opposition to the direction. But this it has not done. As before stated, there was no conflict in the evidence, and the law upon it was clearly with the plaintiff.

The judgment is, therefore,

Affirmed.

ÆTNA LIFE INSURANCE COMPANY *v.* DAVEY.

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

Argued November 23, 1887. — Decided December 19, 1887.

A policy of life insurance contained questions to the applicant with his answers, and provisions that the answers were warranted to be true, and that the policy should be void if they were in any respect false or fraudulent. Among these questions and answers were the following: "5. Q. Are the habits of the party sober and temperate? A. Yes. 6. Q. Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, or does he use any of them often or daily? A. No." It also contained a provision that if the applicant should become so far intemperate as to impair health or induce *delirium tremens*, it should become void. After the death of the assured the insurer defended against an action on the policy by setting up (1) that the answers to these questions were false; and (2) that the deceased, after the issue of the policy, became intemperate, impaired his health thereby, and induced *delirium tremens*. *Held:*

(1) That an instruction to the jury as to question 6 that they could not find the answer to be untrue unless the assured had, prior to the issue of the policy, been addicted to the excessive or intemperate use of alcoholic stimulants or opium, or, at the time of the application, habitually used some of them often or daily, was a correct

construction of the language of question 6, as interpreted in connection with question 5.

(2) That if the death was substantially caused by the excessive use of alcoholic stimulants, not taken for medical purposes or under medical advice, the assured's health was impaired by intemperance within the meaning of the policy, although he might not have had *delirium tremens*, and although he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate; and that it was for the jury to determine whether the death was so caused.

This was an action in the nature of assumpsit upon a policy of insurance. Judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Theron G. Strong for plaintiff in error.

Mr. John Linn for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

By its policy, issued July 16, 1878, the Ætna Life Insurance Company insured the life of William A. Davey in the sum of ten thousand dollars, payable to his wife, the present defendant in error, within ninety days "after due notice and proof of the death" of the insured, during the continuance of the policy. Among the questions in the application for the policy were the following: "5. Are the habits of the party sober and temperate? 6. Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, or does he use any of them often or daily?" To the first question the answer was "Yes;" to the second, "No." The application, which by agreement was made the basis of the contract, contained a warranty of the truth of the answers to the above and other questions, and that the policy should be void if they were in any respect false or fraudulent.

The policy was issued and accepted upon the following among other conditions: 1. That the answers, statements, representations, and declarations contained in or endorsed upon the application, made part of the contract, are war-

ranted to be true in all respects, and that the policy should be absolutely null and void if obtained by or through any fraud, misrepresentation, concealment, or false statement; 2. That if the insured "shall become so far intemperate as to impair his health or induce *delirium tremens*, or if his death shall result from injuries received while under the influence of alcoholic liquor," the policy should be null and void, except as provided in the eighth section of the conditions. The latter section is in these words: "In every case when the policy shall cease, be or become void (except by fraud, misrepresentation, concealment, or any false statement), if the premiums for three entire years shall have been paid, the amount which by the seventh section of these conditions would be applied to the purchase of a paid-up policy, shall not be forfeited to the said company, but the same shall be due and payable in ninety days after due notice and proof of death of the said insured."

The insured died August 6, 1881, while on a visit at Alexandria Bay. The company having received due notice and proof of his death, and having refused to pay the amount named in the policy, this action was brought by his widow. The company, besides pleading the general issue, made these special defences: That, contrary to the statements made in his application, the insured, for a long time prior to the issuing of the policy, was addicted to the excessive and intemperate use of alcoholic stimulants, and had used them often and daily; and that, in violation of one of the conditions of the contract, he became, *after the issuing of the policy*, so far intemperate as greatly to impair his health and to induce *delirium tremens*.

At the trial, evidence was introduced tending to establish both of these special defences. But there was also evidence tending to show that the insured was not, prior to the issuing of the policy, addicted to the excessive or intemperate use of alcoholic stimulants, and that he did not, after that date, become so far intemperate as to impair his health or induce *delirium tremens*.

There was a verdict and judgment for the plaintiff for the sum named in the policy, with damages to the amount of $1419.82.

Upon the issue as to the truth or falsity of the answer to the sixth question in the application for the policy, the court instructed the jury, in substance, that they could not find the answer to be untrue, unless the insured had, prior to the issuing of the policy, been *addicted* to the excessive or intemperate use of alcoholic stimulants or opium, or at the time of the application *habitually* used some of them often or daily. The charge, upon this point, followed almost the identical words of the question propounded to the insured, and is unobjectionable, unless, as is contended, the court erred in using the word "habitually;" implying thereby that the answer of "No" was a fair and true one, if the use by the insured of stimulants, at the time the policy was issued, was not so frequent or to such an extent as to indicate, in that respect, a fixed, settled course or habit of life. We are of opinion that the question put to the insured was properly interpreted by the court. The inquiry as to whether the insured had ever been addicted to the excessive or intemperate use of alcoholic stimulants, and, whether, at the time of the application, he used alcoholic stimulants "often or daily" was, in effect, an inquiry as to his habit in that regard; not whether he used such stimulants or opium at all, but whether he used any of them habitually. If he was addicted to the excessive use of them, he was habitually intemperate; and to use them often or daily is, according to the ordinary acceptation of those words, to use them habitually. That this is the correct interpretation of the words is partly shown by the fifth question, "Are the habits of the party sober and temperate?"

But we are of opinion that the court below erred in its interpretation of the words in the policy which refer to the use of strong drinks by the insured after he obtained it. Having secured his agreement and warranty that he was not at that time, nor ever had been, habitually intemperate, the company sought to protect itself against an improper use by him, in the future, of alcoholic stimulants, by the provision that the policy should become null and void "if he shall become so far intemperate as to impair health or induce *delirium tremens*." The court instructed the jury: "The impairment of health

contemplated by this condition of the policy is not necessarily permanent or irremediable, nor is it the temporary indisposition or disturbance usually resulting from a drunken debauch, but it is the development of disease or the impairment of constitutional vigor by the use of intoxicating beverages in such a degree and for such a time as is ordinarily understood to constitute intemperance."

The defendant then asked the court to say to the jury that the words in the policy, "become so far intemperate as to impair health," do not necessarily imply habitual intemperance, and that an act of intemperance, producing impairment of health, was within the conditions of the policy, and rendered it null and void, except as provided where the premiums for three entire years had been paid, and the policy had ceased upon other grounds than fraud, misrepresentation, concealment, or false statement of the insured. The court declined to so instruct the jury, and said: "The words of the condition are to be expounded according to the common and popular acceptation of their meaning. In this sense of them a single excessive indulgence in alcoholic liquors is not intemperance, but there must be such frequency in their use, continued for a longer or shorter period, as indicates an injurious addiction to such indulgence." The effect of these and other instructions was that the condition that the policy should be void if the insured became so far intemperate as to impair his health, was not broken unless intemperance became the habit or rule of his life after the policy was issued. The jury may have believed — and there was some, we do not say conclusive, evidence, to justify them in so believing — that the efficient, controlling cause of the death of the insured was an excessive and continuous use of strong drinks for several days and nights immediately preceding his death; yet they were not at liberty, under the instructions, to find that he became so far intemperate as to impair his health, unless it further appeared that his intemperance in the use of alcoholic stimulants covered such a period of time, as to constitute the habit of his life. This construction of the contract is, in our judgment, erroneous. If the substantial cause of the death of the insured was

an excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance, within the meaning of the words "so far intemperate as to impair his health," although he may not have had *delirium tremens*, and although, previously to his last illness, he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate. Whether death was so caused is a matter to be determined by the jury under all the evidence.

It is supposed by the plaintiff that the instructions of the court are sustained by *Northwestern Ins. Co.* v. *Muskegon Bank*, 122 U. S. 502. In that case the insured answered "Yes, occasionally," to the question whether he then was or had ever been "in the habit of using alcoholic beverages or other stimulants;" and stipulated, in the application, that he was not then, and would not become, "habitually intemperate." The policy contained a provision, not fully set out in the report of the case, that it should be null and void if the insured "shall become either habitually intemperate *or* so far intemperate as to impair health or induce *delirium tremens*." No question was made or could have been made in this court in respect to the meaning of the words "so far intemperate as to impair health," because the jury were instructed, at the request of the company, that if the insured, Comstock, became so far intemperate as to impair his health, they must find for the defendant. The contest in this court was as to what constituted habitual intemperance, and as to the rulings in the court below upon that point. Indeed, it was assumed at the trial of that case, as well as in this court, that there was, or might be, a difference between habitual intemperance and intemperance that impaired health. There was, consequently, no occasion for this court, in that case, to decide what construction was to be put upon the words "so far intemperate as to impair health," when standing alone in a policy. The jury having found, under proper instructions, that the insured had not become so far intemperate as to impair his health, that finding was not open to review here. It is clear, therefore, that there is nothing in *Northwestern Ins. Co.* v. *Muskegon Bank* that concludes the present case, or that militates against our interpretation of the policy here in suit.

Opinion of the Court.

Other questions have been discussed by counsel; but, as they may not arise upon another trial, or in the precise form in which they are now presented, we will not consider them. For the reasons stated,

The judgment must be reversed, with directions for another trial in accordance with the principles of this opinion. It is so ordered.

TALKINGTON *v.* DUMBLETON.

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

Submitted December 15, 1887. — Decided December 19, 1887.

When the value of the property in dispute is one of the questions in the case and was necessarily involved in its determination in the court below, this court will not, on a motion to dismiss for want of jurisdiction, consider affidavits tending to contradict the finding of that court in respect of its value.

MOTION to dismiss for want of jurisdiction. The case is stated in the opinion of the court.

Mr. Frank V. Drake for the motion.

Mr. John H. Mitchell opposing.

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

This suit was brought on the 10th of April, 1886, by Henry M. Dumbleton, the appellee, to set aside a conveyance of lands made by him to F. P. Talkington, one of the appellants, on the 23d of February, 1885, in exchange for the interest of Talkington in a saloon, on the ground that the exchange was brought about and the conveyance obtained by the false and fraudulent representations of Talkington as to the value of his property. In his bill Dumbleton alleged that the value of the land was $7000, and that Talkington represented to him

that the value of the property to be given in exchange therefor was of equal amount, or more.

In his answer, which was filed May 14, 1886, Talkington denied that the land, "or complainant's interest therein, was on February 15, 1884, or at any time since, has been of the value of $7000, or of any greater value than $4000," and he averred that at the time of the exchange "the said saloon, stock in trade, and the good will thereof was of the value of at least $4000." Upon the issue thus presented testimony was taken by both parties, that for Dumbleton tending to prove that the value was $7000, and that for Talkington that it was less than $4000. A decree was entered November 8, 1886, finding that the value of the land "was and still is $5000, and no more," and directing Talkington to reconvey on the payment to him of the sum of $812.

From that decree Talkington and his codefendants, who claim under him, took this appeal, which Dumbleton moves to dismiss because the value of the matter in dispute does not exceed $5000, that being the amount now required for our jurisdiction on appeals and writs of error from the Supreme Courts of the Territories in cases like this. Act of March 3, 1885, 23 Stat. 443, c. 355. To overcome the effect of the finding of the court upon the question of value, the appellants present here the affidavits of sundry persons tending to show that the actual value of the land at the time of the decree was sufficient for our jurisdiction, and they ask that these affidavits may be considered upon this motion.

Inasmuch as the appellants sought in the court below to establish as part of their defence the fact that the land was not worth $7000, but only $4000, and succeeded so far as to get the court to find that it did not exceed $5000, we are not inclined to allow the same parties, for the purpose of establishing our jurisdiction, to show by affidavits that the answer of Talkington, the principal defendant, and sworn to by him, was erroneous in that particular, even if, under any circumstances, it would be permissible to show by affidavits that the value appearing in the record was not the true value, which we by no means admit. In *Zeigler* v. *Hopkins*, 117 U. S.

683, 689, where affidavits were submitted, the finding of the court below as to value was not a material question in the case upon its merits, but was more in the nature of an inquiry for the purpose of determining whether an appeal should be allowed, as in *Wilson* v. *Blair*, 119 U. S. 387. Here, however, the value of the property was one of the questions in the case and necessarily involved in its determination.

As the value of the matter in dispute is, according to the finding of the court below, not more than $5000,

The motion to dismiss is granted.

HEFNER *v.* NORTHWESTERN LIFE INSURANCE COMPANY.

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

Argued November 7, 8, 1887. — Decided December 19, 1887.

Multifariousness as to subjects or parties, within the jurisdiction of a court of equity, does not render a decree void, so that it can be treated as a nullity in a collateral action.

A court of equity, in a suit to foreclose a mortgage, may permit a person, to whom the land has been sold and conveyed for non-payment of taxes assessed after the date of the mortgage, to be made a party, and may determine the validity of his title.

A bill in equity by A against B and C to foreclose a mortgage from B to A alleged that C claimed some interest in the premises, the exact nature of which the plaintiff was unable to set out, and prayed for a decree of foreclosure, and that the right, title and interest of each defendant be forever barred and foreclosed, and for a sale of the premises, and for further relief. In the decree C's default was recited and confirmed, and it was adjudged that the mortgage was a lien prior and paramount to the lien of each defendant, and that the right, title and equity of redemption of each defendant be by a sale under the decree forever barred and foreclosed, and that the purchaser at such sale should take the premises by title absolute, relating back to the date of the mortgage. Under that decree the land was sold to A. *Held*, that the decree was a conclusive adjudication that C had no valid title or lien, and estopped him to set up, in defence to an action of ejectment by A, a tax title subsequent to the mortgage and prior to the suit for foreclosure.

Statement of the Case.

THIS was an action at law, in the nature of ejectment, to recover possession of a tract of land, brought on July 5, 1883, in the Circuit Court of the United States for the Northern District of Iowa against Hefner and wife and Babcock and wife by the Northwestern Mutual Life Insurance Company, stating its title in substance as follows:

On October 31, 1876, it filed a bill on the equity side of that court against Bates, Callanan and others, to foreclose a mortgage of the same and other lands, executed to the plaintiff on August 23, 1870, by Bates, then the owner; containing the usual allegations of such a bill; also alleging that Callanan "claims some interest in and to a portion of the mortgaged premises, the exact nature of which your orator is unable to set out;" and praying that each and all of said defendants be made parties to the bill, and for a writ of subpœna against all of them, and for judgment against Bates for the sums due on the mortgage, and for "a decree of foreclosure against the premises hereinbefore described against all of the before named defendants, and that the right, title and interest of each and every of the said defendants be by decree of this court forever barred and foreclosed, and that the master in chancery of this court be authorized to make sale of said premises, or sufficient thereof to satisfy the said several sums of money, with interest thereon, and the costs of this suit, and all and singular such relief as your orator is equitably entitled to receive."

Upon that bill, a writ of subpœna was issued against and served upon all the defendants named therein, including Callanan.

On May 21, 1877, a final decree was entered in that suit, reciting a hearing of the plaintiff and of Bates, and a default of the other defendants, confirming that default, ascertaining the sums due on the mortgage, and adjudging that the mortgage "is a lien upon the mortgaged premises, prior and paramount to the lien of each and every of the said defendants;" that Bates pay those sums, with interest and costs, to the plaintiff on or before September 1, 1877; that, in default of such payment, a sale and conveyance of the mortgaged prem-

ises, or of so much thereof as might be necessary to satisfy those sums, be made by a master; "and that the right, title and equity of redemption of each and every of the defendants in this suit be, by a sale of the said mortgaged premises hereunder, forever barred and foreclosed, and the purchaser at such sale shall take the premises sold by title absolute, and such title shall relate back to the date of the execution of the mortgage to the complainant, to wit, the 23d day of August, 1870."

On October 5, 1877, pursuant to that decree, the master sold the mortgaged premises by auction for less than those sums to the plaintiff, and executed a deed thereof accordingly.

In the present action, the plaintiff further alleged that the defendants, Hefner and others, were in actual possession, claiming a right acquired from Callanan since the beginning of the suit for foreclosure, and had no right to possession against the plaintiff, and that Callanan claimed some interest in the premises under and by virtue of a pretended tax deed.

The defendants filed an answer to this action, alleging that, the land in question being subject to taxes lawfully assessed thereon for 1870 and remaining due and unpaid, the county treasurer, at a tax sale on November 15, 1871, in conformity with law, sold the land to Callanan, and, there being no redemption from the sale, executed to Callanan on December 1, 1874, a tax deed thereof, which was duly recorded two days after, and a copy of which was annexed to the answer; and that the right and title created by the tax sale and deed, and no other, was owned by Callanan at the time of the proceedings for foreclosure and of the decree therein, and had since been conveyed by him to the defendants. A demurrer to this answer was sustained, and judgment rendered for the plaintiff; and the defendants sued out this writ of error.

Mr. C. H. Gatch for plaintiffs in error. *Mr. William Connor* was with him on the brief.

Mr. B. F. Kauffman for defendant in error.

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

The question presented by the record is, whether the title now set up by the defendants under the deed executed by the county treasurer to Callanan in 1874, pursuant to a sale in 1871 for non-payment of taxes assessed in 1870, is barred by the decree rendered for the plaintiff in 1877, upon a bill in equity to foreclose a mortgage dated August 23, 1870, to which bill Callanan had been made a party, and upon which he had been defaulted.

By the statutes of Iowa, taxes upon real estate are assessed to the owner in September of each year. In real estate mortgaged, the mortgagor retains the legal title; and it is listed by and taxed to him, unless it is listed by the mortgagee. As between vendor and purchaser, the taxes become a lien on the land on the first day of November ensuing. If the owner neglects to pay them before the first day of the following February, they may be collected by distress and sale of his personal property, and also become a perpetual lien on the land against all persons except the United States and the State. The county treasurer may collect them by sale of the land, and if the owner does not redeem from that sale within three years, the treasurer executes a deed to the purchaser, which vests in him "all the title of the former owner, as well as of the State and county." Iowa Rev. Stat. 1860, §§ 710, 714, 734, 746, 756, 759, 763–784, 2217; Stats. May 27, 1861, c. 24, § 2; April 7, 1862, c. 110; Code of 1873, §§ 796, 803, 823, 839, 853, 857, 865, 871–897, 1938.

The effect of these statutes, as declared by the Supreme Court of the State, is, that from the time of the assessment of the taxes, the State or the county has a lien on the land for the amount thereof; that upon the sale of the land for non-payment of the taxes, that lien passes to the purchaser, but the title, subject to the lien, remains in the former owner until the execution of the tax deed; and that if that deed is for any reason invalid, the lien is the only interest that the purchaser has in the land. *Williams* v. *Heath*, 22 Iowa, 519; *Eldridge* v. *Kuehl*, 27 Iowa, 160; *Everett* v. *Beebe*, 37 Iowa, 452; *Sexton* v. *Henderson*, 45 Iowa, 160; *Springer* v. *Bartle*, 46 Iowa, 688.

But if the tax deed is valid, then from the time of its delivery it clothes the purchaser, not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, but with a new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and incumbrances of private persons, and all equities arising out of them. *Crum* v. *Cotting*, 22 Iowa, 411; *Turner* v. *Smith*, 14 Wall. 553.

It is contended in behalf of the defendants, that the only proper object of the suit to foreclose the mortgage was to sell the title of the mortgagor, and to cut off the equity of redemption of all persons claiming under him any title, lien or interest inferior or subject to the mortgage; and that the title under the tax deed, being adverse and paramount to the rights both of the mortgagor and of the mortgagee, could not be contested in that suit and was not barred by the decree therein. But the authorities cited fall short of supporting that contention.

Multifariousness as to subjects or parties, within the jurisdiction of a court of equity, cannot be taken advantage of by a defendant, except by demurrer, plea or answer to the bill, although the court in its discretion may take the objection at the hearing, or on appeal, and order the bill to be amended or dismissed. *Oliver* v. *Piatt*, 3 How. 333, 412; *Nelson* v. *Hill*, 5 How. 127, 132. *A fortiori*, it does not render a decree void, so that it can be treated as a nullity in a collateral action.

As a general rule, a court of equity, in a suit to foreclose a mortgage, will not undertake to determine the validity of a title prior to the mortgage and adverse to both mortgagor and mortgagee; because such a controversy is independent of the controversy between the mortgagor and the mortgagee as to the foreclosure or redemption of the mortgage, and to join the two controversies in one bill would make it multifarious.

Upon that ground, it has been held by this court, as well as by the courts of New York, California and Michigan, on appeals from decrees for foreclosure of mortgages, that the holders of a prior adverse title were not proper parties; and

judges have sometimes used such strong expressions as that the mortgagee "cannot make them parties," or that their title "cannot be litigated," in a suit for foreclosure. *Dial* v. *Reynolds*, 96 U. S. 340; *Peters* v. *Bowman*, 98 U. S. 56, 60; *Eagle Ins. Co.* v. *Lent*, 1 Edw. Ch. 301, and 6 Paige, 635; *Banks* v. *Walker*, 2 Sandf. Ch. 344, and 3 Barb. Ch. 438; *Corning* v. *Smith*, 6 N. Y. 82; *San Francisco* v. *Lawton*, 18 California, 465; *Summers* v. *Bromley*, 28 Michigan, 125.

But in none of the cases just cited was any question presented or adjudged of the effect that a decree of foreclosure, rendered in a suit in which such adverse claimants were made parties and their claims were directly put in issue and determined, might have against them in a subsequent action.

The cases of *Strobe* v. *Downer*, 13 Wisconsin, 10, and *Palmer* v. *Yager*, 20 Wisconsin, 91, were also appeals from decrees of foreclosure; and in a later case in Wisconsin the court summed up the law thus: "It is freely admitted that a foreclosure suit is not an appropriate proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor, and that, if such rights be so litigated, and be determined upon pleadings and proofs, the decree will be erroneous, and will be reversed. But whether, until reversed, such decree is *coram non judice* and void, so that it may be collaterally impeached, is quite another question. The conclusion would seem to follow, from all of the decisions, that it is not." *Board of Supervisors* v. *Mineral Point Railroad*, 24 Wisconsin, 93, 121.

There are indeed two cases in the Court of Appeals of New York, in which a common decree of foreclosure *pro confesso* was held to be no bar to a subsequent action at law by the owner of a title prior and paramount to the mortgage. But the decision in either case turned on the form in which the plaintiff at law had been made a defendant to the bill of foreclosure.

In the one case, a widow was held not to be barred of her dower by a decree of foreclosure, obtained after the death of her husband, of a mortgage executed by him alone during the coverture, on a bill against her and others as executors and

devisees under his will, alleging that she and the other defendants "have or claim to have some interest in the aforesaid mortgaged premises, as subsequent purchasers, or incumbrancers, or otherwise, but what particular interest your orator is not informed," and praying that they might be foreclosed "of and from all equity of redemption and claim of, in and to" the mortgaged premises. The ground of the decision was, that under the statutes and rules of court the allegations and decree were limited to rights subsequent and subject to the mortgage; and Judge Denio, in delivering judgment, said: "It is not intended to decide that if a party claiming a title prior to the mortgage should be made a party to the suit, and should answer and litigate the question, and should have a decree against him, it would not conclude him in a collateral action." *Lewis* v. *Smith*, 9 N. Y. 502, 516.

In the other case, a testator having devised land to his granddaughter in trust for his daughter for life, with remainder to the granddaughter in fee, the two afterwards executed a mortgage, the granddaughter not executing it as trustee, and having no power by law to execute it as such. The bill and decree of foreclosure were against them as individuals, and therefore the title of the granddaughter as trustee was held not to be barred by the decree, the court saying: "Her interest in remainder was subordinate to the prior estate for life in trust, created by the will, and she was not bound to set up her claim as trustee, when made a party to the foreclosure, in the absence of any averment in the complaint in respect to that interest, or claim that it was subject to the mortgage." *Rathbone* v. *Hooney*, 58 N. Y. 463, 467.

So in a recent case in California, not yet published in the official reports, in which a decree, upon a bill against husband and wife, foreclosing a mortgage, executed by the wife alone, of land held by them in community, was held not to bar a subsequent action of ejectment by the husband, the bill to foreclose contained no averment that the husband had or asserted any claim adverse to the title of the mortgagor, and the decree in terms barred only the equity of redemption. *McComb* v. *Spangler*, 12 Pacific Reporter, 347.

To a bill in equity to foreclose a second mortgage, although the first mortgagee is not a usual or necessary party when the decree sought and rendered is subject to his mortgage, yet, at least when he holds the legal title, and his debt is due and payable, he may, and, when the property is ordered to be sold free of all incumbrances, must be made a party; and if he is, and the bill contains sufficient allegations, he is barred by the decree, the bill in such case being in effect both a bill to foreclose the second mortgage and a bill to redeem from the first mortgage. *Finley* v. *Bank of United States*, 11 Wheat. 304; *Hagan* v. *Walker*, 14 How. 29, 37; *Jerome* v. *McCarter*, 94 U. S. 734; *Miltenberger* v. *Logansport Railway*, 106 U. S. 286, 307; *Woodworth* v. *Blair*, 112 U. S. 8; *Haines* v. *Beach*, 3 Johns. Ch. 459; *Hudnit* v. *Smith*, 1 C. E. Green, 550.

In all the cases heretofore referred to, the adverse title was prior to the mortgage foreclosed. But in the case at bar, the tax title, though adverse to the mortgage title, was not prior to it. The whole title in the land was in the mortgagor at the date of the mortgage; and the title under the tax deed, if valid, was subsequent in time, although paramount in right, to the title acquired under the mortgage and the decree of foreclosure.

Upon the question whether the validity of a tax title subsequent in date to the mortgage may properly be litigated and determined in a suit for foreclosure, there has been a difference of opinion in the courts of the states. The courts of California and of Michigan have held that it may. *Kelsey* v. *Abbott*, 13 California, 609; *Horton* v. *Ingersoll*, 13 Michigan, 409; *Williams* v. *Green*, 34 Michigan, 221, 223. Those of Wisconsin and of Kansas have decided that it should not. *Pelton* v. *Farmin*, 18 Wisconsin, 222; *Roberts* v. *Wood*, 38 Wisconsin, 60; *Short* v. *Nooner*, 16 Kansas, 220. But the question in each of these cases arose upon appeal from the decree of foreclosure; and there is no case, so far as we are informed, in which a decree upon apt allegations in a bill to foreclose a mortgage, adjudging a subsequent tax title to be invalid, has been allowed to be collaterally impeached by the holder of that title in a subsequent action.

On principle, it was within the jurisdiction and authority of the court, upon a bill in equity for the foreclosure of the plaintiff's mortgage, to determine the validity or invalidity of Callanan's tax title, and he was a proper, if not a necessary, party to such a bill.

If the mortgagor or the mortgagee had made a conveyance or assignment after the date of the mortgage, the purchaser or assignee would have been a necessary party to the bill to foreclose. Story Eq. Pl. §§ 193, 199, 201; *Terrell* v. *Allison*, 21 Wall. 289. And in *Stevenson* v. *Texas Railway*, 105 U. S. 703, the Circuit Court, and this court on appeal, upon a bill in equity to foreclose a mortgage, tried the validity of an adverse title under a sale on execution against the mortgagor upon judgments recovered since the mortgage was made, and adjudged that title to be valid, because the judgments were recovered before the mortgage was recorded.

At the date of the plaintiff's mortgage, the entire estate in the land was in the mortgagor, and was included in the mortgage. The subsequent assessment of the taxes created a lien upon that estate, which, upon the sale for non-payment of the taxes, passed to Callanan; but the mortgagor, so long as his right of redemption from that sale existed, still held the legal title, subject first to the lien for taxes, and then to the mortgage. The deed afterwards executed by the county treasurer to Callanan, if valid, conveyed to him all the rights and interests, both of the mortgagor and of the mortgagee, and vested in him a complete title, so that the mortgagor had no title and no equity of redemption, and the mortgagee no lien and no right of foreclosure. There would seem to be no less reason for making Callanan a party to the bill than if he had claimed under a conveyance from or judgment against the mortgagor or the mortgagee since the date of the mortgage. But if Callanan was not a necessary party to the bill to foreclose the mortgage, clearly the mortgagor, if not the mortgagee, might have filed a bill in equity against him to redeem the land from the tax sale, alleging that he had a lien only, and not an absolute title; and by such a bill the issue whether he had or had not such a title would have been directly presented. The

question whether that issue should be determined in the suit to foreclose the mortgage, or in a separate suit, was a question of multifariousness or of convenience, affecting the discretion only, and not the jurisdiction, of the court. By determining, before finally decreeing a foreclosure and sale, the question whether Callanan had a good title under the tax deed, the probability of obtaining a fair price at a sale under the decree of foreclosure would be increased, the rights of all the parties secured, and further litigation avoided. As was said by Lord Chancellor Talbot, and repeated by Chief Justice Marshall, "The court of equity in all cases delights to do complete justice, and not by halves." *Knight* v. *Knight*, 3 P. Wms. 331, 334; *Corbet* v. *Johnson*, 1 Brock. 77, 81.

In the absence of any statute or rule of court, restricting the natural meaning of the words, the allegation in the bill to foreclose, that Callanan "claims some interest in and to a portion of the mortgaged premises, the exact nature of which your orator is unable to set out," was sufficient to include Callanan's interest, whether it was a mere lien for the amount of the taxes, as it would have been if the right of redemption from the sale for taxes had not expired, or if the treasurer's deed was void for any reason, or was a perfect title in fee, as it would be if that right had expired and there was no defect in the tax deed. The prayer of the bill was, not only for a subpœna and a decree of foreclosure against all the defendants named in the bill, but also that the right, title and interest of each and every of them be forever barred and foreclosed by the decree, and that a sale of the premises be made by a master, and for further relief.

Callanan, by the service of the subpœna, had due notice of the allegations and prayer of the bill. By the decree reciting and confirming his default, the bill was taken for confessed against him; and any final decree, warranted by the allegations of the bill, bound him to the same extent as if he had appeared in the suit, and demurred to or contested those allegations. *Thomson* v. *Wooster*, 114 U. S. 104, 111.

The decree not only adjudges, in the usual form, that the mortgage "is a lien upon the mortgaged premises, prior and

paramount to the lien of each and every of the said defendants;" and that, in default of payment by the mortgagor of the sums found due on the mortgage, "the right, title and equity of redemption of each and every of the defendants in this suit be" by a sale under the decree "forever barred and foreclosed." But it further declares that "the purchaser at such sale shall take the premises sold by title absolute," and that "such title shall relate back to the date of the execution of the mortgage," specifying that date.

That decree is a conclusive adjudication, which cannot be collaterally impeached by Callanan or by those claiming under him, that he had no valid title or lien of any kind against the plaintiff as mortgagee of the land in question, and as purchaser at the sale under the decree of foreclosure; and was rightly held to estop the grantees of Callanan to set up his tax title in the present action.

Judgment affirmed.

APPENDIX.

I.

AMENDMENT TO RULES

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

ORDERED, That the first subdivision of Rule 20 be amended so as to read as follows:

RULE 20 — PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counsellors of this court, must be first filed.

Promulgated October 31, 1887.

II.

In Memoriam.

WILLIAM BURNHAM WOODS, LL.D.

DIED MAY 14, 1887.

SUPREME COURT OF THE UNITED STATES.

MONDAY, November 7, 1887.

MR. ATTORNEY GENERAL addressed the court as follows:

MAY IT PLEASE THE COURT: I have been requested by the bar and officers of this court to present resolutions recently adopted by them, expressive of their estimate of the life, character, and services of the late MR. JUSTICE WOODS and their sorrow at his death, for such action as the court may see fit to take as to them.

In performing this duty, I wish to add a few words, — and they need be but few, for the resolutions themselves speak so distinctly and in terms so strong of the true character of our departed friend, there is little room for anything more to be said.

I knew Judge Woods well and somewhat intimately, from the time he came upon this bench, fresh and vigorous from a field of vast labor and responsibility, second only to the one he entered upon here.

His work on the circuit had been onerous and exacting, indeed often perplexing and harassing; for during much of that time "even peace was full of horrors."

He came here from that labor well prepared and ready for the great task that lay before him.

Manfully and conscientiously did he address himself to it, and I now say what I have often said before of him — never did I see one

grow and develop in the reports of this court more rapidly and more decidedly than he; and his portion of the work, from the time he took his seat, January, 1881, was a full share with the other members of the court.

Coming to this court at an age young enough to add to his already extensive knowledge, he did not fail to do so, with all the aid that energy, industry, and painstaking research could bring him.

He wrote and delivered for the time he was here — a period of not quite five years and a half — one hundred and sixty-three opinions.

Mr. Justice Curtis — and the country knows well his wonderful ability as a lawyer — for about the same length of time wrote and delivered fifty-one opinions.

The reference is not made for comparison or contrast of the merits of the two judges, but to show that, as great and demanding as the work here has grown since the time of Mr. Justice Curtis, Mr. Justice Woods was equal to the calls upon him.

I wish to speak of another characteristic of Mr. Justice Woods as a judge.

He was one of the *best listeners* I ever saw in any court; he seemed never to tire or grow weary in the progress of a case, and appeared to hear every word uttered, and to observe everything done.

He illustrated very fully what Pliny, speaking of himself in his letter to Arrianus, said: "For my own part, whenever I have to hear a case, I give the greatest amount of time which any counsel asks. . . . The very first duty which a judge owes to his position is to have that patience which constitutes an important part of justice. Even superfluous matter had better be brought forward than any really necessary point be omitted."

That patience here referred to marked the bearing of Judge Woods upon the bench to the fullest extent, and it was manifest to all.

In his other relations of life, all bear testimony that he was kind, upright, affable, and generous, yet firm and true to purpose, and that he adjusted his accounts with society as fully as he paid his debts to the high profession, of which he was so honorable a member.

With a kind and sincere regard for the memory of one of your number now no more, I ask that the resolutions be spread upon the records of the court, as a truthful testimonial to his worth.

RESOLUTIONS.

The bar of the Supreme Court of the United States and officers of the court have come together for the purpose of showing their respect for the memory of the late Mr. Justice Woods, in whose honorable and useful life they see much that deserves to be remembered and to be held up for the imitation of his countrymen.

Looking back to the beginning of his career, when he entered the bar at Newark, Ohio, and tracing him down the stream of time, we find at every point the evidence of a character intensely devoted to duty.

There existed in this departed judge an uncommon union of patience, moderation, and determination which had much attracted public attention before his accession to the bench. This feature of his character became very marked in the legislature of Ohio in 1861, where he displayed great firmness and independence, in the face of censure and even suspicion, — so blinded by passion was reason, — in contending for the things that made for peace, and in resisting the adoption of war measures so long as it was possible to hope for good from a policy of conciliation.

But when the die of war was cast, he hesitated not a moment as to the course he would pursue, and his strong patriotic speech in the legislature in favor of taking up arms in defence of the Union has become historic already.

This speech he emphasized by promptly drawing the sword, which he did not sheathe until after peace had been firmly established.

His career in the army was distinguished, and, as was to be expected in so earnest and sterling a character, he was always at the front and took part in a number of pitched battles.

He was made a full Brigadier General on the recommendation of Generals Grant, Sherman, and Logan, and afterwards received the brevet rank of Major General for gallant and meritorious services.

It was in Alabama that General Woods was mustered out of service, and there he determined to take up his abode and engage in cotton planting in conjunction with the law.

That he soon commended himself in no small degree to the people among whom he had cast his lot is evident by the fact that in 1868 he was elected the Chancellor of the district in which he lived.

To the duties of that position he dedicated himself with such ability, assiduity, and singleness of purpose that by the following year the distinction he had already attained as Chancellor formed one of

the strongest grounds on which he was appointed the Circuit Judge of the Fifth Judicial District of the United States, an office which Congress had just created.

That he administered the duties of his new office, sometimes most delicate and perplexing, owing to the disturbed political condition of parts of his circuit, to the satisfaction of all is established by abundant testimony, and an examination of the four volumes of his reports of cases decided in his circuit will show the learning, the fidelity, and the ability he brought to the discharge of his duties both as Circuit Judge and Circuit Justice.

The words of the Chief Justice of Georgia, as presiding officer at a banquet given to Judge Woods at Atlanta by the bar on the occasion of his removing from that city, to which he had changed his residence some years before, to the seat of the National Government, to take his place on the bench of the Supreme Court of the United States, would be a proud epitaph on his tomb.

Referring to Judge Woods, Chief Justice Jackson said: "We are proud of him because he is identified with us, and while serving as a judge in our midst has known nothing but the law, and been loyal to nothing but the law."

It may be truly said that as a judge of the Supreme Court of the United States he exhibited great ability and a most praiseworthy industry, and that he possessed in a high degree the invaluable judicial quality of attentiveness to the arguments at the bar.

Of this departed, able, upright judge we believe it can be truly said that he never delayed justice to any man.

RESOLVED: I. That the bar of the Supreme Court of the United States and officers of the court are profoundly sensible of the loss that has been sustained in the death of WILLIAM BURNHAM WOODS, who has illustrated his country as patriot, citizen, soldier, and jurist.

II. That we tender the family of the deceased the assurances of our sincere sympathy.

III. That the chairman be and is hereby requested to transmit a copy of these proceedings to the Attorney General of the United States, with the request to present the same to the Supreme Court of the United States for such action thereon as is usual and proper according to the course of the court.

IV. That the chairman be and he is hereby requested to transmit an engrossed copy of these proceedings to the family of the deceased.

THE CHIEF JUSTICE thereupon said:

We are grateful to the bar for this tribute to the memory of our late associate.

What has been said is no more than is just, and it meets our hearty approval.

Mr. Justice Woods was taken from us in the midst of his usefulness, but the record of his judicial life as Chancellor for the middle division of Alabama, as Circuit Judge for the Fifth Judicial Circuit of the United States, and as an Associate Justice of this court, extends over a period of nearly twenty years of the most active service. Very soon after he took his seat on the bench of the Circuit Court he was compelled to deal with questions of the highest importance, novel in their character, and applicable to a new order of things among those whose rights were involved. How well he met them, and with what ability he exercised the duties of his office, is shown by the reports of his judgments and by the esteem in which he was held by all throughout the entire field of his labors.

He brought to this court a large judicial experience, and from the beginning he was zealous in his work and faithful to every duty. He was an upright man and a just judge.

The resolutions of the bar and the remarks of the Attorney General in presenting them will be entered on the records of the court.

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BOUNDARY.

See FLORIDA BOUNDARY;
LAND GRANT, 2.

CASES AFFIRMED.

1. *Accident Ins. Co.* v. *Crandall*, 120 U. S. 524. *Northern Pacific Railroad* v. *Mares*, 710.
2. *Hayes* v. *Missouri*, 120 U. S. 68. *Spies* v. *Illinois*, 131.
3. *Hopt* v. *Utah*, 120 U. S. 430. *Spies* v. *Illinois*, 131.
4. *Huse* v. *Glover*, 119 U. S. 543. *Sands* v. *Manistee River Imp. Co.*, 288.
5. *Jewell* v. *Knight*, 426, followed in *Smith* v. *Craft*, 436.
6. *Oelbermann* v. *Merritt*, 356, affirmed in *Mustin* v. *Cadwalader*, 369.
7. *Stryker* v. *Goodnow*, 527, affirmed in *Chapman* v. *Goodnow*, 540.
8. *Stryker* v. *Goodnow*, 527, applied as to the effect of *Wolcott* v. *Des nes Co.*, 5 Wall. 681. *Litchfield* v. *Goodnow*, 549.

CASES DISTINGUISHED.

1. *First National Bank of Cleveland* v. *Shedd*, 121 U. S. 74. *Burlington, &c., Railway Co.* v. *Simmons*, 52.
2. *Parsons* v. *Robinson*, 122 U. S. 112. *Burlington, &c., Railway Co.* v. *Simmons*, 52.
3. *United States* v. *Langston*, 118 U. S. 389. *Mathews* v. *United States*, 182.

CASES EXPLAINED.

Osborn v. *Bank of the United States*, 9 Wheat. 738. *In re Ayers*, 443.
United States v. *Philbrick*, 120 U. S. 52. *United States* v. *Allen*, 345.

CERTIFICATE OF DIVISION OF OPINION.

See DIVISION OF OPINION.

CLERKS, OFFICIAL BONDS OF.

See JURISDICTION, A, 16.

COAL LAND.

See PUBLIC LAND, 1, 2.

COMMON CARRIER.

1. A railroad company is not responsible for the loss of a bag containing money and jewelry, carried in the hand of a passenger and by him accidentally dropped through an open window in the car, although, upon notice of the loss, it refuses to stop the train, short of a usual station, to enable him to recover it. *Henderson* v. *Louisville & Nashville Railroad*, 61.
2. The undertaking of a common carrier to transport live-stock, though differing in some respects from the responsibility assumed in the car-

CONFIRMATION.

See JUDGMENT, 1.

CONSTITUTIONAL LAW.

1. It is well settled that the first ten articles of amendment to the Constitution of the United States were not intended to limit the powers of the States, in respect of their own people, but to operate on the national government only. *Spies* v. *Illinois*, 131.
2. *Hopt* v. *Utah*, 120 U. S. 430, affirmed to the point that 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 the defendant if, until

CONTEMPT.

See HABEAS CORPUS.

CONTRACT.

CONTRIBUTORY NEGLIGENCE.

COSTS.

COURT AND JURY.

DIPLOMATIC AND CONSULAR APPROPRIATION ACT.

See STATUTE, A.

DISTRICT OF COLUMBIA.

See LOCAL LAW, 2, 3.

DIVISION OF OPINION.

1. Questions certified to this court upon a division of opinion of two judges in the Circuit Court must be distinct points of law, clearly stated, so that they can be definitely answered, without regard to other issues of law or of fact; and not questions of fact, or of mixed law and fact, involving inferences of fact from particular facts stated in the certificate; nor yet the whole case, even if divided into several points. *Jewell* v. *Knight*, 426.
2. Whether a sale and delivery of a debtor's stock of goods, by way of preference of a *bona fide* creditor, is fraudulent against other creditors, involves a question of fact, depending upon all the circumstances, and cannot be referred to this court by certificate of division of opinion. *Ib.*
3. Whether an agreement to prefer a *bona fide* creditor is so fraudulent against other creditors, as to avoid a subsequent preference of the former, involves a question of fact, depending upon all the circumstances, and cannot be referred to this court by certificate of division of opinion. *Smith* v. *Craft*, 436.

EQUITY.

1. In this suit the facts found are not materially and substantially different from those alleged in the bill, and they will support a decree for the relief asked for. *Tufts* v. *Tufts*, 76.
2. If the plaintiff's contention is well founded that the duty of the Commissioner of the General Land Office to take up, hear and determine his appeal exists, that duty, so far as relates to entering upon its performance, is strictly ministerial, and his remedy is at law, by mandamus, and not in equity. *Craig* v. *Leitensdorfer*, 189.
3. The controversy in this case being confined to the conflicting claims of actual settlers, "holding possession under titles or promises to settle," made by Cornelio Vigil and Ceran St. Vrain, and established under the provisions of the acts of June 21, 1860, 12 Stat. 71, and February 25, 1869, 15 Stat. 275; and it appearing from the pleadings, as amended, that the plaintiff below did not aver an equitable interest in himself in the lands which were so established in favor of the defend-

ERROR.

ESTOPPEL.

2. A provision in a policy of insurance of a steam vessel that the insurer shall not be liable for losses occasioned by "the derangement or breaking of the engine or machinery or any consequences resulting therefrom" relates to losses of which the derangement or breaking is the proximate cause, and not to such as are a remote consequence of either. *Ib.*
3. The abandonment of a vessel for total loss, made in good faith at a time when it was in reasonable probability impracticable to recover and repair it, and when the damage from the perils insured against amounted in like probability to more than fifty per cent of the value, is a valid abandonment within the terms of a policy, which provides that there shall be "no abandonment as for a total loss," unless the injury sustained be equivalent to fifty per cent of the agreed value; although by a change of circumstances it afterwards became practicable to float off the vessel, and thereby the loss was reduced below fifty per cent of that value. *Ib.*
4. A policy of life insurance contained questions to the applicant with his answers, and provisions that the answers were warranted to be true, and that the policy should be void if they were in any respect false or fraudulent. Among these questions and answers were the following: "5. Q. Are the habits of the party sober and temperate? A. Yes. 6. Q. Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, or does he use any of them often or daily? A. No." It also contained a provision that if the applicant should become so far intemperate as to impair health or induce *delirium tremens*, it should become void. After the death of the assured the insurer defended against an action on the policy by setting up (1) that the answers to these questions were false; and (2) that the deceased, after the issue of the policy, became intemperate, impaired his health thereby, and induced *delirium tremens*. *Held:*
   (1) That an instruction to the jury as to question 6 that they could not find the answer to be untrue unless the assured had, prior to the issue of the policy, been addicted to the excessive or intemperate use of alcoholic stimulants or opium, or, at the time of the application, habitually used some of them often or daily, was a correct construction of the language of question 6, as interpreted in connection with question 5.
   (2) That if the death was substantially caused by the excessive use of alcoholic stimulants, not taken for medical purposes or under medical advice, the assured's health was impaired by intemperance within the meaning of the policy, although he might not have had *delirium tremens*, and although he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate; and that it was for the jury to determine whether the death was so caused. *Ætna Life Ins. Co.* v. *Davey*, 739.

INTEREST.

See ADMIRALTY, 4;
CONTRACT, 7.

INTERNAL COMMERCE.

See CONSTITUTIONAL LAW, 7.

INTERNAL REVENUE.

See TAX AND TAXATION, 3.

INTOXICATING LIQUORS.

See CONSTITUTIONAL LAW, 16–24.

JUDGMENT.

1. A confirmation by the court of a sale under execution will not cure an infirmity growing out of the nullity of the judgment under which it was had. *Lamaster* v. *Keeler*, 376.
2. If a cause is removed in a regular manner from a state court to a Circuit Court of the United States, on motion of one or more of several defendants who have a right to have it removed as to him or them, and the Circuit Court takes jurisdiction, and all parties defendant appear, and no objection to the jurisdiction is made, and the cause proceeds to final judgment, the judgment remains in force and of binding effect upon all the parties, until judicially vacated, although it appears on the face of the record that some of the defendants, who did not join in the petition for removal, were citizens of the same State with the plaintiff. *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 552.
3. This case is reversed because the state court failed to give due faith and credit to the decree of this court in *Homestead Company* v. *Valley Railroad*, 17 Wall. 153; *Plumb* v. *Goodnow*, 560.
4. The respondents, holding a quantity of securities hypothecated as collateral for an indebtedness due them from an insolvent bank, sold them by public auction, in the manner stated in the opinion of the court, for less than the debt, and proved the balance of the debt. When the judgment declaring a dividend was entered, it was stated in it, both parties consenting, that all the rights of both touching damages resulting from the sale of the bonds were expressly reserved. *Held*, that this could not be construed into an admission of the liability of the respondents, or that a just cause of action existed against them. *Lacombe* v. *Forstall's Sons*, 562.

See EQUITY, 7;
ESTOPPEL;
JURISDICTION, A, 1, 9, 10, 11, 12; B, 4.

JURISDICTION.

A. Jurisdiction of the Supreme Court.

LIMITATION, STATUTES OF.

LOCAL LAW.

PATENT FOR INVENTION.

PLEDGE.

with the knowledge that they had been or were to be sold again by them, and for the purpose of enabling the respondents to transfer the bonds with a good title, must be considered to have waived any right to sue on the first sale; (3) that, conceding the first sale to have been invalid, it was nevertheless the respondents' duty to sell the bonds at as early a time as possible, and to place the proceeds in the hands of their principals in payment of the debt for which the bonds were pledged, and that they had done this with the consent and aid of the complainants; and (4) that, on the complainant's theory of the relief to which they were entitled, their remedy was at law, and not in equity. *Lacombe* v. *Forstall's Sons*, 562.

PRACTICE.

1. The mandate in *Sun Insurance Co.* v. *Kountz Line*, 122 U. S. 583, is modified in manner as shown in the order herein announced. *Sun Insurance Co.* v. *Kountz Line*, 65.
2. Rulings of the court below on questions of law will not be considered here on a writ of error, unless it appears from the bill of exceptions, or otherwise in the record, that the facts were such as to make them material to the issue which was tried. *New York, Lake Erie, &c., Railroad Co.* v. *Madison*, 524.
3. The court below acted properly in ordering the consolidation and trial together of an action of replevin and an action in contract, the parties being the same in both, their rights depending upon the same contract, and the testimony in each being pertinent in the other. *Teal* v. *Bilby*, 572.
4. On the stipulation of such of the parties as are before this court, the decree of the court below is reversed without costs, and the cause is remanded with instructions to proceed in accordance with the stipulation, but without prejudice to the rights of other parties to the suit who were not before this court on the appeal. *Bond* v. *Davenport*, 619.
5. When the value of the property in dispute is one of the questions in the case and was necessarily involved in its determination in the court below, this court will not, on a motion to dismiss for want of jurisdiction, consider affidavits tending to contradict the finding of that court in respect of its value. *Talkington* v. *Dumbleton*, 745.

See APPEAL; ASSIGNMENT OF ERROR; CONSTITUTIONAL LAW, 5; COURT AND JURY, 1, 2; DIVISION OF OPINION, 1; EQUITY, 6; JURISDICTION, B, 4; LOCAL LAW, 1

PROHIBITORY LAW.

See CONSTITUTIONAL LAW, 16-24.

PUBLIC LAND.

1. In order to constitute the exemption of coal lands contemplated by the preëmption act under the head of "known mines," there must be

SUPERSEDEAS.

A supersedeas obtained by a plaintiff in error under the provisions of Rev. Stat. § 1007 does not operate to enjoin the defendant in error from bringing a new suit on a new cause of action, but arising out of the same general matter, and involving the same questions of law which are brought here for review. *Natal* v. *Louisiana*, 516.

TAX AND TAXATION.

1. Section 5219, Rev. Stat., respecting the taxation of national banks, does not require perfect equality between state and national banks, but only that the system of taxation in a State shall not work a discrimination favorable to its own citizens and corporations and unfavorable to holders of shares in national banks. *Davenport Bank* v. *Davenport*, 83.
2. If a state statute creating a system of taxation does not on its face discriminate against national banks, and there is neither evidence of a legislative intent to make such discrimination, nor proof that the statute works an actual and material discrimination, there is no case for holding it to be unconstitutional. *Ib.*
3. Construing the clause in the internal revenue act of July 14, 1870, which imposed a tax for the year 1871 of 2½ per cent on all undivided profits of corporations accrued and earned and added to a surplus, contingent, or other fund, in connection with the previous internal revenue statutes, it is plain that it was the intention of Congress not to subject to that tax profits of a railroad corporation during that year, which were not divided, but were used for construction. *Marquette, &c., Railroad Co.* v. *United States*, 722.

See COURT AND JURY, 2; MUNICIPAL CORPORATION; EQUITY, 8, 9; STATES.

TREATY.

See JURISDICTION, A, 5; LAND GRANT, 6.

TRUST.

1. If the trustee in a deed of trust in the nature of a mortgage acts in good faith in foreclosing it, and obtains a decree of foreclosure and sale, whatever binds the trustee in the proceedings which are begun and carried on to enforce the trust, binds the *cestuis que trust* as if they were actual parties to the suit. *Richter* v. *Jerome*, 233.
2. If, in a suit in equity by the trustee in a deed of trust in the nature of a mortgage to foreclose the mortgage the decree or the sale is obtained in fraud of the rights of the *cestuis que trust*, their remedy is a direct proceeding to set aside the sale or the decree and proceed anew with another foreclosure; and not an attempt to reforeclose what had been fully foreclosed before, under a decree which remains in force. *Ib.*